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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.213/2008

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17th October, 2011

M/S. G. AJAIB SINGH & CO.

..... Appellant

Through: Mr. D.D. Singh, Advocate.

versus

SH. PARDEEP ARORA

..... Respondent

Through: Mr. Rajat Aneja, Advocate with Ms.
Neha Rastogi, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 6.12.2007 whereby the suit of the respondent/plaintiff for recovery of Rs.5,29,750/- with interest @ 18% per annum has been decreed.

2. The facts of the case are that the respondent/plaintiff gave loans to the appellant/defendant on various dates. A sum of Rs.75,000/- was given as loan on 27.10.1990 vide cheque No.450212. A sum of Rs.1,25,000/- was paid vide demand draft dated 18.5.1992 of Oriental Bank of Commerce. Another sum of Rs.65,000/- was paid vide demand draft dated 3.7.1992 of Oriental Bank of Commerce. Finally, a sum of Rs.2,50,000/- was paid vide cheque No.081212 dated 27.12.1995 drawn on Oriental Bank of Commerce. These cheques were duly credited to the account of the appellant/defendant. The appellant/defendant also executed promissory notes-cum-receipts with respect to the loans taken and which were signed by the appellant/defendant on 27.10.1990, 18.5.1992, 13.7.1992 and 27.12.1995. The appellant/defendant also paid a sum of Rs.52,650/- towards interest on 8.10.1999 vide cheque No.079060 drawn on Oriental Bank of Commerce, Kingsway Camp, Delhi and which covered the interest upto the period till 31.3.1999. The suit amount of Rs.5,29,750/- was claimed being the principal balance due of Rs.3,25,000/- alongwith interest thereon.

3. The suit was contested by the appellant/defendant who claimed that the plaint does not disclose the mode, manner and date of granting the loan. It was further simultaneously alleged that the

loans taken by the appellant/defendant were repaid long back and the account stood settled.

4. The trial Court, after the pleadings were completed, framed the following issues:-

“1. Whether the suit is barred by virtue of provisions of Punjab Money Lenders Act? OPD

2. Whether the plaintiff is entitled to recover any amount from the defendant, if so, what amount? OPP

3. If issue No.2 is decided in favour of the plaintiff, whether plaintiff is entitled to recover any amount from the defendant on account of interest, if so, at what rate, for what period and to what amount? OPP

4. Relief.”

5. The trial Court besides referring to the factum of payment of loans by cheques has referred to the promissory notes which were exhibited as Ex.PW1/2 to Ex.PW1/5. The trial Court has also referred to the TDS certificates issued by the appellant itself which showed the tax deducted at source with regard to payment of interest, the TDS Certificates being exhibited as Ex.PW1/8 and Ex.PW1/9. The TDS Certificates showed that tax was deducted in a consolidated manner for the loans. The relevant forms 16A were exhibited as Ex.PW1/10 and Ex.PW1/11. The statement of account was proved and exhibited as Ex.PW1/1. The trial Court has accordingly held that the

respondent/plaintiff was able to prove the grant of the loans, and therefore entitlement for the respondent/plaintiff to the suit amount. The trial Court has also noted that there is no cross-examination of the respondent/plaintiff on any particular entry of the statement of account Ex.PW1/1. The trial Court referred to the fact that the veracity and authenticity of the documents filed by the respondent/plaintiff was not challenged in the cross examination of the witnesses of the plaintiff. The trial Court has referred to the fact that if nothing was due as alleged by the appellant/defendant because the account was settled, then, there was no need of having paid any interest on 8.10.1999.

6. A civil case is decided on balance of probabilities. In the present case, in view of the fact that amounts of loans were paid by cheques, promissory notes were executed, the TDS certificates were issued by the appellant/defendant and the statement of account filed which was not challenged by reference to even a single entry, shows that the trial Court has rightly decreed the suit for recovery.

7. Learned counsel for the appellant argued the following points:-

(i) The suit was liable to be dismissed as the respondent/plaintiff was not registered as a money lender under the Punjab Registration of Money Lenders Act, 1938.

(ii) The promissory note was a separate cause of action and there is mis-joinder of cause of action because separate suits have to be filed for each promissory note and the suit was in fact barred by limitation if taken with respect to each loan.

(iii) The statement of account which has been exhibited as Ex.PW1/1 cannot be read in evidence as it has not been proved in accordance with law.

(iv) The promissory notes have not been referred to in the pleadings and therefore the said documents cannot be exhibited being beyond pleadings.

(v) The suit was not maintainable against the partners of the partnership firm as the respondent/plaintiff himself did not know who the partners were.

(vi) The facts of the case show that the respondent/plaintiff failed to prove that the amounts were due and therefore the suit was liable to be dismissed.

8. In my opinion, none of the arguments as raised on behalf of the appellant/defendant have any substance. At the outset, the mutual inconsistent stand of the appellant is to be noted that whereas on the one hand there was denial of the loans but in the same breath it was also contended that loans were repaid and nothing remains due. This stand of the appellant/defendant itself shows that loans were given by the respondent/plaintiff to the appellant/defendant.

9. So far as the argument that the respondent/plaintiff was not registered under the Punjab Registration of Money Lenders Act, 1938, the argument is once again without merit because the official witness, and who is a neutral and independent witness, appeared as PW-4 and who was one Mr. Kailash Kumar, a revenue official from the Division Commissioner Office. This official witness had brought the summoned record to show that money lending licence had been issued in the name of the respondent/plaintiff having licence and registration No.2811/86. The date of licence was 1.12.1986. These details were furnished by the official witness on the basis of register of dispatch of licences which was brought by him. I therefore do not agree with the argument of the counsel for the appellant that merely because a copy of the registration/licence had not been filed, therefore, the trial Court has wrongly decided the issue No.1. Issue No.1 is rightly decided and

the official witness showed that the respondent was in fact duly registered for the money lending business.

10. So far as the argument of the counsel for the appellant/defendant that there is mis-joinder of cause of action because each promissory note constitute a separate transaction, this objection is totally beyond the pleadings i.e. written statement of the appellant/defendant. Since no such defence was raised, no issue was also framed on this aspect. As per the provision of Order 2 Rule 7 CPC all objections as to the mis-joinder of cause of action have to be taken before the issues are framed and if not taken this objection is deemed to have been waived. I therefore hold that this objection is deemed to have been waived by virtue of Order 2 Rule 7 CPC. On this issue, it was argued that the suit was barred by limitation, however the question of limitation, is a mixed question of law and fact. In the facts of the present case and it was therefore necessary that an objection of the suit being barred by limitation ought to have been raised by the appellant/defendant in his written statement so that an issue could have been framed thereupon. The object of such pleading and framing an issue thereupon arises so that respondent/plaintiff is put to notice and who could have accordingly proved his case to show the suit to be within limitation. Admittedly, the issue of limitation was not raised in

the written statement and therefore no such issue was also framed. The appellant/defendant in the appeal for the first time thus cannot be allowed to raise this mixed question of law and fact especially because the statement of account has been filed and proved as Ex.PW1/1 showing consolidation of the loans. Also, issuance of TDS certificate by the appellant is in a consolidated manner for the loans as a whole. I therefore cannot permit the appellant/defendant to raise this mixed question of law and fact for the first time in the appeal as the respondent/plaintiff will be taken by surprise, and if this issue had been raised in the trial Court, the respondent/plaintiff could have pleaded and proved otherwise that the suit was not barred by limitation.

11. The next argument raised by the counsel for the appellant was that statement of account should not be taken as proved because merely marking of an exhibited number is not determinative of the proof of document. Once again, this argument as raised by the counsel for the appellant is misconceived in view of decision of the Supreme Court in the case of ***R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple* 2003 (8) SCC 752** in which it has been held that all objections as to the exhibition of the documents i.e. the mode of proof have necessarily to be taken when the documents are sought to be proved inasmuch as if objection to the

mode of proof is taken, then, the person who seeks to prove the document can as per the objection prove the document in other methods as required by law. If the objection is not taken and the document is exhibited, the exhibition and proof of the document is to be taken as final and the opposite party is estopped from claiming that the document has not been proved and exhibited.

A reading of the facts of the case shows that before the commencement of the cross-examination no objection was taken as to the fact that statement of account Ex.PW1/1 has been wrongly exhibited. The objection as to proof of statement of account is therefore deemed to be waived as per the decision in the case of ***R.V.E. Venkatachala (supra)***.

12. The next argument of the counsel for the appellant was that promissory notes have been wrongly exhibited as there was no reference to the same in the plaint. At the first blush, this argument seems to be valid, however, at this stage of the appeal, I would not seek to put emphasis on the same when otherwise promissory notes are basically proof of loan transactions and it is not necessary that specific evidence has to be pleaded. What was required to be pleaded was the material fact of the loans and not the evidence by which it was to be proved inasmuch as it is settled law that a pleading must contain

only the material facts and not evidence by which the same is to be proved. The material fact which was with regard to grant of loan and therefore the promissory notes are only the evidences to show that the loans were in fact granted. This argument of the counsel for the appellant is therefore rejected.

13. It was then argued that the suit as filed was not maintainable against the partners because the respondent/plaintiff did not even know who the partners were.

(i) Before proceeding to deal with this argument, I may note that today I have disposed of Execution First Appeal No.10/2011 and in which I have set aside the impugned order of the executing Court dated 6.12.2007 which holds that the appellant was a sole proprietorship concern of one Ms. Kulvinder Kaur and was not a partnership firm. I have set aside the impugned order in the Execution First Appeal inasmuch as in the suit the respondent/plaintiff was allowed to amend the title of the suit plaint for showing that the appellant/defendant was a partnership firm. The suit was therefore filed against the appellant/defendant as a partnership firm and the decree is also therefore against the appellant/defendant as a partnership firm. There was no challenge to the order by which the amendment application of the respondent/plaintiff was allowed to aver

that the appellant/defendant was a partnership firm, either at the stage when that order was passed or even in the present appeal. Therefore it does not lie in the mouth of the appellant/defendant to allege that the appellant/defendant was a sole proprietorship concern of Ms. Kulvinder Kaur and not a partnership concern. With respect to suits against the partnership firms there is a peculiarity by virtue of the provisions of Order 30 Rule 1 CPC read with Order 21 Rule 50 CPC. If a suit is decreed against the partnership firm the decree can only be executed against the properties of the partnership firm but not against the properties of the individual partners. However, in the execution proceedings, it is open for the decree holder to lead evidence to show that a particular person or particular persons were partners of the firm and thereafter the decree can be executed against the individual properties of such persons.

(ii) On such disputed questions of facts as to whether a particular person was or is partner in the firm, parties will have a right to lead evidence and then the Executing Court would come to a conclusion as to whether a decree passed against a partnership firm can or cannot be executed against a particular person claimed to be a partner and against whom decree is sought to be executed as a partner of the partnership firm.

(iii) In this backdrop, I really fail to understand the argument as raised on behalf of the counsel for the appellant that the suit was not maintainable against the partners because the respondent/plaintiff did not know who the partners were at the time when cause of action accrued as is required under Order 30 Rule 1 CPC because the suit is in fact not against the partners and the suit is only against the partnership firm. Thus, the argument is really an argument without any basis because the issue with respect to who are the partners is still subjudice and will be decided by the Executing Court under Order 21 Rule 50 CPC. The impugned judgment and decree in the suit is only against the partnership firm and on this appeal being dismissed the decree will stand only against the partnership firm and its properties. The decree can only be executed against any other person only if the person is a partner in the partnership firm at the time of accruing of cause of action as per Order 30 Rule 1 CPC and when this would be proved by the respondent/plaintiff in the execution proceedings as per Order 21 Rule 50 CPC.

14. Finally, the learned counsel for the appellant argued that the respondent/plaintiff had failed to prove the case. This argument is without merit as I have narrated above the findings and conclusions of the trial Court to show that the respondent/plaintiff has proved the

factum of giving of the loans and the failure of the appellant/defendant to repay back the same. The defence of the appellant/defendant is dishonest because in the same breath of denying of taking of the loan it is alleged that the loans have been repaid back. These defences are not only mutually inconsistent, and in fact the same are mutually destructive. Once the appellant/defendant in its evidence avers through its witnesses (and which is so averred by the witnesses) that the loans have been repaid back, then, in such circumstances it does not lie in the mouth of the appellant/defendant to urge that no loans were taken.

15. In view of the above, there is no merit in the appeal which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

OCTOBER 17, 2011
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VALMIKI J. MEHTA,J