

(2007) 07 DEL CK 0112

In the Delhi High Court

Case No : IA No. 4162 of 2001 in CS (OS) 802 of 1999

National Westminster Bank

APPELLANT

Vs

Intraport India Limited

RESPONDENT

Date of Decision : 09-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1(2), Order 37 Rule 3(5), Order 7 Rule 11, 151

Contract Act, 1872 — Section 72

Citation : (2007) 2 ILR Delhi 197

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Kapil Kher, for the Appellant; M. Dutta, for the Respondent

Judgement

Badar Durrez Ahmed, J.—This application has been filed on behalf of the defendant for rejection of the plaint under the provisions of Order

VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC") and, in the alternative, under

Order xxxvII Rule 3(5) of the CPC for grant of unconditional leave to defend. Although the application primarily purports to be under Order VII

Rule 11 for rejection of the plaint, the same was not argued before this Court. In any event, nothing has been pointed out so as to warrant the

rejection of the plaint under Order VII Rule 11 CPC. Only two questions arise for consideration:

(1) Whether this suit, which is essentially for recovery of money paid under mistake, can fall under Order xxxvII CPC and be tried as a summary

suit?

(2) If yes, whether the applicant/ defendant is entitled to unconditional leave to

defend?

2. Before I embark upon a discussion relating to the above two questions, it would be necessary to point out the nature of the suit, as indicated in

the plaint. The plaintiff is a bank incorporated under English Law in the United Kingdom. There were some dealings between the defendant with

regard to supply of garments and M/s Inwear Fashions, New York, USA. On 13.03.1997, the plaintiff received a communication from one Fleet

Bank N.A., New York, USA authorising one wire transfer for Pound Sterling 80,000 on behalf of its customer M/s Inwear Fashions. The

remittance was to be made to the defendant through their bankers, UTI Bank Limited, 18 Barakhamba Road, Kanchanjunga Building, New Delhi.

Since the plaintiff did not maintain a Sterling Account for the UTI Bank, New Delhi, it opened a Query file in its information system and asked the

Fleet Bank N.A. New York to inform as to how the payment should be made. On 18.03.1997, the said Fleet Bank N.A. New York reverted to

the plaintiff and requested the plaintiff to pay the amount through Chase Manhattan Bank, London, U. K. Accordingly, the plaintiff made the

payment on 19.03.1997 for Pound Sterling 79,964 being the principal sum excluding the bank charges. Due to an inadvertent mistake of the

employees of the plaintiff, although the payment had been made, the said Query file was not deleted from the records.

3. On 25.03.1997, Fleet Bank N.A. New York, contacted the plaintiff and stated that the beneficiary, that is, the defendant was claiming non-

receipt of the payment against the above transfer made by the plaintiff. On receiving the above information, the plaintiff noticed that the Query file

opened on 13.03.1997 did not reflect the fact that payment had already been made through Chase Manhattan Bank, London, U.K. on

19.03.1997. Consequently, the plaintiff immediately remitted the amount once again as a third party CHAPS payment to Chase Manhattan Bank,

London, for Pound Sterling 79,988 being the principal sum less bank charges. Subsequently, in the course of verification of transactions of the

plaintiff, the duplication of the payment to the defendant came to light and the plaintiff requested Chase Manhattan Bank to refund the said Pound

Sterling 79,988 paid erroneously for onward payment to the defendant. It is averred that Chase Manhattan Bank in turn had taken up the matter

with UTI Bank Limited, which informed that the amount had been credited to the account of the defendant and that the funds had already been withdrawn by the defendant from the said account. It is further averred that the New Delhi office of UTI Bank had been following up the matter with the defendant for refund of the double payment and various efforts had been made in this regard but did not yield any result. It is in these circumstances that the plaintiff filed the present suit for a sum of Pound Sterling 1,06,220, out of which Pound Sterling 79,988 was the principal sum payable by the defendant and Pound Sterling 26,232 was the interest thereon calculated at the rate of 18% per annum from 04.04.1997 till 28.01.1999.

4. From the aforesaid averments made in the plaint, the case of the plaintiff is simply this, that through inadvertence and under mistake of fact, the plaintiff paid the defendant twice. Although M/s Inwear Fashions had only instructed the plaintiff to pay once. The defendant had received both the payments in its bank and had withdrawn the same.

5. The defendant has stated in the application that a suit under Order xxxvII CPC is not maintainable inasmuch as it does not fall under the six categories of suits referred to in Order xxxvII Rule 1(2). It is also contended on behalf of the defendant that there is no privity of contract between M/s Inwear Fashions and the plaintiff or between the plaintiff and Chase Manhattan Bank or between the plaintiff and UTI Bank. As regards the receipt of the payments, the defendant has admitted that it had received two payments dated 20.03.1997 and 04.04.1997 of Pound Sterling 79,964 and Pound Sterling 79,988. The defendant has, however, stated that the defendant had received only what was due to it from its buyer and that no amount was recoverable from the defendant.

6. Order xxxvII Rule 1 (2) of the CPC specifies that the summary procedure prescribed under the said Order applies to the following classes of suits, namely:

- (a) suits upon bills of exchange, hundies and promissory notes;
- (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,--

(i) on a written contract, or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

There is no difficulty with stating straightway that the present suit is not covered under Clause (a) inasmuch as it is not a suit upon a bill of

exchange, handy or a promissory note. It has been contended on behalf of the defendant that the present suit, which seeks to recover a sum of

money from the defendant, does not arise out of any written contract or on an enactment or on a guarantee and, Therefore, even Clause (b) would

not be applicable.

7. In order to arrive at a conclusion as to whether the present suit can qualify as a suit under Clause (b) of Rule 1(2) of Order xxxvII, it would be

necessary to ascertain the meaning of the word "debt". In Union of India (UOI) Vs. Raman Iron Foundry, , the Supreme Court observed

that:

The classical definition of "debt" is to be found in Webb v. Stenton (1883) 11 QBD 518 where Lindley L.J., said:

...a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation.

In J. Jermons Vs. Aliammal and Others, , the Supreme Court considered the word "debt" in the following manner:

...Ordinarily, "debt" means money that is owed; an existing obligation to pay a certain amount; a sum of money due from one person to

another. Debts can be classified, having regard to the criteria for payment, into three categories:

(i) debt which has become due and is payable at present (*debitum in praesenti*) e.g. in monthly tenancy, rent becomes due after the expiry of each

month like rent for the month of January becoming due and payable on February 1;

(ii) debt which has become due but is payable at a future date (*debitum in praesenti solvendum in futuro*); in the above example if under an

agreement of tenancy rent is payable on the 15th of the following month, the rent for January becomes due on February 1, but is payable on

February 15; and

(iii) contingent debt which becomes payable on the happening of a certain event which may or may not occur; in the above instance the rent for the

month of January will not be a debt in the preceding month of December for the tenant may or may not reside in the next month.

Thus, rent that has not become due is not debt. It follows that rent for the unexpired period of lease is not debt....

8. The meaning of "debt", Therefore, is that it has reference to a sum of money which is now due and payable as also a sum of money which

has been promised at a future date. But this distinction is not relevant for the purposes of the present case as will become clear shortly. The

question then is whether the amount, which the plaintiff is seeking to recover by virtue of this suit, could be construed as a "debt". On the

basis of the averments in the plaint and on the basis of the statement made by the defendant that it received the two payments, it is clear that the

money was paid twice by the plaintiff to the defendant. The second payment was made by the plaintiff under mistake. By virtue of Section 72 of

the Indian Contract Act, 1872 a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return

it. Illustration (a) to the said Section gives a further clue as to the meaning and purport of the said word. The said illustration indicates that where A

and B jointly owe 100 rupees to C, if A alone pays the amount to C, and B, not knowing of this fact, pays 100 rupees over again to C, then C is

bound to repay the amount to B. This makes it clear that the recipient of money paid under mistake is obliged under law to repay it. In the present

case, money has been paid by mistake twice over to the defendant by the plaintiff. By virtue of Section 72 of the Indian Contract Act, 1872, the

defendant is obliged to repay it. The plaintiff seeks to recover only the said debt and it would clearly be arising on an enactment. The enactment

being the Indian Contract Act, 1872 and in particular Section 72 thereof. The sum sought to be recovered is a fixed sum of money. It is also in the

nature of debt other than a penalty. Therefore, in my view, the present suit, as framed, falls within Order xxxvII Rule 1(2)(b)(ii) and the first

question that has been posed above, is accordingly decided in favor of the plaintiff.

9. This leads me to the discussion of the second question. The principles for grant of leave to defend are well settled and they were set out in the

Supreme Court decision in *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, . Paragraph 8 of the said decision reads as

under:

8. In *Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee* 10, Das, J., after a comprehensive review of authorities on the subject, stated the principles

applicable to cases covered by Order 37 C.P.C. in the form of the following propositions (at p. 253):

(a) If the defendant satisfies the court that he has a good defense to the claim on its merits the plaintiff is not entitled to leave to sign judgment and

the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense although not a positively good defense the

plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively

and immediately make it clear that he has a defense, yet, shows such a state of facts as leads to the inference that at the trial of the action he may

be able to establish a defense to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in

such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave

to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to

leave to sign judgment, the court may protect the plaintiff by only allowing the defense to proceed if the amount claimed is paid into court or

otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a

defense.

10. Considering the facts and circumstances of the case, I am of the view that

the defendant has no defense. It has admitted the double payment and has sought to only set up an illusory or a sham defense by suggesting that it has only received what was owed to it by M/s. Inwear Fashions.

This defense completely glosses over the fact that M/s. Inwear Fashions gave one instruction for payment. That instruction ought to have, ordinarily, resulted in only one payment. Through inadvertence and mistake on behalf of the employees of the plaintiff, the single instruction for payment to the defendant resulted in two payments. The second being clearly under mistake. There is no doubt in my mind that the defendant has no defense and has only purported to set up one which, in any event, is illusory and is practically a moonshine defense. Though I hold these views, I would "show mercy" to the defendant by enabling him to try to prove a defense, but, that can only be done, as indicated by the Supreme Court, in *Mechelec Engineers* (supra) by protecting the plaintiff. Accordingly, conditional leave to defend is granted to the defendant. The condition being that the entire amount claimed in the suit be deposited in Court within a period of six weeks.

With these directions, this application stands disposed of.