(2011) 03 DEL CK 0019

In the Delhi High Court

Case No : Regular Second Appeal No. 111 of 2009

Shri Rajesh Jaina and Others APPELLANT

Vs

Shri Tapesh Jain and Others RESPONDENT

Date of Decision : 23-03-2011

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 10

Citation : (2011) 03 DEL CK 0019

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Rajesh Aggarwal, for the Appellant; S.A. Khan, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 13.4.2009 which had modified the finding of the trial judge dated 28.4.2006. Vide the judgment and decree dated 28.4.2006 the suit filed by the Plaintiffs seeking recovery of Rs. 98,880/- against the four Defendants had been decreed against the Defendant No. 1 alone. The suit qua other Defendants had stood dismissed. Appeal had been filed before the first appellate court. Vide the impugned judgment the suit stood dismissed against all the four Defendants.

2. This is a second appeal. The substantial questions of law have been embodied on page 3 of the body of the appeal. On behalf of the Appellant, it has been submitted that Section 10 of the Negotiable Instruments Act, 1881 defines "payment in due course". Section 10 of the Negotiable Instruments Act, 1881 is extracted here in below:

10. "Payment in due course"- "Payment in due course": means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount there in mentioned.

As per this provision "payment in due course" means payment in accordance with the tenor of the instrument. Such a payment has to be made in good faith and without any negligence. It is pointed out that this has not been adverted to by the Defendant No. 4. Defendant No. 4 had opened a bank account and in collusion with other Defendants allowed Defendant No. 1 to misappropriate the money of the Plaintiff; Defendant No. 2 was an account holder who had been introduced by Defendant No. 3; both persons were non-existent. The bank did not act in good faith. He was guilty of negligence. The impugned judgment dismissing the claim of the Plaintiff against Defendant No. 4 as also other Defendants is an illegality and is liable to be set aside.

3. The case of the Plaintiff is that Defendant No. 1 is his employee. By virtue of this job, Plaintiff had entrusted Defendant No. 1 for looking after his banking transactions. Cheques dated 23.4.1986 for Rs. 12,835/- had been contrived by Defendant No. 1 in connivance with Defendants No. 2 and 3 and a fake bank account in the name of M/s Jain & Company, a non-existent person, was opened; pay order in the sum of Rs. 12,825/- was procured and this money was thereafter withdrawn fraudulently and deceitfully. Other sums of Rs. 16,674/-, Rs. 18,500/- Rs. 13,810/- and Rs. 6,318/- were also misappropriated in the afore noted fashion. Defendants were accordingly liable for repayment of the said accounts which were due to the Plaintiff.

4. Defendants No. 1 to 3 were ex party; they did not even filed written statement. Defendant No. 4 was the only contesting Defendant. He had denied negligence or lack of good faith on his part.

5. On the pleadings of the parties three issues had been framed by the trial judge; they read as follows:

1. Whether the Plaintiff is entitled to the decree of Rs. 98,880/- as prayed for? OPP

2. Whether the Plaintiff is entitled to the interest, if yes, at what rate and for what period? OPP

3. Relief.

6. One witness was examined on behalf of the Plaintiff and one witness was examined by Defendant No. 4. Testimony of these witnesses clearly show that no case is made out in favour of the Plaintiff. PW-1 had averred that Defendant No. 1 had misappropriated the aforenoted amount in connivance with Defendants No. 2 and 3 and the officials of the Defendant No. 4; he had written a letter to Defendant No. 4 on 02.12.1987 to bring this fact of fraud to light but no action was taken. In his cross-examination he admitted that before December 1987 he did not write any letter to Defendant No. 4. This information that there was a fake account in the name of M/s Jain & Company had been given to him by his Chartered Accountant. This was the sum total of the allegations leveled against the Defendants; no particulars or details has been given. Transactions were

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admittedly of the year 1986; Defendant No. 4 was informed of this fraud only in December 1987; no criminal complaint or criminal action had also been taken. The notice dated 02.12.1987 purported to have been sent by Defendant No. 4 had also not been proved; it was only marked. DW-1 had proved the account opening form Ex. DW-1/1 in the name of M/s Jain & Co.; it is pointed out that this document on the face of it shows that it has not been signed and verified by a duly authorized person; it does not contain the photograph of the applicant. The cross-examination of DW-1 shows that not a single question has been put to this witness qua this submission. Not even a single suggestion has been given to DW-1 that this document is not as per the rules and procedures of banking practice or that this account opening form has not followed the banking rules. It was in these circumstances that the impugned judgment had noted that no case is made out in favour of the Plaintiff. Impugned judgment has also noted that the Plaintiff has failed to produce any documentary evidence to show that the Defendant No. 1 was his employee. There is no doubt that the Defendants No. 1 to 3 were ex parte but the Plaintiff himself must stand on its own legs. It must prove its case before a decree can follow in his favour. No issue had also been framed qua the negligence of the bank or that the bank had not acted in good faith in allowing the aforenoted transaction. Both the fact finding courts have already returned their findings against the Appellant. This Court is not a third fact finding court. It cannot go into the submissions now urged before this Court. No substantial question of law has arisen.

7. Appeal is dismissed in limine.

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