

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

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Date of Judgment : 23rd September, 2010

R.S.A. No. 173/2010

+ MOHD. MUBARAK

.....Appellant
Through: Mr. Arvind Kumar Gupta with Mr.
Bipin Bihari Singh, Mr. Mohit Garg
and Mr. Rahul Mangla, Advocates.

Versus

MOHD. AZAM

.....Respondents
Through: None.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.(Oral)

CM Appl No. 17181/2010 (for exemption)

Allowed subject to just exceptions.

R.S.A. No. 173/2010

1. This second appeal has impugned the judgment and decree dated 03.08.2010 which had endorsed the finding of the trial judge dated 30.07.2009 dismissing the suit of the plaintiff. The plaintiff filed a suit for recovery in the sum of Rs. 80,000/- based on a document exhibit PW 1/A. The trial judge had framed a single issue which inter alia reads as follows:-

“Whether the plaintiff is entitled to decree of recovery for a sum of Rs. 80,000/- as prayed for?
OPP”

This issue was held against the plaintiff; consequence of which was that the suit was dismissed.

2. The plaintiff had examined three witnesses. Trial court had

noted that the attesting witness to the document exhibit PW 1/A which was the basis and the foundation of the case of the plaintiff, had not been examined. He was Advocate Mr. Mohd. S. Hussain. PW 3, the Notary Public, testified that Ex. PW 1/A had been executed in his presence; this was neither mentioned in the document and nor in the plaint; PW 3 was disbelieved. The stamp and seal of the notary also appeared to be dubious. The handwriting expert produced by the plaintiff PW 2 had given a contrary version qua the handwriting expert set up by the defendant; the testimony of the two conflicting handwriting reports i.e. set up by PW-2 and DW-2 were also rejected. The contradictions in the versions of PW 1 and PW 3 had also been noted, the suit of the plaintiff was accordingly rejected.

3. The first appellate court had re-appreciated these facts which had been gone into in-depth detail by the trial judge. The impugned judgment had also noted that the testimony of PW-1 was suspect; contradictions in the version of PW 3, the Notary Public, had also been noted.

4. The findings in the impugned judgment which are relevant for the disposal of this appeal read as follows:-

“15. The evidence on the record shows that Mohd. Sajid Hussain, Advocate is the marginal witness to the receipt Ex. PW1/A. He is a material witness as he was present throughout the entire transaction. His examination was essential to unfold the real facts. His examination would have lent credence to the version of the appellant that the loan amount was allegedly handed over to the respondent who executed the receipt Ex. PW1/A in his presence by putting his signatures. The appellant has withheld the best possible evidence. His non-examination calls for adverse inference against the appellant.

16. The testimony of PW1 is silent about the mode of payment of alleged loan amount to the respondent. The appellant should have specified

whether the alleged loan amount was given in cash or by way of cheque.

17. The testimony of PW1 shows that the receipt Ex.PW1/A was executed by the friend of the respondent. The chief examination nowhere shows that it was written by the friend of the respondent. I failed to understand why the receipt was allegedly written by the friend of the respondent when the appellant could have easily availed services of a lawyer to execute the receipt who is allegedly one of the witnesses.

18. The receipt Ex. PW1/A is a notarized receipt. PW1 has nowhere deposed that receipt was duly notarized from Notary Public. The appellant has omitted to depose this fact for the reasons best known to him.

19. PW3 is a Notary Public. I have perused the testimony of PW3. Her testimony doesn't inspire confidence for the number of reasons. PW1 nowhere deposed that he alongwith respondent and witness was taken to Notary Public by an Advocate for the attestation of receipt though deposited by PW3. PW1 is silent about the factum of attestation of the receipt for the reasons best known to him. The testimony of PW1 nowhere shows that receipt was executed in the presence of PW3 though PW3 has categorically stated in the chief examination that transaction took place in her presence. Further, PW3 stated that receipt was written in her presence. This part of the testimony of PW3 doesn't inspire confidence because she stated in the cross-examination that one counsel brought the party and she attested the receipt on his identification. It shows that the receipt was already written. The receipt was not allegedly written in her presence. The parties came to her through an Advocate only for the purpose of attestation and she merely attested the receipt. Her own cross-examination creates a doubt on the version given by her in the court. It is discernible from her cross examination that the alleged transaction had already taken place and receipt was allegedly written before the parties came for alleged attestation.

20. PW3 didn't make any entry in the register for the reasons best known to him. She didn't put her seal bearing her name on the receipt for the reasons best known to her. All this also make her testimony not reliable.

21. Both the parties have examined hand writing expert. The appellant has examined Sh. S.P. Singh as PW 2 to prove that receipt Ex. PW 1/1 bear the signatures of respondent as apparent from his report Ex. PW 2/1. The respondent has examined his own hand writing and finger expert Sh. Sayyed Sarfaraz Ahmed as DW2 who proved

his report Es. RW1. The report of both the experts are contradictory. The report given by the witness examined by the appellant has supported the version of the appellant whereas the report given by the witness examined by the respondent has supported the version of the respondent. No reliance can be placed on such kind of reports. Both the parties cannot draw any capital out of the reports.

22. The appellant has alleged payment of loan amount to the respondent who has totally denied the claim of the appellant. The reports given by hand writing expert in no way advance the case of either party because the reports are contradictory. The appellant while appearing as PW1 has corroborated the version of plaintiff whereas respondent while appearing as DW1 corroborated the version of WS. There is statement of oath against oath. In these circumstances, it was the duty of the appellant to examine the marginal witness to the receipt. The marginal witness is not examined for the reasons best known to the appellant. The friend of the respondent who allegedly written the receipt is not examined. The testimony of PW3 doesn't inspire confidence vis-à-vis payment of loan amount by the appellant to the respondent. The best possible evidence has been withheld by the appellant. To my mind, there is no evidence on record to show that the loan amount was advanced by the appellant to the respondent.

5. The examination of this impugned judgment shows that the scrutiny of evidence, both the oral and documentary, had been done. The substantial questions of law have been formulated by the appellant in para 3 of the Memo of Appeal. They inter alia reads as follows:-

“(a) Whether the documentary evidence has to be read in super-session and over and above oral testimony of witness?

(b) Whether in the event of two contrary reports of the handwriting experts, which handwriting expert report should be followed by the Court in terms of the provisions of Evidence Act?”

6. They are both fact based. They do not raise any question of law much less any substantial question of law.

7. This is a second appellate court. It is settled law that second appellate court can interfere only if a substantial question of law is raised. The power of this Court has further been curtailed after the amendment of 1976. Fact findings have already been delved into detail by the two courts below; these cannot now be re-appreciated by this court. This is not a third fact finding court. There is no merit in the case. It is dismissed in limine.

INDERMEET KAUR, J.

SEPTEMBER 23, 2010

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