(2011) 07 DEL CK 0265

In the Delhi High Court

Case No : Regular First Appeal 43 of 2002

Shri Dileep Maheshwari APPELLANT

Vs

Cemindia Company Ltd. and Others RESPONDENT

Date of Decision : 20-07-2011

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2011) 07 DEL CK 0265

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : D.K. Rustogi and B.S. Bagga, for the Appellant; Manish Kohli and Manjit Pathak for R-3, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—The challenge by means of this regular first appeal u/s 96 of the Code of Civil Procedure, 1908 (Code of Civil Procedure), is to the impugned judgment and decree dated 30.8.2001 which dismissed the suit of the Appellant/ Plaintiff for recovery of money claimed on account of bad delivery of shares from the Defendant No. 3/Respondent No. 3 to the Plaintiff. The shares in questions were 200 shares of the Defendant No. 1 M/s Cemindia Company Ltd.

2. The facts of the case are that the Defendant No. 3 admittedly sold 200 shares of M/s Cemindia Company Ltd. to the Appellant/Plaintiff on 29.4.1993. The Appellant paid to the Respondent No. 3 a sum of Rs. 28,093.00 for the purchase of such shares. The extant period of the transaction was during the years when the shares were transacted not in D-mat form but they were sold/purchased in the form of share scripts. In the share scripts, there is a column with respect to transfers which are made inasmuch as it is not as if each transfer had to be registered with the company whose shares were sold and transferred inasmuch as before the cutoff date which is mentioned in a share ownership form, there could take place many transfers and deliveries inter se various buyers and sellers without the actual owner being reflected in the share ownership register of the

company whose shares were sold and transferred. I may only state that this position resulted in a nominal owner of shares, who existed in the shareholders register of a company and actual owner of the shares who was different. The actual holder of the shares scripts was the actual owner of the share scripts and the normal owner in the shareholder''s register of the company used to be a trustee for the actual owner. This aspect is deliberated upon by the Supreme Court in its celebrated judgment in the case of Life Insurance Corporation of India Vs. Escorts Ltd. and Others,

3. The Appellant/Plaintiff laid out a case in the plaint that the subject shares were transferred firstly to Sh. Shashikant M. Damani and thereafter through various transfers ultimately the same were lodged for transfer with the Respondent No. 1 company by one M/s Phool Holdings Ltd. On lodging the shares for transfer, it transpired that the original owner of shares as per the shareholders register of the company had got duplicate shares issued on the ground that the said shares had been lost. The net effect of the above was that the subject shares which were sold by the Respondent No. 3 to the Appellant were "bad delivery". As normally happens, each purchaser takes a refund of the amount from the person from whom he purchases the shares which were bad deliveries. The names of all the different purchasers from the Appellant right to M/s Phool Holdings Ltd. are mentioned in the different endorsements found in the relevant share transfer for Ms. The first person of this chain M/s Secured Investment and Finance Company Ltd. demanded payment from the Appellant for bad delivery and the Appellant pleaded a case that he had to pay a sum of Rs. 3,60,960/- to M/s Secured Investment and Finance Company Ltd. On the demand being made to the Respondent No. 3 in around October, 1994, the Respondent No. 3 refused to make payment to the Appellant resulting in filing of the suit.

4. After pleadings were completed, issues were framed on 10.1.2000 and the main issue argued was issue No. 5 as to whether the Appellant is entitled to recover any amount from the Respondent No. 3/Defendant No. 3 and if so, how much? It is this issue which has been argued before me by the counsel for both the parties.

5. First let us come to certain admitted facts. That the Respondent No. 3 sold 200 shares of M/s Cemindia Company Ltd. to the Appellant /Plaintiff is not disputed. That the owner of such shares in the company M/s Cemindia Company Ltd. reported loss of the shares and got duplicate share scripts issued is also not disputed. What is really disputed is the price at which the shares were transferred by Appellant and which ultimately were bought by M/s Phool Holdings Ltd. and whether the Appellant was forced to pay the amount of Rs. 3,60,960/- to M/s Secured Investment and Finance Company Ltd., who is the first endorsee on the share transfer forms as a buyer of the subject share scripts.

6. The trial court has basically dismissed the suit on two main counts. Firstly, the trial court relied upon the inconsistencies of the Appellant/Plaintiff in the plaint

and the evidence inasmuch as in the plaint, the stand which was taken up was that the share scripts were sold by the Appellant to Mr. Shashikant M. Damani whereas in the evidence, the Plaintiff proved the case that the shares were in fact sold to M/s Secured Investment and Finance Company Ltd. The second aspect was that it was not held to be proved that the Appellant/Plaintiff had in fact parted with the sum of Rs. 3,60,960/- to M/s Secured Investment and Finance Company to whom the shares were alleged to be sold.

7. Whereas the learned Counsel for the Appellant argued to explain away Inconsistencies between the plaint and the evidence by referring to the aspect that the share transfer forms itself showed transfer to M/s Secured Investment and Finance Company Ltd. and not Mr. Shashikant M. Damani, it was also further argued that the Respondent No. 3 could not take any advantage of any mistake committed in para 9 of the written statement because the Respondent No. 3 itself stated in the written statement that as per its knowledge, the subject shares were sold to M/s Secured Investment and Finance Company. It was further argued that when in the plaint, it was stated that the shares were sold to Mr. Shashikant M. Damani, really what the Plaintiff meant was M/s Secured Investment and Finance Company Ltd., inasmuch as this company was in fact owned by Mr. Shashikant M. Damani. On the aspect of the finding of the trial court that the Appellant failed to prove the payment of Rs. 3,60,960/- to M/s Secured Investment and Finance Company Ltd., learned Counsel for the Appellant drew the attention of the court to the statement of account Ex.PW1/D3, and which is a statement of account of M/s Secured Investment and Finance Company Ltd. in the books of the Appellant/Plaintiff, where there exists a necessary entry of bad delivery of the subject shares and payment of Rs. 3,60,960/- to the said M/s Secured Investment and Finance Company Ltd. It was also argued that in fact this statement of account got produced during the cross examination of the Plaintiff himself by the Respondent No. 3 and there is No. cross examination as to the fact that the statement of account does not reflect the correct position of the facts. Reliance is also sought to be placed upon a letter Ex.PW1/5 written by Mr. Shashikant M. Damani to Ms. Secured Investment and Finance Company Ltd. for payment of the amount of Rs. 3,60,960/-

In response, the learned Counsel for the Respondent No. 3 again laid great emphasis on the fact that No. person can be allowed to lead evidence beyond what is pleaded in the plaint and since it was pleaded in the plaint that the buyer was Mr. Shashikant. M. Damani, No. evidence could be led to show that shares were in fact sold to M/s Secured Investment and Finance Company Ltd. Learned Counsel for the Respondent also sought to lay stress on the fact that the letter Ex.PW1/5 is not a letter from M/s Secured Investment and Finance Company but this letter is in fact issued by Mr. Shashikant M. Damani. It is also sought to be argued that in the cross-examination, the Plaintiff admitted that M/s N.K. Maheshwari & Company, Kanpur is a different firm then the Plaintiff and that in the same portion of the cross examination, the Plaintiff admitted that it had sold the shares to M/s N.K. Maheshwari Company, Kanpur, further showing the inconsistencies that the shares were not even sold to M/s Secured Investment and Finance Company Ltd.

8. In my opinion, the appeal has considerable merits and is entitled to succeed. The fact that the subject shares were sold by the Respondent No. 3 to the Plaintiff is not disputed. It is also not disputed that these shares resulted in bad delivery. It is an established practice under the normal course of such contracts and also in the normal rules and Regulations of the stock exchange transactions, although the present is proved to be off stock exchange transaction, that whenever there are various transfers before the final transferee lodges the shares of the company for transfer and which transfer is not recorded because of bad delivery, each buyer only claims his monies from the immediately preceding seller and not earlier sellers or the first seller. Once it is established on record that there was in fact a bad delivery of shares, and which cannot be doubted in the present case, the conclusion would have to be that the Appellant/Plaintiff has paid monies to the Respondent No. 3 for shares/goods which it never received. Not only therefore, the Appellant is entitled to refund of the price paid to the Respondent No. 3, further, the Appellant is entitled to receive the losses which it suffered on account of further transfer of shares, and to which, the Respondent No. 3 had No. title to sell.

9. In my opinion, normally, the argument that No. evidence can be led beyond the pleadings would be of considerable weight however, where the parties go to trial with knowledge of their respective cases, then there is No. surprise caused to either of the parties and therefore the doctrine of variance between pleadings and proof cannot come in. This doctrine cannot come into application in the facts and circumstances of the case because the Respondent No. 3 in its written statement admitted that it was to the knowledge of Respondent No. 3 that the subject shares were sold by the Appellant to M/s Secured Investment and Finance Company Ltd. I, therefore, reject the argument urged on behalf of the Respondent No. 3 that there is a variance between the pleadings and the evidence which is led in the case. In fact, variance if any between the pleadings and the proof has been explained by the Plaintiff in his evidence to a question in the cross-examination and which shows that in fact Mr. Shashikant M. Damani was the owner of the concern M/s Secured Investment and Finance Company and the same is the sister concern. In common man''s language, when reference is made to a person, it actually means reference to the company represented by the individual. I may note that there is No. further evidence led on behalf of the Respondent No. 3 that M/s Secured Investment and Finance Company Ltd. is not a sister concern of M/s Shashikant M. Damani.

10. So far as the argument that there is inconsistency that whether the sale of the shares was made to M/s Secured Investment and Finance Company or to M/s N.K. Maheshwari Company, Kanpur, this aspect has also been sufficiently explained in the evidence because the Defendant in his cross-examination admitted that M/s N.K. Maheshwari & Company was the sole proprietorship of

the Plaintiff Mr. Dileep Maheshwari. Mileage therefore cannot be derived by the Respondent No. 3 from the alleged inconsistencies because really both the firms M/s N.K. Maheshwari & Company, whether at Delhi or at Kanpur, are really sole proprietorship concerns of the Plaintiff, and, the statement that the shares were sold to M/s N.K. Maheshwari Kanpur is made in the context ultimately, that the shares were sold at Kanpur. It cannot therefore be said that there is such contradiction so as to defeat the case of the Appellant/Plaintiff for recovery of money. The contradiction in my mind has been sufficiently explained and is not unnatural because businessmen tend to refer their firms at different places sometimes as different concerns because many a times separate books of account are maintained for the separate concerns at different cities.

11. So far as the fact as to whether the Appellant has failed to prove the payment of Rs. 3,60,960/- to the purchasers of shares from the Appellant, in my opinion, the very fact that the statement of account Ex.PW1/D3 was produced during the cross-examination of the Appellant, and that too, subject to cost which the Appellant paid, accordingly, the said statement of account can be looked into. There cannot be any doubt about the contents of the same because there is No. question in the cross examination as to lack of authenticity of the statement of account Ex.PW1/D3. In fact, I have gone through the entire examination-in-chief of the Respondent No. 3 and find that there is not a single affirmative statement that this payment of Rs. 3,60,960/- has not been made by the Appellant to M/s Secured Investment and Finance Company Ltd. or M/s Shashikant M. Damani.

12. A civil case is decided on balance of probabilities and the balance of probabilities including the affirmative evidence led by the Appellant/Plaintiff, the statement of account Ex. PW1/D3 and the fact that the authenticity of Ex.PW1/D3 has never been challenged even by making a token affirmative statement whether in the examination in chief by the Respondent No. 3 or in cross-examination to the Appellant by the Respondent No. 3, makes me come to the conclusion that the Appellant has successfully proved payment of Rs. 3,60,960/- to M/s Secured Investment and Finance Company Ltd.

13. In view of the above, the appeal is accepted, the suit of the Plaintiff for recovery of Rs. 3,60,960/- is decreed against the Defendant No. 3/Respondent No. 3 along with the interest from 1.5.1993 at 10% per annum simple till the date of filing of the suit and 7 1/2 % per annum simple pendente lite and future till payment. Decree sheet be prepared. Trial court record be sent back.

