
(2016) 02 CAL CK 0120
In the Calcutta High Court
Case No : C.O. 404 Of 2015

Precision Processors (India) Private Limited

APPELLANT

Vs

Bank of India

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 15, Section 16, Section 32, Section 60, Section 8, Section 9

Citation : (2016) 2 CalHCN 469 : (2016) 4 CalLT 444 : (2016) 2 ICC 192 : (2017) 1 WBLR 334

Hon'ble Judges : Soumen Sen, J.

Bench : Single Bench

Advocate : Abhrajit Mitra, Sr. Adv., Satadeep Bhattacharya and Sanket Sarawgi, for the Appellant; Amitava Das, Sudip Pal Chowdhury and P.K. Pal Chowdhury, for the Respondent

Final Decision : Disposed Off

Judgement

Soumen Sen, J.—1. This revisional application is directed against an order passed by the Debts Recovery Appellate Tribunal, Kolkata (hereinafter referred to as the "Appellate Tribunal") on 19th September, 2014 in an Appeal No. 11 of 2007 reversing the judgment passed by the Kolkata Debts Recovery Tribunal No. 2 (hereinafter referred to as the "DRT") on 24th January, 2006.

2. The brief facts of the case are stated hereinafter.

3. One Espee Trading Corporation (hereinafter referred to as the "Constituent") having its office at 1359 Broadway, Suite 2210, New York, N.Y. 10018 was a constituent of the opposite party bank's New York Branch and was enjoying various credit facilities from the said New York Branch.

4. The applicant Bank purchased three Bills of Exchange from M/s. Espee Trading Corporation relating to Bill No. 5890 for US \$10,797=15, Bill No. 5889 for US \$10,587=68 and Bill No. 5886 for US \$10,382=93 dated 28th February, 2001,

27th February, 2001 and 20th February, 2001 respectively and the due date was 29th May, 2001, 28th May, 2001 and 21st May, 2001 respectively. These Bills of Exchange were drawn on M/s. Precision Processors (India) Pvt. Ltd. (hereinafter referred to as the "Applicant"). All the aforesaid bills were accepted by the applicant on 3rd May, 2001. The applicant, however, did not pay the amount of the bills on demand after maturity. By reason thereof, the Canara Bank, the banker of the applicant through its Notary, Mr. A.K. Biswas made presentment of the said Bills on 17th November, 2003 and the protest was notarized. The applicant did not make payment.

5. Under such circumstances, the bank filed a proceeding for recovery of an amount of Rs. 17,14,943/- along with interest. In the said proceeding, the applicant filed a written statement in which it was contended on behalf of the applicant that there is no privity of contract between the bank and the applicant. The privity of contract was between the Bank and Espee Trading Corporation. The bank is not the holder in due course of the Bills of Exchange and has no right to claim any amount from the applicant. The applicant is not liable to pay the aforesaid sums by reason of the fact that Espee Trading Corporation by their letter dated 12th December, 2001 had informed the applicant that they are not required to make any payment of the bills.

6. The bank has filed the evidence on affidavit of one Mr. S.P. Reddy and the applicant has also filed the evidence of affidavit of Mr. Ajay Gaggar along with the evidence on affidavit of one Mr. Sanjay Kedia, President of Espee Trading Corporation.

7. The bank also appears to have initiated a proceeding against Espee Trading Corporation at an appropriate forum at USA.

8. In the statement of claim, the bank has stated that three Bills of Exchange are issued by Espee Trading Corporation. The applicant company is a drawee. These bills have been purchased by the bank as holder in due course and, accordingly, the bank is entitled to recover the amounts from the applicant in view of non-payment of the amount under the bills.

9. The question raised before the Tribunal appears to be whether the bank is the holder in due course and can recover the amounts from the applicant company.

10. The Tribunal on the basis of the pleadings recorded that only the question which has been raised is whether these Bills of Exchange are legal and valid, whether the bank is the holder in due course or is the indorsee of M/s. Espee Trading Corporation to recover the amount and also whether on acceptance of the bills of exchange the applicant becomes primarily liable to the bank for payment of the amounts. The Tribunal on consideration of the materials-on-record held that the circumstances under which M/s. Espee Trading Corporation handed over these Bills of Exchange to the bank and if these bills were purchased for consideration could not be decided in absence of Espee Trading Corporation who has not been made a party in this proceeding. The bank has

also not filed any statement of accounts of its New York Branch to this effect. If the Bills of Exchange are examined it could be seen that the direction was "pay to the order of Espee Trading Corporation for value received and charged the same to the account of Espee Trading Corporation". On the reverse of this, there is a stamp of the Espee Trading Corporation with certain initials. There is no indorsement of these Bills of Exchange that these are being indorsed in favour of the applicant bank. There is also no mention that for value received the Bills of Exchange are hereby handed over to the bank. In view of the definition of Section 9 of the Negotiable Instruments Act the bank cannot claim to be a holder in due course. There is no indorsement in favour of the bank on the Bills of Exchange nor the bank has mentioned on his own volition that the amounts are payable to it. The bank without the purchase of the Bills of Exchange or under credit facilities given to the M/s. Espee Trading Corporation on the basis of the Bills of Exchange without purchasing the said bills could send the Bills of Exchange for collection. In the event, the bank is the collection agent then in that capacity the bank does not become the "holder in due course" for value without a proper endorsement. If it is found that the bank is not the holder in due course and there is no proper indorsement in their favour, the bank is not entitled to recover the amount under the Bills of Exchange from the defendant.

11. The learned Presiding Officer relied upon the judgment of the Hon'ble Supreme Court in Jagjivan Mavji Vithlani V. Messrs. Ranchhodddas Meghji reported at , AIR 1954 SC 554 and the Division Bench of the Hon'ble Madhya Pradesh High Court in Gabhabhai Velji V. The Commissioner of Income Tax, M.P., Nagpur and Bhandara, reported at , 1969 Madhya Pradesh Law Journal 491 and observed that if the amounts of the bills of exchange are not paid by the drawee then the remedy of the holder of the bills of exchange is to recover it from the drawer and not from the drawee and the only exception to this is where the bills of exchange has been accepted by the drawee in favour of the holder of the bills of exchange. The endorsement of acceptance on the bills of exchange of the drawee only gives an impression that this acceptance is for payment to M/s. Espee Trading Corporation or to his collection agent. The collection agent is not the holder in due course because he is authorized only to collect the amount on behalf of M/s. Espee Trading Corporation from the applicant which, however, is not realizable by reason of some alleged communications between M/s. Espee Trading Corporation and the applicant. The Bills of Exchange were presented on 17th November, 2003 while the alleged satisfaction of the bills was already made long back in October, 2001. The privity of contract for payment is between the Espee Trading Corporation and the applicant. The parties have settled their disputes and once the amounts of the Bills of Exchange have been satisfied the liability of the applicant for payment stands extinguished.

12. It was on such finding the claim of the bank was rejected.

13. In the appeal, the Appellate Court has proceeded on the basis that the transaction between the bank and M/s. Espee Trading Corporation is undisputed.

The three Bills of Exchange were supported by due consideration and M/s. Espee Trading Corporation, the drawee was the beneficiary. On acceptance of such Bills of Exchange, the applicant became the principle debtor to the bank. The consideration has passed from bank to Espee Trading Corporation. The holder of a bill of exchange in the event of dishonour is not bound to sue all the parties liable under it. On acceptance of the Bill of Exchange, the acceptor became the principal debtor and the drawer becomes surety and the law is well-settled that the holder of Bill of Exchange can sue only the acceptor of the Bill of Exchange. The Bank of India sued the acceptor of Bill of Exchange without impleading M/s. Espee Trading Corporation, the drawer of the Bill of Exchange as Espee Trading Corporation is not required to be made party in this proceeding. The Bank of India came into possession on those three bills of exchange after the said bills were deposited by M/s. Espee Trading Corporation with the bank and can sue the acceptor as admittedly the bills were parted with by Espee Trading Corporation in favour of the bank for valid consideration. The bank duly gave credit in the account of Espee Trading Corporation and that was the actual consideration passed in connection with the handing over of the Bills of Exchange by the Espee Trading Corporation to the bank. The appellate Tribunal refused to accept the submission of the applicant that the Bank of India is not the holder in due course. The Appellate Tribunal on consideration of a Division Bench Judgement of the Bombay High Court in M/s. M. Ramnarain Pvt. Ltd. v. The State Trading Corporation Ltd. reported at , AIR 1988 Bombay 45 and the Hon''ble Supreme Court in American Express Bank Ltd. v. Calcutta Steel Co. & Ors. reported at (1993) 76 Company Cases 768: 1993 (2) SCC 97/199 held that Espee Trading Corporation after enjoying the benefit of advance credit in its favour on the basis of three accepted bills of exchange cannot be heard to say that the Bank of India was a bare collecting Agent and the bank had no right under the Bills of Exchange to realize the amount from the applicant being the acceptor of the said bills. The Appellate Tribunal was of the view that the Bank of India is coming within the definition of holder as well as the holder in due course and, accordingly, reversed the judgement of DRAT.

14. Mr. Satadeep Bhattacharya, learned Counsel led by Mr. Abhrajit Mitra, learned Senior Counsel appearing on behalf of the petitioner has supported the findings of the DRAT and submitted that the bank is not a holder in due course and the fact that the Espee Trading Corporation has discharged the applicant from all liabilities arising out of the said three several bills of exchange the Appellate Tribunal could not have reversed the said finding. The learned Counsel has referred to Sections 9, 15, 16 and 60 of the Negotiable Instruments Act, 1881 and submitted that in absence of any indorsement in the bill of exchange in favour of the bank, the bank could not have sued the applicant for recovery of amounts covered under the said three Bills of Exchange. The learned Counsel has relied upon the Division Bench Judgment of the Punjab and Haryana High Court in Punjab National Bank v. Himgiri Traders & Anr. reported at 121 Company Cases 819 for the proposition that in order to become a holder in due course, the

bank would be required to satisfy that the bank for consideration became the possessor of the bills payable to bearer or the payee or indorsee thereof. With regard to endorsement, it should be clear that when the maker and holder of the Negotiable Instruments Act signs the same for the purpose of negotiation on the back or face thereof, he is said to indorse the same and is called the "indorser". Section 16 of the Act makes it further clear when it states that if the indorser signs his name only, the indorsement is said to be "in blank", and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be "in full", and the person so specified is called the "indorsee" of the instrument. The provisions of the Act relating to a payee shall apply with the necessary modifications to an indorsee. Since no such intention could be gathered from the three Bills of Exchange, the bank cannot claim to be a holder in due course of the said Bills of Exchange.

15. Per contra, Mr. Amitava Das, learned Counsel appearing on behalf of the bank that the bank proceeds on the basis of acceptance of the bills of exchange by the applicant and by reason of Section 32 of the Negotiable Instruments Act, 1881 in the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand. It is submitted that Section 32 does not refer to holder in due course. The Section makes the maker and acceptor both liable to the holder to pay the amounts. The learned Counsel has relied upon Sections 8 and 9 of the Negotiable Instruments Act, 1881 in order to emphasize that the bank is the holder of the bill of exchange and is entitled to recover the amount from the applicant petitioner being the acceptor of the bill.

16. In order to decide the issues raised in this application it would be fruitful to refer to the following sections of the Negotiable Instruments Act, 1881:--

"S.7. "Drawer", "drawee". - The maker of a bill of exchange or cheque is called the "drawer"; the person thereby directed to pay is called the "drawee".

"drawee in case of need". - When in the bill or in any indorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need such person is called a "drawee in case of need".

"acceptor". - After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the "acceptor".

"acceptor for honour". - [When a bill of exchange has been noted or protested for non-acceptance or for better security], and any person accepts it supra protest for honour of the drawer or of any one of the indorsers, such person is called an "acceptor for honour".

"Payee". - The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee".

S.8. "Holder". - The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

S.9. "Holder in due course". - "Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if [payable to order], before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

S.15. Indorsement. - When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the "indorser".

S.16. Indorsement "in blank" and "in full" - "Indorsee". - [(1)] If the indorser signs his name only, the indorsement is said to be "in blank", and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be "in full", and the person so specified is called the "indorsee" of the instrument.

[(2) The provisions of this Act relating to a payee shall apply with the necessary modifications to an indorsee.]

S.60. Instrument negotiable till payment or satisfaction. - A negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee or acceptor at or after maturity, but not after such payment or satisfaction."

17. In the statement of claim filed before the Tribunal, the bank alleged that at the request of M/s. Espee Trading Corporation, the bank purchased aforesaid three bills of exchange drawn by the M/s. Espee Trading Corporation on the defendant. The appellant bank being the holder in due course sent the aforesaid three bills for collection through the Canara Bank, SSI Branch, 5/1A, A.J.C. Bose Road, Kolkata - 700 020. However, the said bills were returned dishonoured on presentation after due dates.

18. It was contended that the obligation to pay under the said bills only remained with Espee Trading Corporation and the bank never had or could claim any amount in respect thereof from the petitioner.

19. Mr. Sanjay Kedia whose deposition was produced in the aforesaid

proceedings has, during his cross-examination, said:--

"It is true that I had availed of the bill discounting facility, overdraft facility and letter of credit facility of a limit of 1.91 million dollars from the applicant bank's New York branch.

It is true that the three bills in question referring to invoice No. 5886 dt. 20.02.2011, US dollar 10,382.92, invoice No. 5889 dt. 27.2.2001 US dollar 10,587.68 and Invoice No. 5890 dt. 28.2.2001 of US dollar 10,797.15 were raised on the defendant No. 1 company.

These bills were deposited with the applicant bank for collection.

It is true that I received the advances against three bills from the bank."

20. The learned Counsel of the opposite party submits that the bank in order to succeed its claim as holder in due course would be required to establish that the bank became the indorsee of the bill of exchange since the bill of exchange was payable to the order of Espee Trading Corporation. The opposite party as indorser signs his name only on the reverse of the bills which means it is an indorsement is said to be in "in blank" and the bank by virtue of the said bill of exchange could not have enforced its right as a holder in due course.

21. An indorsement in blank (also known as a "general indorsement") specifies no indorsee. It consists of the bare signature of the indorser, and a bill so indorsed becomes payable to bearer. The same situation arose in *Peacock v Rhodes*; (1781) 2 Doug 633. A bill is payable to the order of Jonathan Jones. Jonathan Jones signs on the back of the bill thus: "Jonathan Jones". This is an indorsement in blank. In such a case, so long as the indorsement continues in blank, the property in the instrument is payable to bearer. For, "[t]here is no difference between a note indorsed in blank and one payable to bearer. They both go by delivery and possession proves property in both cases".

22. An indorsement in full (also known as a "special indorsement") specifies, in addition to the signature of the indorser, the person to whom or to whose order, the instrument is payable.

23. It is submitted that there is no direction in the bill of exchange to pay the amount mentioned, to a specified person, and in absence of such specific direction or indorsement, the bank cannot be an indorsee of the instrument.

24. The Bill of Exchange contemplates three parts, namely, (i) the "drawer" that is the person who is the maker of a bill of exchange, (ii) the "drawee" that is the person who is directed to pay and (iii) there is any person or to whose order the amount of the instrument is payable to the bearer.

25. It is, however, not necessary that three separate persons are necessary "drawer", "drawee" and "payee". The bill is required to state with certainty to whom the payment is to be made where a bill is payable to the bearer, the payee is indicated with certainty where a bill is not payable to the bearer with

reasonable certainty. After the drawee of a bill has signed its assent upon the bill and delivered the same to some person on his behalf he is called the acceptor.

26. The acceptance of a bill is an indication by the drawee of his assent to the order of the drawer. The essentials of a valid acceptance are, that it must be written on the bill and signed by the drawee. The usual form in which the drawee accepts the instrument is by writing the word "accepted" across the face of the bill and signing his name underneath. Under Section 32 of the Act, the acceptance by the drawee of the instrument, without an acknowledgement of the liability, is sufficient for fixing the liability. Under the Act, before a person can claim to be the holder of a negotiable instrument, he should:

"(a) be entitled in his own name to the possession of the instrument; and

(b) have the right to receive or recover the amount due thereon from the parties thereto."

27. An indorsee for collection is not a holder, as he does not acquire any interest in the instrument. (Irinjalakuda Bank Ltd. v. Poruthussery Panchayat; , (1970) 40 Comp. Cas. 767)

28. Acceptance of a bill of exchange is the signification by the drawee of his assent to the order of the drawer. It is the act by which the drawee evinces his consent to comply and be bound by, the request contained in a bill of exchange directed to him and is the drawees agreement to pay the bill when it falls due. In common parlance, the acceptance of a bill of exchange is the drawees signed engagement to honour the draft as presented. The Negotiable Instruments Act, 1881 insists that a bill of exchange makes the acceptor personally liable unless the acceptor states on the face of the bill that he subscribes for a disclosed principal.

29. The definition implies that the holder has a right to sue on the instrument.

30. A person claiming to be a holder in due course must show that he acquired the instrument for valuable and lawful consideration and he became the holder of the instrument before the amount mentioned in it became payable. The maker of a promissory note under Section 32 of the Act is primarily liable upon the instrument.

31. In the instant case, the Bill of Exchange reads as follows:--

"U.S. \$ 10,797.15

02/28/2001

AT 90 DAYS FROM B/L DATE Of this FIRST of exchange (second unpaid) Pay to the order of ESPEE TRADING CORPORATION

Ten thousand seven hundred Ninety Seven and 15/100 United States Dollars

For Value received and charge at the same to account

To

ESPEE TRADING CORPORATION PRECISION PROCESSORS (INDIA) PVT. LTD.
S.D.F. (ELECTRONICS) BUILDING, BLOCK -1, MODULE III & IV, SECTOR - 1,
PROCESSING ZONE, FALTA - 24 PARGANAS (SOUTH), WEST BENGAL

No. 5890

Authorized Signature"

32. The other two bills are of the same tenor. M/s. Espee Trading Corporation is the drawer and M/s. Precision Processors (India) Pvt. Ltd. is the drawee. M/s. Precision has accepted the said bill of exchange and agreed to pay to the order of Espee Trading Corporation. A dispute is raised that the bank does not become a holder in due course by reason of the fact that the drawer signs his name on the reverse of the bill, there is a stamp of Espee Trading Corporation with certain initials. There is no endorsement on these bills of exchange that these are being indorsed in favour of the bank. There is also no mention that for the value received the bills are hereby handed over to the applicant bank.

33. Section 15 of the Act defines indorsement. The "indorsement" in its literal sense imports writing on the back of an instrument but in this technical sense it is applicable to negotiable papers and means writing of one's name on the back thereof with the intent to transfer therein. In the instant case, this intention is missing.

34. The indorsement by Espee Trading on the reverse of the bill of exchange does not indicate that the amount covered under the bill would be payable to the bank. In absence of such indorsement, it cannot be said that the opposite parties would be liable as an acceptor of the bill to the bank. However, the obligation of the opposite party to the Espee on the tenor of the bill of exchange remains although the opposite party has relied upon communications to show that the Espee Trading has discharged the opposite party from its obligation to pay under the Bill of Exchange. Under such circumstances, I am inclined to accept the view expressed by Debt Recovery Tribunal that the said bills were sent on collection basis and the bank was not authorized to enforce its right as a holder in due course in respect of the said bills. Moreover, Espee Trading Corporation has contended that they have communicated to the bank that the opposite party is discharged from its liability. The Appellate Tribunal has proceeded on the basis that the bank is holder of the said bills disregarding the case made out by the bank specifically in O.A. No. 52 of 2004 that the bank is the holder in due course of the said bills and the sent the said bills for correction. The Appellate Tribunal cannot make a third case not pleaded by the parties. Under such circumstances, the order of the Appellate Tribunal is set aside. The order of the Presiding Officer Debt Recovery Tribunal is restored. The Civil Revision succeeds.

35. Urgent xerox certified copy of this judgment, if applied for, be given to the

parties on usual undertaking.