

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA NO. 177 OF 2009**

Judgment reserved on : 23rd September, 2009

Date of Decision: 9th October, 2009

Arun Duggal and anr. Appellants
! Through: Mr. N.N. Aggarwal, Mr. Kapil
Gupta with Mr. Rohit Gandhi,
Advocates

versus

\$ **D.N. Talwar** Respondent
^ Through: Mr. Rajat Aneja and
Mr. Gurmeet Singh, Advocates

CORAM:

* **HON'BLE MR. JUSTICE P.K. BHASIN**

1. Whether Reporters of local papers may be allowed to see the Judgment? (No)
2. To be referred to the Reporter or not? (No)
3. Whether the judgment should be reported in the digest? (No)

JUDGMENT

P.K. BHASIN, J

This appeal is against the judgment of the learned Additional District Judge passed on 09/02/09 in Suit No. 75 of 2006 filed by the respondent herein under Order XXXVII of the Code of Civil Procedure, 1908 ('CPC' in short) whereby a decree for a sum of Rs.8,80,000/- with

pendente lite and future interest thereon @ 12% p.a. has been passed against the two appellants-defendants after rejection of their separate applications for leave to defend the suit.

2. The relevant facts are that the respondent herein, who shall hereinafter be referred to as 'the plaintiff', filed a suit under Order XXXII CPC for recovery of Rs.8,80,000/- against the two appellants-defendants, who shall hereinafter be referred to as 'the defendants', on the allegation that on 31/05/05 he had advanced a loan of Rs.8,00,000/- to the defendants for a period of four months. The defendants had agreed to repay the loan alongwith interest @ 12% p.a. It was averred in the plaint that at the time of taking the loan on 31/05/05 the defendants had executed an undertaking, based on which the suit was filed under Order XXXVII CPC, to repay the loan amount within four months alongwith interest. However, they did not honour their commitment and so a legal notice dated 09/03/06 was served upon them requiring them to re-pay the loan amount as per the undertaking executed by them. The defendants replied to that notice denying that they had taken any loan from the plaintiff. Regarding the alleged undertaking referred to in the notice they asked the plaintiff to give them a copy of that undertaking so that they could take civil and criminal action against him. On the refusal of the defendants to re-pay the loan amount to the plaintiff he filed the suit for recovery and the suit amount included a sum of Rs.8,00,000/- on account of the principal loan amount and Rs.80,000/- as interest thereon

accrued upto the date of the institution of the suit.

3. The defendants filed separate affidavits as required under Order XXXVII Rule 3(5) CPC disclosing facts which according to them entitled them to get leave to defend the suit. As far as defendant no.1 (appellant no.2) Atul Duggal is concerned, he had sought leave to defend the suit on the ground that he had neither taken any loan from the plaintiff nor had he signed any undertaking as was being claimed by the plaintiff and thus the suit qua him was liable to be dismissed. Defendant no.2 (Appellant no.1) Arun Duggal in his affidavit although admitted that the document purporting to be an undertaking and being relied upon by the plaintiff in support of his claim bore his signatures but he denied having taken any loan from the plaintiff. Elaborating further his stand, it was pleaded by defendant no. 2 Arun Duggal that he alongwith his brother, had entered into a property transaction with the plaintiff regarding the sale of 2nd and 3rd floors of property no. 8/18, Ramesh Nagar, New Delhi for a total sale consideration of Rs. 22,30,000/- and some earnest money had also been received from them by him vide two receipts dated 31/05/05 (which date in the rejoinder, the defendant clarified to be 31/03/05 and not 31/05/05) and copies of which are placed on record. Later on it had transpired that the plaintiff had misrepresented himself to be the owner of the said property and actually he was not the owner but his wife owned it. So another agreement to sell was got executed by the plaintiff between his wife and defendant no. 1, Atul Duggal and his uncle, defendant no.2, Arun

Duggal on 30/05/05 for a sum of Rs.9 lacs and that agreement showed payment of Rs.20,000/- as earnest money and Rs.8,80,000/- received from defendant's banker by pay order and sale deed was executed on 08/06/05, copy of which was placed on record. It was also pleaded that sale in respect of 3rd floor sale deed could not be executed although defendant no.2 and his brother had paid the plaintiff and his wife Rs.20,80,000/-. Since sale deed in respect of 3rd floor could not be executed the balance sale consideration of Rs.1,50,000/- could not be demanded by the plaintiff from the defendant no.2 and his brother and not only that the defendant no.2 and his brother became entitled to the refund of excess money received from them by the plaintiff and that this suit was filed to pressurize the defendants to not to ask for the refund of the excess amount. In these circumstances, there was no occasion for the defendant to take loan from the plaintiff. Regarding the alleged Undertaking it was pleaded by the defendant that the stamp paper on which the Undertaking was drawn out was actually signed by defendant no.2 and one other person (who in the memorandum of appeal is stated to be Dalip Duggal, the brother of Arun Duggal) for the loan transaction with the ICICI Bank, on a blank stamp paper but the agent of the said bank seemed to have colluded with the plaintiff and the plaintiff allowed him to convert that blank stamp paper having the signature of the defendant no. 2 into an Undertaking of the said defendant acknowledging the receipt of Rs.8,00,000/- as loan from the plaintiff.

4. In reply-affidavit, in respect of the property transaction, the plaintiff had pleaded that defendant no. 2 Arun Duggal had in fact entered into agreement for the purchase of only the 2nd floor of the property no. 8/18, Ramesh Nagar, New Delhi, with his wife Smt. Kanta Rani and that property transaction did not have anything to do with the loan taken by the defendants from him and the averments relating to the property transaction had been made to mislead the court. He denied that the Undertaking was not signed by defendant no.1 and claimed that he was a necessary party. He reiterated his stand taken in the plaint that the defendants had taken the loan from him and had also signed the Undertaking.

5. In the rejoinder to the plaintiff's reply the defendants averred that they had not given the stamp paper, which is being used as an Undertaking, to the plaintiff and the same was procured by the plaintiff from the agent of ICICI Bank.

6. The learned Additional District Judge rejected the application of the defendants for leave to defend by the impugned order of two paragraphs only. The relevant lines from that order are re-produced below: –

".....Admittedly, the defendant has not made any complaint to any quarter regarding the signature taken on certain blank documents either with the police or to any other civil authority. Defendant cannot be heard to say at this stage that he has signed the document as blank and he is not liable to pay any amount to the plaintiff and no complaint has been made to any quarter or any other authority regarding the signatures taken on blank paper which was subsequently converted into an undertaking of the defendant.

2. Under the circumstances I am of the considered view that defendant is not entitled to any relief prayed in application for leave to

defend. Accordingly, application seeking leave to defend is dismissed.....”

7. It was contended by the learned counsel for the appellants-defendants that the defence raised by them before the trial Court certainly raised triable issues and so they were entitled to leave to defend the suit. On the other hand learned counsel for the respondent-plaintiff argued that the trial Court had rightly refused leave to defend to the defendants.

8. After giving my thoughtful consideration to the rival submissions made with reference to the facts stated by the defendants in their affidavits filed before the trial Court in support of their application for leave to defend as well as the reply affidavit of the plaintiff and the averments made in the plaint and the documents placed on record by the defendants, I have come to the conclusion that the defendants should have been given leave to defend the suit. In the facts and circumstances of the case where the plaintiff is not claiming that he was a financier or that he knew the defendants it required something to be stated by him in his plaint as to under what circumstances the defendants came to approach him for loan of lacs of rupees and he obliged them by giving them loan of Rs. eight lacs. Nothing was, however, said in the plaint in that regard. From the facts disclosed by the defendants in their affidavits and the reply affidavit of the plaintiff, however, it has become clear that the plaintiff is a property dealer of Ramesh Nagar and there was in fact a property deal

entered into between defendant no.2 Arun Duggal and his brother Dalip Duggal on the one hand and the plaintiff and his wife on the other. That deal was in respect of 2nd and 3rd floors of house no.8/18, Ramesh Nagar. According to the case of the defendants, second floor was agreed to be sold to Dalip Duggal and the 3rd floor to defendant no.2 Arun Duggal by the plaintiff on 31/03/2005, representing himself to be the owner of both the floors and the total sale consideration for the two floors was agreed to be Rs.22,30,000/- out of which a sum of Rs.20,80,000/- had allegedly been received by the plaintiff. The defendants had placed on record copies of two documents purporting to be 'bayana' receipts signed by the plaintiff. After a couple of months an agreement to sell was entered into in respect of 2nd floor with terrace/roof rights between the two defendants, the appellants herein, as purchasers and the wife of the plaintiff on 30/05/05 as the seller whereby she had agreed to sell to the defendant no.1, Atul Duggal, who happens to be the son of defendant no.2's brother Dalip Duggal (who was to be earlier the purchaser of the 3rd Floor) and defendant no.2 Arun Duggal the "second floor with roof/terrace rights" claiming herself to be the owner thereof. The sale consideration in that agreement, copy of which was placed on record by the defendants, was shown to be Rs.9,00,000/-. On 08/06/05 the wife of the plaintiff executed the sale deed also in favour of the two defendants and copy of that sale deed was also placed on record by the defendants. The plaintiff in his reply to the leave to defend application had not categorically refuted

these factual averments made by the defendants regarding the property deal between the parties as also the averments that some loan had been taken from ICICI Bank for purchase of the property and Rs.8,80,000/- had been paid by this bank directly to the plaintiff's wife. During the course of arguments in this appeal also learned counsel for the plaintiff had not raised any serious dispute regarding the genuineness of the documents relating to the said property deal which had been placed on record of the trial Court by the defendants in support of their application for leave to defend as also about the factual averments relating to the property deal made by the defendants in their affidavits in support of the leave to defend application. During the course of arguments it was also claimed by the counsel for the appellants that in fact the plaintiff had some dealings with the bank as an Estate Agent and he had represented to the defendants that he could arrange the loan also for them from ICICI Bank and he was instrumental in getting the loan from the bank. In this situation the stand taken by defendant no. 2 Arun Duggal that he had signed on some blank papers meant for obtaining bank loan and had been handed over to the bank's agent who in turn appeared to have handed over one of those blank signed papers to the plaintiff for being converted into a loan document/undertaking between the defendants and the plaintiff cannot be, at least at this stage, said to be improbable or implausible and the one requiring no trial at all.

9. There are some other circumstances also which lend support to the

probability of the defence taken by the defendants at least for the purposes of consideration of their prayer for granting them leave to defend the suit. Perusal of the original Undertaking relied upon by the plaintiff shows that the stamp paper on which the Undertaking is written was infact purchased for the execution of some indemnity bond. There is no explanation coming forth from the plaintiff as to under what circumstances the said stamp paper came to be purchased for the execution of indemnity bond and in what connection somebody was to be give indemnity. This document also shows that defendant no. 2, Arun Duggal's signature appear on the same as a partner of one M/s Duggal Motor Centre and the stamp of that Firm is also affixed. The document is also signed by one Dalip Duggal, reference to whom has also been made earlier. The stand of defendant no. 1, Atul Duggal is that he has not signed this document. Apparently this stand appears to be correct. During the course of arguments counsel for plaintiff was asked by me to point out the signature of Atul Duggal on this document to falsify his contention. However, the counsel could not point out the signature of Atul Duggal on the Undertaking.

10. In the aforesaid circumstances as far as appellant- defendant Atul Duggal is concerned he is entitled to get unconditional leave to defend. However, as far as the other defendant, Arun Duggal is concerned, considering the fact that he has admitted his signature on the Undertaking relied upon by the plaintiff from which it is clear that this defendant had

taken loan of rupees eight lacs from the plaintiff, he is entitled to conditional leave only. For this view I find support from a Division Bench decision of this Court reported as 129 (2006) DLT 92, "Rajesh Kumar Aggarwal v. Punjab and Sind Bank and Ors.", wherein also one of the defendants had while admitting his signature on the agreement relied by the plaintiff had claimed that he had signed on blank papers and accepting that defence conditional leave was granted.

11. In the light of the fore-going conclusions, this appeal is allowed and the impugned judgment and decree passed against the appellants are set aside. Appellant no. 2 Atul Duggal is granted unconditional leave to defend the suit while appellant no. 1 Arun Duggal is granted leave to defend conditional upon his furnishing either bank guarantee for a sum of Rs. 8,80,000/- or security of an immovable property to the satisfaction of the trial Court. The case is remanded back to the trial Court and the parties are directed to appear there on 22nd October, 2009 at 2 p.m. on which date the appellant no. 1 Arun Duggal shall furnish the security as well as his written statement and appellant no. 2 Atul Duggal shall file his written statement.

P.K. BHASIN,J

OCTOBER 09, 2009