

(2009) 11 DEL CK 0016

Delhi High Court

Case No: Regular First Appeal No. 47 of 1997

Voltas Ltd.

APPELLANT

Vs

The Federal Bank Ltd.
and Others

RESPONDENT

Date of Decision: Nov. 26, 2009

Citation: (2010) 157 PLR 27

Hon'ble Judges: Hima Kohli, J

Bench: Single Bench

Advocate: D.S. Chauhan, Ruchi Singh and Beena Pandey, for the Appellant; V.P. Dewan, for R-1, for the Respondent

Final Decision: Allowed

Judgement

Hima Kohli, J.

The present appeal is filed by the appellant (defendant No. 6 in the court below) against a judgment and decree dated 16.11.1996 passed in a suit for recovery of a sum of Rs. 41,219.75 paise filed by the respondent No. 1/Bank (plaintiff in the court below), against the appellant and the respondents No. 2 to 6 (defendants No. 1 to 6 in the court below).

2. Before proceeding to deal with the respective submissions of the parties, it is necessary to advert to the brief facts of the case. Respondent No. 1/Bank, plaintiff in the suit proceedings, claimed that on 06.07.1981, it had engaged the services of the respondent No. 2 firm as its sub-contractor for completing certain jobs in connection with a contract awarded to it by the West Bengal Electricity Board for erection, testing and commissioning of six numbers of Electrostatic Precipitators for their Kolhaghat Thermal Power Station. As per the averments in the plaint, respondent No. 3, the sole proprietor of respondent No. 2 firm had an account with the respondent No. 1/Bank, who on his request, granted overdraft limit of Rs. 20,000/- on 20.1.1981 to respondent No. 2 and a promissory note dated 20.01.1981 was executed by respondent No. 3 in favour of respondent No. 1/Bank. The amount

was subsequently increased to Rs. 50,000/- and again on 16.9.1981, the respondent No. 3 executed a demand promissory note and other related security documents as proprietor of respondent No. 2 firm and the respondents No. 4 to 6 as coobligants signed the documents jointly with respondent No. 3.

3. The respondent No. 1/Bank further stated that the respondents No. 2 & 3 had executed a special power of attorney dated 14.8.1981 in its favour, authorizing it to receive payments of their bills from the appellant, raised in connection with execution of the contract, appropriate the same and give due discharge in respect thereof and vide letter dated 28.08.1981, the appellant had accepted the special power of attorney dated 14.8.1981. It was averred that despite the assignment of debt and the obligation cast on the appellant to make payments of the amounts payable to the respondents No. 2 & 3 directly, to the respondent No. 1/Bank, the appellant released payments to the tune of Rs. 2,50,000/- in favour of the respondents No. 2 & 3. On 12.03.1982, a sum of Rs. 23,941/- was recovered by respondent No. 1/Bank from respondents No. 2 & 3 and after adjusting the said amount, respondent No. 1 claimed that as on 12.3.1982, a balance sum of Rs. 32,090.85 paise remained outstanding and payable by the respondents. Legal notices of demand were duly served by the respondent No. 1/Bank upon the respondents, but they did not care to pay the same, thus compelling the respondent No. 1/Bank to file the summary suit in March 1983, praying for a decree of Rs. 41,219.75 paise against the appellant and respondents No. 2 to 6 jointly and severally, along with costs and future interest @ 19.5%p.a. The respondent No. 1/Bank impleaded the appellant as defendant No. 6 in the aforesaid suit.

4. Appearance was entered in the suit proceedings by the respondents No. 2 to 6 (defendants No. 1 to 5) and the appellant (defendant No. 6), who contested the suit. The appellant/defendant No. 6 raised a preliminary objection in its written statement that the suit was liable to be dismissed against it, on account of lack of privity of contract between the parties. It was denied that the respondent No. 1 was entitled to receive any payment from the appellant/defendant No. 6 as per the special power of attorney or that it was liable to pay any amount of bills of the respondents No. 2 & 3, directly to the respondent No. 1. The appellant asserted that it did not owe any money to the respondents No. 2 & 3 and as such, there was no question of passing any decree against it.

5. After the pleadings in the suit, were completed, the following issues were framed:

1. Whether the plaint has been signed and verified and the suit has been filed by a duly authorized person? -OPP
2. Whether the signatures of defendants No. 3 to 5 were obtained on blank forms as alleged in para 3 of the written statement? If so, its effect?
3. Whether any liability can be fixed on defendant No. 6 on the basis of power of attorney executed by defendant No. 2 on behalf of defendant No. 1 in favour of

defendant No. 6?

4. Whether there is any cause of action against defendant No. 6?

5. To what amount and rate of interest the plaintiff is entitled, from each of the defendants?

6. Vide order dated 10.5.1991, the defence of the respondents No. 2 to 5 was struck off. Though the appellant was proceeded against ex-parte vide order dated 14.11.1994, the said order was later on set aside. In support of its case, the respondent No. 1/Bank examined Sh. A.R. Mathur, Manager of the Bank, as PW-1 and Sh. T.C. Garg, Manager of the Bank as PW-2. The appellant did not lead any evidence. After hearing the parties and considering the pleadings and the evidence on the record, the trial court passed a decree in favour of the respondent No. 1/Bank and against the appellant and respondents No. 2 to 5 jointly and collectively, for a sum of Rs. 41,219.75 paise, along with costs and interest @ 19.5% p.a., from the date of institution of the suit till realization of the decretal amount. Aggrieved by the impugned judgment, the appellant/defendant No. 6 has filed the present appeal.

7. The main plank of the argument of the counsel for the appellant/defendant No. 6 was that on the strength of the special power of attorney dated 14.8.1981 (Ex.PW-1/8) and in terms of the letter dated 28.8.1981 (Ex.PW-1/9) issued by the appellant to the respondent No. 1, at best the respondent No. 1/Bank could have claimed from the appellant, the amount that was found to be due and payable by it to the respondents No. 2 & 3, but the trial court ought not to have directed recovery of the balance amount of loans that the respondent No. 1/Bank had advanced to the respondents No. 2 & 3 from the appellant on the ground that the same could have been treated as due from the appellant to the respondents No. 2 & 3. He urged that the learned ADJ failed to appreciate the fact that liability to pay the said amount could not have been fastened on the appellant as the respondent No. 1/Bank had failed to produce any material evidence to prove that any amount was due and payable by the appellant to the respondents No. 2 & 3. The respondent No. 1/Bank having failed to discharge the said onus, the trial court ought not to have decreed the suit against the appellant on the basis of bald and vague allegations levelled against the appellant that a sum of Rs. 2.50 lacs was due and that in spite of the special power of attorney executed by the respondents No. 2 & 3 in favour of the respondent No. 1/Bank, the appellant had made direct payments of the said amount to the respondents No. 2 & 3. Counsel for the appellant also relied on a judgment dated 15.12.1996 passed in a suit registered as Suit No. 1206/1982 entitled "The Federal Bank Ltd v. M/s Ganga Engineering Works and Ors." wherein the appellant was impleaded as defendant No. 4. He submits that the said suit which was instituted by respondent No. 1/Bank was dismissed against the appellant in identical facts and circumstances as exist in the present case in hand.

8. On the other hand, counsel for the respondent No. 1/Bank disputed the aforesaid submissions made on behalf of the appellant and supported the impugned judgment by submitting that the appellant having failed to categorically deny payment of Rs. 2.50 lacs directly to the respondents No. 2 & 3, an adverse inference had been rightly drawn against it to the effect that the said amount had been paid by it to respondents No. 2 & 3. In this regard, counsel for the respondent No. 1/Bank referred to para 15 of the plaint and the reply given by the appellant in the corresponding para of its written statement. In para 15 of the plaint, the respondent No. 1/Bank made an averment that as per the terms of the special power of attorney dated 14.8.1981, executed by the respondents No. 2 & 3 in favour of the respondent No. 1/Bank, the appellant/defendant No. 6 was liable to pay any amount of bills of the respondents No. 2 & 3 directly to the respondent No. 1. It was further submitted that the appellant had violated the terms of the special power of attorney and had made payments directly to the respondents No. 2 & 3 to the tune of Rs. 2.50 lacs for which they were held responsible as they were supposed to make payment of all the bills of the respondents No. 2 & 3 to the respondent No. 1/Bank, which was duly accepted by them. In the corresponding para of the written statement, the appellant denied the aforesaid contention and its liability to pay any amount of the bills of the respondents No. 2 & 3 directly to the respondent No. 1/Bank. It was also denied that the appellant had violated the terms of the special power of attorney. Additionally, it was submitted that as the appellant did not owe any money to the respondents No. 2 & 3, hence there was no question of passing any decree against it.

9. I have heard the counsels for the parties and perused the trial court record. I have also summoned the record of Suit No. 1206/1982 and perused the judgment dated 15.12.1996 passed by a learned Single Judge of this Court.

10. Before proceeding to deal with the respective submissions of the counsels for the parties, it is pertinent to note that prior to the contract in question being awarded by the appellant in favour of the respondents No. 2 & 3, the same was awarded to a sub-contractor by the name of M/s Ganga Engineering Works (hereinafter referred to as "the firm"), who also had an account with respondent No. 1/Bank, in which certain credit facilities were availed of by them. To secure its advances, the respondent No. 1/Bank called upon the aforesaid firm to execute a demand promissory note and other related security documents in its favour. Apart from the aforesaid documents, a power of attorney dated 1.12.1980 was executed by the firm in favour of the respondent No. 1/Bank entitling it to receive from the appellant, payments of the bills raised by the firm, for execution of the job and give due discharge in respect thereof.

11. As per the appellant, M/s Ganga Engineering Works committed breaches/defaults in execution of the contract. It therefore invoked the bank guarantee for a sum of Rs. 1,20,900/- issued by the respondent No. 1/Bank, at the instance of the firm in favour of the appellant. On 8.6.1981, the respondent No.

1/Bank paid the full amount of the bank guarantee to the appellant. The appellant cancelled the contract awarded to the firm and thereafter, engaged the services of the respondent No. 2 as a sub-contractor for executing the same job. Thereafter, on 02.09.1982, the respondent No. 1/Bank filed a suit in this Court, for recovery of a sum of Rs. 1,97,599.01 paise against M/s Ganga Engineering Works and Ors., including the appellant herein, registered as Suit No. 1206/82. Pertinently, the appellant herein, who was impleaded as defendant No. 4 in the said suit proceedings, contested the same on identical grounds as taken by it in the present suit, which culminated in the impugned judgment, subject matter of the present appeal. The said suit was eventually dismissed against the appellant with costs, vide judgment dated 15.12.1996, whereunder it was held that though there was a privity of contract between the respondent No. 1/Bank and the appellant, the onus was on the former as the plaintiff, to prove that some amount was due from the appellant to M/s Ganga Engineering Works (defendant No. 1 therein) and that since the respondent No. 1/Bank (plaintiff therein) had failed to prove the same, it could not claim any recoveries from the appellant (defendant No. 4 therein). It was also observed that it was not for the appellant (defendant No. 4 therein) to prove in the negative that no amount was due from it to M/s Ganga Engineering Works.

12. In the present case, the trial court returned collective findings in respect of issues No. 3 & 4, in favour of the respondent No. 1/Bank (plaintiff therein) by holding that liability could be fixed upon the appellant (defendant No. 6 in the court below) on the basis of the special power of attorney executed by the respondent No. 3 on behalf of the respondent No. 2, in favour of the respondent No. 1/Bank and that the latter had a cause of action against the appellant. The learned ADJ decreed the suit collectively against the appellant as well as the respondents No. 2 to 6 by taking notice of the fact that the special power of attorney (Ex.PW-1/9) was duly accepted and admitted by the appellant and that the allegation of the respondent No. 1/Bank in the plaint that the appellant had violated the terms of the special power of attorney and made direct payments to the respondents No. 2 & 3 to the tune of Rs. 2.50 lacs, was neither specifically disputed by the appellant, nor did it lead any evidence in defence or in support of the said issues. The trial court was of the opinion that the onus of proving issues No. 3 & 4 was on the appellant. While rejecting the argument of the appellant that no amount was due and payable by it to the respondents No. 2 & 3, it was held that the respondent No. 1/Bank was entitled to recover the suit amount from the appellant.

13. This Court is unable to persuade itself to agree with the trial court that the onus of proving issues No. 3 & 4 lay with the appellant/defendant No. 6. Since it was the respondent No. 1/Bank who had based its claim in the suit instituted by it against the appellant and respondents No. 2 to 6, on a special power of attorney executed by the respondents No. 2 & 3 in its favour, the burden of proving issue No. 3 lay at the door of the respondent No. 1/Bank. In view of the fact that the appellant had admitted having received the aforesaid power of attorney (Ex.PW1/8) by its letter

dated 28.8.1981 (Ex.PW1/9), the onus in respect of issue respondent No. 3 was duly discharged by the respondent No. 1/bank. Liability could be fixed on the appellant on the basis of power of attorney executed by respondents No. 2 & 3 and in favour of respondent No. 1/Bank and conveyed to the appellant. Issue No. 4, i.e., "whether there was a cause of action against the appellant/defendant No. 6", was also framed in the affirmative and was required to be proved by the respondent No. 1/Bank as the plaintiff. Counsel for the appellant is justified in submitting that it was not for his client to prove in the negative that no amount was due and payable by the appellant to the respondents No. 2 & 3 and that it was for the respondent No. 1/Bank as the plaintiff to prove that some amount was actually due from the appellant to the respondents No. 2 & 3, which the former was liable to pay to the respondent No. 1/Bank, in view of the special power of attorney executed by respondents No. 2 & 3 in its favour and the letter dated 28.8.1981 issued by the appellant to the respondent No. 1.

14. A mere bald averment made by the respondent No. 1/Bank in the plaint that a sum of Rs. 2.50 lacs was paid by the appellant directly to the respondents No. 2 & 3, without proving the same by way of placing on record or summoning relevant material documents or adducing evidence, cannot be held to be sufficient to conclude that the respondent No. 1/Bank had established that it was entitled to recover the suit amount from the appellant as well. Hence, even if issues No. 3 & 4 were decided in favour of the respondent No. 1/Bank and against the appellant, the trial court could still not have arrived at the conclusion that on the strength of the special power of attorney executed by the respondents No. 2 & 3 in favour of the respondent No. 1/Bank, the latter could have claimed any amounts directly from the appellant, without the same being proved in the first place, as due and payable by it to the respondents No. 2 & 3. Undoubtedly, there was a privity of contract between the respondent No. 1/Bank and the appellant as the respondent No. 1/Bank was entitled to receive the amounts payable to respondents No. 2 & 3 from the appellant in view of the special power of attorney executed by the respondents No. 2 & 3 in favour of the respondent No. 1/Bank. But the conclusion arrived at by the trial court that the respondent No. 1/Bank was entitled to recover the suit amount from the respondents No. 2 to 6 and the appellant jointly and collectively, is not tenable. The onus still lay with the respondent No. 1/Bank as the plaintiff in the suit to prove as to what was the specific amount that was due and payable by the appellant to the respondents No. 2 & 3, liability in respect of which could be fastened on the appellant on the strength of the special power of attorney. The said onus was not discharged by the respondent No. 1/Bank.

15. The plea of the counsel for the respondent No. 1/Bank that as the appellant was ambiguous in response to para 15 of the plaint, the averments contained in para 15 were rightly deemed to be admitted, is untenable. Mere reliance on the averments made in para 15 of the plaint without proving the same, was not enough to decree the suit against the appellant. The respondent No. 1/Bank ought to have stood on

its own legs to prove its case. This required summoning of relevant records, accounts, etc., maintained by the appellant in respect of its transactions with the respondents No. 2 & 3, pertaining to the contract, subject matter of the special power of attorney, executed in favour of respondent No. 1/Bank. Further, a perusal of the corresponding para in the written statement filed by the appellant shows that it had nowhere admitted owing any monies to the respondents No. 2 & 3 and had gone on to deny the contents of para 15 of the plaint. Simply because a specific denial in respect of the figure of Rs. 2.50 lacs was not made by the appellant cannot be taken as an admission on its part or considered sufficient to draw an adverse inference against it and conclude that the respondent No. 1/Bank had discharged the onus placed on it. It was not for the appellant to prove in the negative that no amount was due and payable by it to the respondents No. 2 & 3. Rather, it was for the respondent No. 1/Bank to prove in the positive that the appellant had directly released specific and quantified amounts in favour of the respondents No. 2 & 3, contrary to the terms and conditions of the special power of attorney (Ex.PW1/8).

16. In view of the aforesaid facts and circumstances, the findings returned by the trial court under issue No. 5, require to be modified. It is held that the respondent No. 1/Bank is entitled to recover a sum of Rs. 41,219.75 paise, along with interest @ 19.5% p.a. from the date of institution of the suit till realization of the decretal amount, jointly and collectively from the respondents No. 2 to 5 alone and that no amount is due and payable by the appellant/defendant No. 6 to the respondent No. 1/Bank. As a result, the suit against the appellant/defendant No. 6 fails and is dismissed. A modified decree be prepared. Appeal is allowed with costs. The trial court record be released forthwith.