

(2009) 05 DEL CK 0004

In the Delhi High Court

Case No : IA No. 6459 of 2008 in CS (OS) No. 930 of 2007

Sh. Vijay Singh and Others

APPELLANT

Vs

Smt. Manali Malik and Others

RESPONDENT

Date of Decision : 05-05-2009

Acts Referred:

Citation : (2009) 159 DLT 259

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Satinder Gulati and Kamaldeep Gulati, for the Appellant; L.K. Singh, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—Does a cheque presented for payment to the bank after the death of the drawer and returned unpaid for the reason of death, ceases to be a cheque for a suit under Order 37 CPC to be maintainable thereon. This question inter-alia arises for consideration in this application for leave to defendant.

2. The three plaintiffs instituted the suit under Order 37 of the CPC for recovery of the total principal sum of Rs. 22,65,000/- together with pre-institution interest at 18% per annum amounting to Rs. 71,720/-, total Rs. 23,36,721/- and further together with pendente lite and future interest at 18% per annum against the three defendants on the basis of three dishonoured cheques. The plaintiffs No. 1&2 are pleaded to be the sons of the plaintiff No. 3. It is the case in the plaint (i) that the plaintiffs were having friendly relations with Shri Anil Kumar Malik the deceased husband of the defendant No. 1 and father of the minor defendants No. 2&3; (ii) that the said Shri Anil Kumar Malik was working as Development Officer with LIC and had got agency of LIC in the name of the wife of the plaintiff No. 2 also; (iii) that during the long relationship of twenty years between the parties both were helping each other financially as and when need arose; (iv) that the deceased Anil Kumar Malik owed an amount of Rs. 8,00,000/- to the plaintiff No.

3 against which he had issued a cheque; (v) that Sh. Anil Kumar Malik was in need of money and had approached plaintiffs No. 1 & 2 to arrange money; (vi) plaintiff No. 1 had arranged a sum of Rs. 8,50,000/- and paid the same to the deceased Anil Kumar Malik against which he issued a cheque for the said amount in favour of the plaintiff No. 1; (vii) plaintiff No. 2 paid a sum of Rs. 6,15,000/- to the deceased Anil Kumar Malik and against which the deceased issued a post dated cheque for Rs. 6,15,000/- in the name of the plaintiff No. 2; (viii) that all the said amounts were paid by the plaintiffs to the deceased by way of friendly loan; (ix) that the deceased used to make entries in the record of the amount received from the plaintiffs in the name of the plaintiff No. 1 only; (x) Shri Anil Kumar Malik expired untimely on 1st February, 2007 in a train accident; (xi) the plaintiffs presented their respective cheques for encashment after the demise of Sh. Anil Kumar Malik on or about 6th February, 2007 and all the said cheques were returned dishonoured with the remarks "withdrawal stopped owing to death"; (xii) that the plaintiffs approached defendant No. 1 being the widow of Sh. Anil Kumar Malik, she though admitted the monies owed to the plaintiffs had been non committal and evasive and did not make the payment inspite of repeated reminders; (xiii) that the defendants being the legal heirs of Sh. Anil Kumar Malik who owed monies to the plaintiffs are liable to re-pay the monies to the plaintiffs along with interest; (xiv) that a legal notice dated 10th March, 2007 was issued which was avoided by the defendant No. 1.

3. The defendant No. 1 for herself and for her minor children defendants No. 2&3 has sought leave to defend on the grounds (i) of mis-joinder of plaintiffs and causes of action; it is averred that the transactions pleaded with each of the plaintiffs being separate, they are not entitled to join in a single suit; (ii) that the suit under Order 37 is not maintainable against the defendants who are neither authors of the cheques nor have issued the cheques on the basis whereof the suit has been filed, that a suit on the basis of an instrument can be filed under Order 37 of the CPC only against the person issuing the instruments; (iii) that the plaintiffs have not given any details as to when and in what manner each of the plaintiffs had advanced monies to Sh. Anil Kumar Malik and thus there was nothing to show that the cheques had been issued towards discharge of any alleged loan; (iv) the signatures on the cheques were admitted to be that of Sh. Anil Kumar Malik but the writing on the remaining portion of the cheque either in words or in figures was denied to be of said Sh. Anil Kumar Malik; (v) it is averred that there was nothing to show that the cheques had been issued by Sh. Anil Kumar Malik to the plaintiffs in discharge of any alleged loan; (vi) that a presumption of liability from signatures could be made only against the signatory and not against the heirs of the signatory; (vii) that the defendants have no knowledge about any loan advanced by the plaintiffs to Sh. Anil Kumar Malik or of any cheques issued by him to the plaintiffs; (viii) that the plaintiff No. 1 was employed with Indian Overseas Bank where Sh. Anil Kumar Malik was having his account and was thus aware of the demise of Sh. Anil Kumar Malik and of the account being frozen by the bank but still the cheques were presented for

payment; (ix) that the defendant No. 1 had never seen Sh. Anil Kumar Malik giving blank cheques to anyone; (x) that the plaintiffs were trying to illegally enrich themselves and had concocted the story of loan.

4. The plaintiffs filed a reply to the application for leave to defend and denied that the defendants had raised any triable issue. It was further alleged that the defendants had inherited lot of movable and immovable properties from Sh. Anil Kumar Malik and were the custodian of his estate and were thus liable for repayment of the amount due from Sh. Anil Kumar Malik to the plaintiffs. It was further pleaded that Sh. Anil Kumar Malik by issuing the cheques to the plaintiffs had admitted his liability to the plaintiffs and the defendants having admitted the signatures of Sh. Anil Kumar Malik on the cheques, the plaintiffs were entitled to a decree forthwith. It was also denied that the accounts were frozen by the bank owing to the death of Sh. Anil Kumar Malik; the accounts were in the joint name of Sh. Anil Kumar Malik and the defendant No. 1 and the defendant No. 1 had stopped payment from the said accounts. It is also denied that the plaintiff No. 1 had worked with the branch of the Indian Overseas Bank in which Sh. Anil Kumar Malik had an account. It was further pleaded that the defendant No. 1 was a director in several companies of Sh. Anil Kumar Malik and was thus fully involved in his business and had knowledge of the transactions of Sh. Anil Kumar Malik with the plaintiffs. Significantly, inspite of objection being taken in the leave to defend, the plaintiffs in the reply also did not give any further particulars as to how the monies were advanced by each of them to Sh. Anil Kumar Malik and in repayment whereof the cheques subject matter of the suit were stated to be issued.

5. The plaintiffs have filed the original cheques and the cheque returning memos in the court. The reason given in each of the cheque returning memo is "withdrawal stopped owing to death". The counsel for the defendants in his submissions relied upon Section 118 of the Negotiable Instruments Act and the judgment reported in Sarla Devi and Others Vs. Daya Ram and Others, to contend that a suit under Order 37 is not maintainable against heirs of a signatory to an instrument. The counsel for the plaintiffs relied upon (A) Sarala Devi and Others Vs. Daya Ram and Others, overruling the above and in which the suit under Order 37 of the CPC for recovery of advance sale consideration paid under an agreement to sell in writing and refundable in terms thereof was held to be maintainable against the legal heirs. The reasoning given was that u/s 37 & 40 of the Indian Contract Act the contract can be enforced by or against the parties and their legal heirs unless contrary intention appears.

(B) Raghubir Singh and Others Vs. Sarla Devi and Others, merely reiterating the aforesaid judgment.

(C) Bharat Barrel and Drum Manufacturing Company Vs. Amin Chand Payrelal, on the importance of cheques in the commercial world.

(D) Mallavarapu Kasivisweswara Rao Vs. Thadikonda Ramulu Firm and Others, on

the presumption u/s 118 (a) of the Negotiable Instruments Act. It was contended that the defendants had in their leave to defend not pleaded anything to rebut the said presumption.

(E) Ravi Chopra Vs. State and Another, holding that if the signatures on the cheques are shown to be of much prior to the date of filling up of the materials/particulars, it does not probabalize the defence in a case u/s 138 of the Negotiable Instruments Act.

6. The counsel for the plaintiffs emphasized that the defendants had not denied the signatures on the cheque, had not disputed inheriting the estate from the defendants, had not denied the consideration for the cheques and thus it was contended that the defence of the defendants was a moonshine within the meaning Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, . It was further contended that pleading that there was no evidence of consideration was not the same as pleading that there was no consideration for the cheques.

7. Before proceeding further, I may notice that the suit though filed under Order 37 of the CPC, does not comply with the requirement of it being stated in the body of the plaint that the suit is filed under Order 37 of the CPC and that no relief falling outside the ambit of the said order had been claimed in the plaint.

8. I do not find any merit in the ground taken by the defendants of mis-joinder of parties. The averments in the plaint show sufficient material for the right of relief of the plaintiffs arising out of the same series of acts or transactions and for their joinder. Even otherwise under Order 1 Rule 9 of the CPC no suit can be defeated for the reason of mis-joinder.

9. The aforesaid state of pleadings and submissions would show that the question posed by me at the outset, though staring one in the face has not been pleaded or argued so. The two judgments of the Division Bench of this Court relied upon by the counsel for the plaintiffs also do not apply to the facts of the case. A suit under order 37 of CPC on a written contract and which has been held to be maintainable against the legal representatives of the signatories stands on a different footing than a suit under Order 37 of the CPC on the basis of a cheque. If it were to be held that on the death of the drawer prior to the presentment of the cheque, the cheque ceases to be a cheque, then axiomatically the suit under Order 37 would not be maintainable thereon. That is the question to be adjudicated in the present case. My research does not show any precedent thereon.

10. The relevant provisions of the Negotiable Instruments Act relating to a cheque have been perused. Section 6 defines the cheque as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. Normally cheques are issued on the banks holding the monies of the drawer of the cheque. The bank is in the position of the debtor of the drawer of the cheque. The cheque is thus an order of the drawer thereof as creditor, to the

bank who is his debtor, to pay to the payee of the cheque on the date of presentment the amount thereof. The relationship between the drawer of the cheque and his banker is contractual.

11. u/s 31, the liability of the bank as drawee of the cheque is, subject to having sufficient funds of the drawer in its hands properly applicable to the payment of such cheque, to pay the cheque when duly required so to do. It is only when the bank defaults in such payment that it becomes personally liable to compensate the drawer for any loss or damage caused by such default. Else, bank as a drawee of the cheque is not liable personally for default in payment thereof. The text book on the Negotiable Instruments Act by Bhashyam & Adiga (17th Edition) u/s 31 thereof states that at the instant of the death of the drawer, the title to the balance vests in his legal representative and his own order is not competent to withdraw any part of that which is no longer his property. It is further stated that on death of a customer, the order of the customer comes to an end and only if the banker pays the cheque before notice of death, is it valid. It would thus appear that the death of customer terminates his authority to order payment and operates as a countermand of the outstanding cheque.

12. Section 30 also requires due notice of dishonour to be given to the drawer of the cheque for maintaining a claim for compensation on account of dishonour of the cheque. Thus, the dishonour of the cheque is actionable under Order 37 of the CPC only if notice of dishonour has been given to the drawer. If the drawer is dead on the date of dishonour or even on the date of presentment, no notice can possibly be given to him. That also leads to the inevitable conclusion that in such a eventuality no suit under Order 37 of the CPC is maintainable on the basis of a cheque.

13. It is to be noted that the drawing of a cheque does not by itself operate as an assignment of the monies in the hands of the banker in favour of the payee. The holder of a cheque has no right to enforce payment from the bank unless the banker has contracted with the holder to honour. The banker is only liable to the order of the drawer and thus if there is no order of the drawer on the banker, on the date of the presentment owing to the death of the drawer, the bank is not liable to pay. Section 57 provides that the legal representatives of a deceased person cannot negotiate by delivery only a cheque payable to order and endorsed by the deceased but not delivered. This is on the ground that the legal representative is not the agent of deceased. Upon demise, the estate including the amounts with the bank vest in the legal representatives or nominee and it requires a fresh act on the part of the legal representative or nominee to transfer the money, if any. Only if the cheque had been signed by the legal representative, at the instance of holder thereof does the legal representative becomes personally liable thereunder, u/s 29 of the Act.

14. Sir Ernest Pollock M.R. speaking for the court of Appeal in *Re Swinburne Sutton v. Featherley* (134) 1926 DLT 121 held that a cheque is clearly not an assignment of money in the hands of a banker; Lord Romilly in *Hewitt v. Kaye* L.

Reports 6 E.Q. 198 was quoted:

A cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at the banker or anywhere else. It is an order to deliver the money and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing.

It was further held that it is merely a mandate or authority in the hands of the holder of the cheque to go to the bank and get the money from it. Warrington L.J. in the same judgment held that a cheque is nothing more than an order directed to the person who has the custody of the money, requiring him to pay so much to the person in whose favour the cheque is drawn.

15. The House of Lords in *London Joint Stock Bank Limited v. Mac. Millan Arthur* 1918 LR (HL) 777 speaking through Lord Finlay L.C. so described the relationship between the banker and the customer:

The relation between banker and customer is that of debtor and creditor, with a super added obligation on the part of the banker to honour the customers' cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque.

The said mandate, on demise of customer, ceases to be a mandate. On the moment of demise of customer, the bank, in terms of its contract, is holding the money not to the order of the deceased customer, but to the order of his nominees or legal representatives. The bank cannot thus act on the order of the deceased customer. The cheque, which has been held to be merely an order, thus, on demise of drawer, ceases to be a cheque.

16. Closer home, in *Canara Bank Vs. Canara Sales Corporation and Others*, it has been held that a cheque on which the signatures of the account holder are forged is not cheque in as much as it is no order/mandate of the drawer to the banker to pay the money. To the same effect is *Bihta Co-operative Development Cane Marketing Union Ltd., and Another Vs. The Bank of Bihar and Others*, .

17. I, therefore, reach a conclusion that the cheques on the basis of which the present suit has been filed, since not presented for payment in the lifetime of the drawer, ceased to be a cheque on the demise of the drawer in as much as they ceased to be the order of a person entitled to make an order to the bank to pay the money thereupon and thus the suit under order 37 of the CPC would not be maintainable on the same.

18. Be that as it may, the matter is considered on other aspects also.

19. Under the provisions of the Negotiable Instruments Act, the cheque only raises rebuttable presumption of having been issued for consideration. Thus at the stage of grant to leave to defend, it has to be seen, in which case an opportunity for rebutting the presumption is to be given. Merely because the suit

is filed against the legal representatives of the drawer, is no ground for grant of leave to defend, if otherwise the court is convinced that no case for giving an opportunity for rebutting the presumption is made out. The contention of the counsel for the defendant that, whenever the suit is against legal representatives, leave has to be granted, thus cannot be accepted.

20. The position with respect to the three cheques in the present case is as under:

In favour of Dated Cheque Number

plaintiff No.1 30th January, 2007 196235 plaintiff No.2 27th January, 2007 636299 plaintiff No.3 29th January, 2007 187146

The drawer of the aforesaid cheques died on 1st February, 2007.

21. What strikes one immediately is that the three cheques though bearing dates of a few days apart appear to be drawn from three different cheque books. The case of the plaintiffs is of the cheque in favour of plaintiff No. 2 only to be post dated. It is not stated that the cheques in favour of the other plaintiffs were post dated. The plea is conspicuously quite as to the dates on which the cheques were issued. The plea of the defendants is that the plaintiff No. 1 is an employee of the bank on which the cheques have been issued; while the defendants contend him to be employee of the same branch where the account was, the plaintiffs contend he was in another branch. That can only be adjudicated after trial.

22. The plaintiffs besides the cheques have not filed any document whatsoever to show any financial transactions with the predecessor of the defendants. Though, it is claimed that besides transactions subject matter of the suit, in the past also there were financial dealings between the parties but no instance/particulars thereof are also given. I had during the course of hearing inquired whether the plaintiffs in their income tax returns had shown the alleged loan to the predecessor of the defendants. No reply was given thereto. The plaintiffs have not even placed any documents to show that they were possessed of the monies which are alleged to have been loaned to the predecessor of the defendants. The plaintiff No. 1 is admittedly employed with the bank and the vocation of the other plaintiffs has not been stated. No case has been made out of the plaintiffs, in the course of their business or other affairs being possessed of the sums of money alleged to have been loaned to the predecessor of defendants. Not only are the plaintiffs quite in the plea in this regard but in spite of the said questions being raised in the application for leave to defend also, in the reply thereto nothing further was stated.

23. In view of plaintiff No. 1 being an employee of same bank where the account of the deceased was and the averments of the plaintiffs themselves of relationship with the deceased, it is not improbable that the plaintiffs could be in possession of the cheques signed by the deceased, without any money being due

from deceased to plaintiffs. Mere possession of a cheque does not entitle the holder thereof to monies thereunder when challenged. In the present case an opportunity for trial ought to be given. In the event of the plaintiffs being unable to prove that the cheques on the basis whereof the suit has been instituted are for consideration, plaintiffs would not be entitled to a decree. It would be unjust to in these circumstances deny leave to defend which would result in a decree.

24. Though no arguments have been addressed on the aspect of security but the plaintiffs along with the suit had filed an application for restraining the defendants from selling the immovable property of the deceased. An ex-parte order exists in favour of the plaintiffs. The plaintiffs have also applied under Order 38 Rule 5 CPC. In the circumstances, it is not deemed necessary to discuss and the need is not felt to grant to leave to defendants subject to any condition of furnishing security or otherwise. Also, since the suit has been held to be not maintainable under Order 37, the question of at this stage imposing any condition does not arise.

25. The defendants are therefore found entitled to leave to contest. The application is allowed.