
(1981) 11 CAL CK 0024
In the Calcutta High Court
Case No : Suit No. 27 of 1981

Sumani Ferro Alloys Ltd.

APPELLANT

Vs

Super Forging Steel Sales Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 18-11-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2
Negotiable Instruments Act, 1881 (NI) — Section 9

Citation : AIR 1982 Cal 136

Hon'ble Judges : Dipak Kumar Sen, J

Bench : Single Bench

Judgement

Dipak Kumar Sen, J.—The Sumani Ferro Alloys Ltd., the plaintiff instituted this suit under Order 37 of the Civil P, C. against Super Forging Steel Sales Private Limited and the Bank of India, defendants Nos. 1 and 2 respectively, claiming a decree for Rs. 3,62,131/- with interests and costs. The plaintiff's cause of action is based on several Hundies, all drawn by the plaintiff on the defendant No. 2 and accepted by the defendant No. 1 in March, 1979. It is alleged that the said Hundies matured in April and May 1979 when it is alleged they were presented by the defendant No. 2 to the defendant No, 1 for payment but were dishonoured.

2. On or about the 25th Aug., 1980 it is alleged that the defendant No. 2 endorsed in favour of the plaintiff the said Hundies for value received.

3. The plaintiff claims to have become the holder of the said Hundies in due course and alleges that it again presented the said Hundies to the defendant No. 1 for payment but the same were again dishonoured. In this application the plaintiff prays for a final judgment of the amount claimed in the suit with interest and costs.

4. There is another application by the defendant No, 1 praying for leave to defend this suit. The case of the defendant No. 1 is, inter alia, that the transaction between the plaintiff and the defendant No. 1 was for supply of 458

tonnes of steels ingots of different specifications by the plaintiff to the defendant No. 1 at agreed rates, It was a term of the said transaction that the defendant No. 1 would pay the plaintiff for the supply by Hundies presented through the Bank provided the plaintiff was entitled to such payment, The defendant No. 1 alleges that only 84,290 metric tonnes ingots were supplied by the plaintiff in nine instalments, but the same did not conform to the agreed specifications or quality were defective; could not be rolled or forged and were wholly unfit for the purpose for which they were purchased. The defendant No. 1 it is alleged rejected the said ingots supplied and intimated the plaintiff of such rejection directly and through the latter's broker. The defendant No. 1 alleges that it has a counter-claim of over Rs. 9 lakhs against the plaintiff on account of damages and or non-supply.

5. The defendant also contends that the said Hundies are invalid as they are not properly and sufficiently stamped as required in law.

6. At the hearing, learned Counsel for the plaintiff cited a decision of the House of Lords in *Nova (Jersey) Knit Ltd, v. Kammgarn Spinnerei G, M. B. H*, reported in (1977) 2 All ER 463 for the proposition that a claim for unliquidated damages could not be raised by way of defence, set off or counter-claim to an action on a bill of exchange.

7. Learned Counsel for the defendant No. 1 cited *Jade International Steel Stall Und Eisen Gamb H. & Co. K. G. v. Robert Nicholas Steels Ltd.*, reported in (1978) 3 All ER 104. In this case the plaintiff sold to the defendants a quantity of steel to be delivered in two consignments and drew a bill of exchange payable on the defendants for the price of the first consignment. The bill was accepted by the defendants. The plaintiff discounted the bill with their Bank which" was thereafter discounted with two other Banks, The first consignment of steel was delivered to the defendants. The defendants did not honour the bill on the ground that the first consignment delivered was substandard. The bill traced its course back to the plaintiff's Bank which debited the plaintiff's account for the amount and returned the bill to the plaintiff. The plaintiff brought an action against the defendants and applied for a summary judgment. The defendant alleged that they had good defence by way of a counter-claim and applied for leave to defend. In the Court of the first instance leave was not granted to the defendants to defend the action on the ground that in an action on a bill of exchange defence by way of counterclaim could" be put up if the action was between immediate parties to the bill. The plaintiffs having discounted the bill they were not immediate parties to it and they derived their title to it through the holders in due course. The Appeal Court sustained the said order.

8. Submissions were made by learned Counsel on different aspects of the Stamp Act.

9. In the instant case it appears to me that the Hundies were payable to the order of the Bank, the defendant No. 2. The case of the plaintiff is that the Bank

endorsed the said Hundies in favour of the plaintiff and returned the same to the plaintiff for value received.

10. Section 9 of the Negotiable Instrument Act, 1881 reads as follows:--

" "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 indorse 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."

11. The plaintiff cannot claim to be the holder in due course of the said Hundies under the said section as the same are not payable to bearer and as the Bank endorsed the same in favour of the plaintiff after the amount mentioned in the Hundies became payable and also after the Hundies were dishonoured. In that view the counter-claim of the defendants can be a sufficient defence to the claim of the plaintiff. I need not express any final opinion on the disputes raised as to the validity or sufficiency of the stamps at this stage. In my view the defendant No. 1 has raised triable issues and is entitled to defend the suit.

12. Leave is given to the defendant No. 1 to defend the suit unconditionally. Learned Counsel for the defendant No. 1 on instructions waives service of the Writ of Summons. The defendant No. 1 will file its written statement within three weeks from date; cross-orders for discovery within two weeks thereafter; inspection forthwith thereafter. The Suit will appear in the appropriate prospective list for hearing ten weeks hence.

13. This order disposes of both the applications.