(2011) 03 DEL CK 0408

In the Delhi High Court

Case No : Regular First Appeal 54/524 2004

Oriental Bank of Commerce — APPELLANT

Vs

Pawan Kumar Aggarwal and Another
 State Bank of Saurashtra Vs Pawan Kumar and Another — RESPONDENT

Date of Decision : 21-03-2011

Acts Referred:
Negotiable Instruments Act, 1881 (NI) — Section 10

Citation : (2011) 03 DEL CK 0408

Hon'ble Judges : P.K. Bhasin, J

Bench : Single Bench

Advocate : H.C. Kundra, Bal Ram Singh, in RFA 524/2004, S.L. Gupta and Ram Gupta, in RFA 54/2005, for the Appellant; S.L. Gupta, Ram Gupta for R-2 in RFA 524/2004, H.C. Kundra, Bal Ram Singh for R-2 in RFA 54/2005 and Rajesh Katyal, for R-1 in RFA 524/2004 and 54/2005, for the Respondent

Final Decision : Allowed

Judgement

P.K. Bhasin, J.—Two nationalized banks have filed separate appeals feeling aggrieved by the judgment and decree dated 02.07.2004 passed by the Court of Additional District Judge in a suit filed against them by Respondent No. 1-Plaintiff whereby a joint and several decree for a sum of Rs. 2,62,036/- alongwith interest thereon @ 9 % p.a. from the date of filing of the suit till the date of the decree and @ 5% p.a. from the date of the decree till realization in full was passed against both of them. Though both the banks had filed separate appeals but the same were heard analogously and so are being disposed of also together by this common judgment.

2. The case of the Appellant-Plaintiff(who shall hereinafter be referred to as "the Plaintiff") was that his proprietorship firm by the name of M/s Bansal Industries had supplied certain goods to The National Small Industries Corporation Ltd.,a Government of India Enterprise(hereinafter to be referred to as "NSIC") and towards the payment of price of those goods NSIC had issued an account payee

cheque No. 508735 dated 17/0498 for Rs. 2,62,036/-(hereinafter to be referred as "the cheque in dispute") and that cheque was drawn on State Bank of Saurashtra(Nehru Place branch, New Delhi) which was impleaded in the suit as Defendant No. 2 and hereinafter also shall be referred to as "Defendant No. 2?. The Plaintiff was maintaining a current account No. 2371 in the Azadpur branch of Oriental Bank of Commerce, which bank was impleaded in the suit as Defendant No. 1 and shall hereinafter also be referred to as "Defendant No. 1?. The Plaintiff had deposited the cheque in dispute with the Azadpur branch of Defendant No. 1 on 18/4/98 for collection of its proceeds from Defendant No. 2 bank. Thereafter when he enquired about the realization of the said cheque from the Defendant No. 1 on 22/04/98 the concerned officer informed him that his cheque had not been received back and he was also told by the same officer that the cheque had been misplaced. The Plaintiff became suspicious and then he went to the office of NSIC on 22/04/98 itself for issuance of "stop payment" instructions to Defendant No. 2 but he was informed that the payment of the cheque in dispute had already been debited to its account on 21/4/98. On 30/4/98 Defendant No. 1 informed him that the cheque in dispute had been got encashed fraudulently by someone from Defendant No. 2 bank. The Plaintiff then lodged a complaint with the police on 05/05/98. Then the Plaintiff served a joint demand notice dated 1/07/99 upon Defendant No. 1 as well as Defendant No. 2 through his advocate and when he did not succeed in getting his money from both the banks he filed a suit against them for recovery of Rs. 3,91,604/- which sum included the cheque amount of Rs. 2,62,036/-. and interest of Rs. 1,29,568/-. In the plaint the Plaintiff alleged that firstly someone in collusion between the officials of Defendant No. 1 had taken away the cheque in dispute from its Azadpur branch and then in collusion with the officials of Defendant No. 2 bank had got it encahsed fraudulently across the counter.

3. The Defendant No. 1 contested the suit primarily on the ground that the cheque in dispute was never deposited in its Azadpur branch and that in fact the Plaintiff himself in collusion with the officials of Defendant No. 2 and NSIC had got that cheque encashed across the counter.

4. Defendant No. 2 contested the suit primarily on the ground that it had rightly made the payment of the cheque in dispute across the counter to one Rinku Bansal on 21/04/98 after the concerned officials had satisfied themselves that the cancellation of "account payee" endorsement on the cheque was done by the correct persons on behalf of NSIC and further that the branch officials had before making the payment to that Rinku Bansal had enquired from him about the reasons for the cancellation of the crossing of the cheque and he had informed that since he did not have any bank account in the name of his firm NSIC had at his request cancelled the crossing and then payment was made to that Rinku Bansal. It was also pleaded that there was no privity of contract between the Plaintiff and Defendant No. 2.

5. On the basis of the above pleadings the following issues were framed by the

learned trial Judge:

1. Whether the suit is not maintainable against the Defendant No. 1 because of having no cause of action as alleged in the written statement? OPD

2 . Whether the suit is bad for misjoinder and non joinder of necessary parties as alleged in the written statements of the Defendants? OPD

3. Whether the Plaintiff is beneficiary of the cheque in dispute, if so, what is its effect?OPP

4. Whether the Defendant No. 2 has committed the negligence and deficiency of the services if so, what is its effect?OPP

5. If issue No. 3 ,is proved, whether the Defendant No. 2 has discharged its obligations/ duties in making the payment in the ordinary course of its banking business, if so, what is its effect?

6. Whether the Plaintiff is entitled a decree of the suit amount as claimed along with the interest ,is so, at what rate?

7. Relief.

6. The learned trial Court after evaluating the evidence adduced by the parties decided all the issues in favour of the Plaintiff and decreed the suit vide impugned judgment against both the banks, as noticed already.

7. During the course of arguments before this Court it was not disputed by the learned Counsel for both the banks that the Plaintiff''s proprietorship firm by the name of Bansal Industries was supposed to receive the payment in respect of the cheque in dispute (Ex. PW-2/1). However, learned Counsel for Defendant No. 2(State Bank of Saurashtra) vehemently contended that the payment in respect of the cheque in dispute had been rightly made across the counter by its concerned officials posted at the Nehru Place branch since that had been done by them after taking due care of the fact that the cheque in dispute had been rightly converted into a bearer cheque by the two authorized signatories of NSIC by comparing their signatures appearing on the cheque with their specimen signatures available with the bank. It was also contended that NSIC could have cancelled the "A/c Payee" endorsement on the cheque in dispute and made it a bearer cheque authorizing the bearer of that cheque to receive the payment from Defendant No. 2 bank and since nothing suspicious was found by the officials of the bank the payment was made in due course in accordance with the apparent tenor of the cheque and in good faith and without any kind of negligence on the part of the officials of the bank before whom the cheque in dispute was placed by the bearer of the cheque. The learned trial Judge after noticing the fact that the rubber stamp of NSIC affixed on the cheque in dispute on top while cancelling the "A/c Payee" endorsement was not similar to the one which had been used by the authorized signatories of NSIC at the bottom of the cheque where they had originally put their signatures and so Defendant No. 2 could not be said to have

made the payment across the counter in normal course of banking business and its concerned officials should have been vigilant enough to confirm from NSIC, before making the payment, if the "A/c Payee" cheque in dispute had been converted by their officials into a bearer cheque but no such precaution was taken. Therefore, according to the learned trial Judge,the protection available to Defendant No. 2 u/s 10 of the Negotiable Instruments Act, 1881 was not available to it and also because this specimen signature card having the specimen signatures of the two officials of NSIC was not produced which should have been done since both the authorized signatories, who were examined as P Ws 3 and 4,had denied having converted the a/c payee cheque into bearer cheque . After examining the cheque in dispute I find myself in full agreement with the said conclusions of the learned trial Court. The cheque in dispute is dated 17th April, 1998. Initially it was an "A/c Payee" cheque made payable to Bansal Industries, Delhi. Subsequently, on the top of front side of the cheque it was written "Cross in cancel" and this endorsement purports to have been made by the two signatories of NSIC who had initially signed that cheque(P Ws 3 and 4). These officials were examined by the Plaintiff as his witnesses(P Ws 3 and 4) and both of them denied having made any such endorsement. It appears that whosoever had written the words "Cross in cancel" wanted to write "Crossing cancelled" Any bank officer authorised to clear the payment of cheques would and acting in good faith have become suspicious with this kind of endorsement on a cheque which does make any sense and would have made an enquiry from NSIC. That was not done. Another circumstance making the cancellation of the "A/c Payee" endorsement on the cheque in dispute highly doubtful is that on the back side of the cheque it was written "The party M/s. Bansal Industries may be paid in case the signature of M/s. Bansal Industries is attested below". By making such an endorsement on the back side of the cheque the maker thereof wanted to convey to the bank that the payment of the cheque may be made in cash but it was written "in case".This endorsement purpoted to have been made by P Ws 3 and 4 also does not make any sense and P Ws 3 and 4 denied having made that endorsement also. Defendant No. 2 had in any case not produced the specimen signatures of P Ws 3 and 4 kept in its record nor did it ake the services of any handwriting expert for comparison of the disputed signatures of P Ws 3 and 4 on the endorsements on the cheque in dispute with their admitted signatures. There is another endorsement on the back side of the cheque to the effect "Crossing cancelled. Please pay Bansal Industries in favour of this cheque". This noting on the cheque appears to have been made by someone other than the person who had made the other noting and that is not even signed by anyone from NSIC. In fact, it was the defence of Defendant No. 2 itself that when the cheque in dispute with these endorsements/notings had been presented across the counter it was asked from the presenter of that cheque as to why the cheque had been converted into a bearer cheque and his reply was that since he did not have a bank account in his Firm''s name the cheque had been converted at his request into a bearer one by NSIC to enable him to receive the payment across the counter in cash. That shows that the officials had become suspicious and the reply of the presenter of the cheque should also have aroused further suspicion in the mind of the concerned bank official since the presenter despite having got a cheque for huge amount in his Firm''s name did not have any bank account in the name of his Firm. Admittedly, NSIC is a Government of India enterprise and such kind of endorsements/notings on its cheque to any prudent official of the bank should have prompted him to at least make a telephone call to the office of NSIC to verify the exact position and had that been done no payment would have been made across the counter in respect of the cheque in dispute. The concerned official did not do that which shows that he had passed the payment fraudulently in connivance with the presenter of the cheque. Here it may be noticed that this Court had sought a report from the police regarding the fate of the FIR lodged by the Plaintiff. The police placed on record a copy of the charge-sheet showing the two officials of State Bank Of Saurashtra were involved in the fraudulent encashment of the cheque in dispute. This Court has, therefore, no hesitation in affirming the findings of the learned trial Court to the effect that the officials of Defendant No. 2 bank had not made the payment of the cheque in dispute to somebody by the name Rinku Bansal in good faith and according to the apparent tenor of the cheque. Therefore, the Plaintiffs? suit has been rightly decreed against Defendant No. 2, State Bank of Saurashtra.

8. Now I come to the challenge to the impugned judgment made on behalf of Defendant No. 1, Oriental Bank of Commerce. The Plaintiff was claiming joint and several decree against both the banks on the ground that he had deposited the cheque in dispute for collection with his banker Oriental Bank of Commerce but that cheque was got encashed by someone fraudulently in connivance with the officials of both the banks and, therefore, his own bank was also equally responsible to make the payment to him in respect of the cheque in dispute. The defence raised by Defendant No. 1 was that the cheque in dispute was never deposited with it for the collection of its proceeds from State Bank of Saurashtra. It is not in dispute that the counter-foil of the deposit slip vide which the Plaintiff claims to have deposited the cheque in dispute with Defendant No. 1 does not bear the initials of any official of the bank. It only has the bank''s stamp. The Defendant No. 1 had examined one witness in support of its defence and he is DW-1 Shri S.P. Chaudhary. He had categorically deposed that whenever any cheque is deposited by any account holder for collecting the proceeds from some other bank the counter-foil of the deposit slip is stamped and then initialled also by the bank official and then is given to the person depositing the cheque. In cross-examination of this witness a suggestion was put to him on behalf of the Plaintiff that the bank officials do not put initials on the counter-foils of the deposit slips and only bank''s stamp is affixed. The witness denied that suggestion.

9. The Plaintiff had in his complaint to the police(Ex. PW-1/1) had claimed that the cheque in dispute was handed over by him to one Mrs. Usha Sudan posted at Azad Pur branch of Oriental Bank of Commerce. However, he has not examined

her to substantiate his plea in that regard. She was the best witness who could have helped the Plaintiff''s case. Because of her non-examination, this Court cannot accept the bare statement of the Plaintiff that it was not the practice of the bank officials to put initials on the counter-foils of the deposit slips in respect of cheques deposited for being sent for clearance and I see no reason to reject the evidence of DW-1. I am, therefore, of the view that learned trial Court was not justified in coming to the conclusion that the Plaintiff had established the deposit of cheque in dispute with Defendant No. 1. Therefore, the impugned judgment and decree qua Oriental Bank of Commerce has to be set aside.

10. Submissions from both the sides in both the appeals were made only on the afore-said aspects and not on other issues decided by the trial Court in favour of the Plaintiff.

11. In the result, RFA 524/04 is allowed and the impugned judgment and decree against Oriental Bank of Commerce are set aside. At the time of first hearing of the appeal of Oriental Bank of Commerce it was directed to deposit the decretal amount in this Court and that money was to be kept in a Fixed Deposit with the bank . That was done, and now that money shall be paid back to it within four weeks along with the interest accrued on the FDR. RFA 54/05 is, however, dismissed and the decree passed against State Bank of Saurashtra stands affirmed.

