

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

% *Date of Judgment: 01.3.2011*

+ **RSA No.62/2009 & CM No.6792/2009 (for stay)**

SHRI VINOD LAMBA Appellant
Through: Mrs.Mala Goel and Mr.Yashpal
Singh, Advocates.

Versus

O.P.HASIJA Respondent.
Through: Nemo.

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)

1. This appeal has impugned the judgment and decree dated 28.2.2009 which had endorsed the finding of the trial judge dated 30.9.2008 whereby the suit filed by the plaintiff O.P.Hisja seeking recovery of ₹ 2,90,000/- from the defendants had been decreed along with interest @ 10% per annum in his favour.

2. Case of the plaintiff is that the defendant no.2 was a family friend. He was facing financial hardship. He requested the plaintiff for financial support. He borrowed a sum of ₹2,00,000/- from the plaintiff. The said amount was given through cheque bearing No.454757 drawn on Canara Bank, Kalkaji. It was deposited in the account of the defendant. It was agreed that the defendant would repay the amount in six months along with

interest @ 15% per annum. Defendant did not adhere to this arrangement. In spite of requests the amount was not repaid. Suit was accordingly filed.

3. Defendant had filed his written statement denying that he had taken a loan or that he was ever in financial hardship. Defendant had entered into an agreement with one Mr.Sanjay Bhatia in respect of acquisition of satellite TV rights etc including doordarshan rights. This agreement was dated 17.2.2001. Pursuant to this agreement the plaintiff had approached the defendant to join him in this joint venture because the defendant was already dealing with the business of buying copyrights etc. Oral terms had been agreed between the plaintiff and the defendant; signing amount had already been paid to Sanjay Bhatia when the plaintiff had approached the defendant. A sum of ₹4,00,000/- had been paid by defendant to Sanjay Bhatia; plaintiff had paid his share of ₹2,00,000/-. This agreement between defendant and Sanjay Bhatia was unsuccessful. A suit for recovery was filed by the defendant against Sanjay Bhatia.

4. On the pleadings of the parties, following four issues were framed:

- 1.Whether the plaintiff has the cause of action in his favour to file the present suit? OPP
- 2.Whether there was no agreement for the payment of the interest between the parties? OPD
- 3.Whether the plaintiff is entitled for the decree of ₹2,90,000/- alongwith interest as prayed for in the plaint? OPP
- 4.Relief, if any.

5. Oral and documentary evidence was led which included the testimony of plaintiff and the defence of the sole defendant. Parties were cross-examined at length.

6. Admittedly a sum of ₹2,00,000/- had been paid through cheque by the plaintiff to the defendant. The contention of the defendant that this was in terms a joint venture the agreement which the defendant had entered into with Sanjay Bhatia and the plaintiff had chosen to get himself included in the said venture. In his cross-examination, the defendant had admitted that he had filed a suit against Sanjay Bhatia for recovery of ₹4,00,000/-; plaintiff was admittedly not a party in that suit; that suit had been decreed in favour of the defendant. Trial judge had noted that the story of investment in the joint venture set up by the defendant was unbelievable. It is thus clear that this version as set up by the defendant was not the correct version; the defendant in the natural course would also have impleaded the plaintiff as a party when he had filed his suit against Sanjay Bhatia as this was allegedly a joint venture of all the three persons. The trial court had weighed the evidence and the balance of probabilities were in favour of the plaintiff qua the defendant. Suit of the plaintiff was accordingly decreed.

7. In appeal vide the impugned judgment this finding was endorsed. The impugned judgment had re-appreciated the oral and documentary evidence to arrive at this finding; it had held that no interference is called for. 8. This is a second appeal. It is yet at the stage of admission. On behalf of the appellant, it has been urged that the onus of proof is always upon the plaintiff which he had failed to discharge. Reliance has been placed upon PLR Vo.LVIII-1956 Sir Sobha Singh Vs. Bihari Lal Beni Parsahd, AIR 1939 Lahore 386 Bihari Lal Vs. Chandu Lal as also another judgment reported in ILR (1974) I Delhi Bal Kishan Gupta Vs.

Ramdhar to support a submission that where in a suit for recovery the amount was allegedly advanced as a loan the burden of proving the amount was upon the plaintiff. There is no dispute to the proposition.

8. The burden is upon the person who is alleging the fact and this is clear from the provision of Section 101 and 102 of the Evidence Act. It was for the plaintiff to prove his case; he had proved it by both oral and documentary evidence. Apart from the cheque which he had issued to the defendant, the plaintiff had reiterated his averments on oath and he had been subjected to a lengthy cross-examination. Both the fact finding courts below had noted that nothing could discredit this testimony of the plaintiff. He had discharged the burden of proof entitling him to the decree which was passed in his favour.

9. This Court is sitting in second appeal. Interference is called for in fact findings only if there is a perversity. Neither any perversity has been urged nor has it been pointed out.

10. Learned counsel for the appellant has additionally submitted that perusal of the decree drawn up on 30.9.2008 shows that it had been drawn up on a stamp paper of ₹500/-; the decree was insufficiently stamped; such a decree is nonest. This plea now urged before this court was also urged before the first appellate court. The impugned judgment had noted that this point has not been raised in the written statement; no issue had been framed on this count; it was a clear case where plaint had been entertained on insufficient stamp paper due to a mistake/ inadvertently.

11. Order 7 Rule 11(c) of the Code of Civil Procedure (hereinafter referred to as 'the Code') reads as follows:

“11.Rejection of plaint – the plaint shall be rejected in the following cases:-

.....

(c) where the relief claim is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

.....”

Section 11 of the Suit Valuation Act 1887 also indicates that notwithstanding anything contained in Section 578 of the Code, an objection that the Court which had no jurisdiction over the suit or appeal had decided it by reason of over-valuation or under-valuation should not be entertained by the appellate court unless the under-valuation or over-valuation thereof has prejudicially affected the disposal of the suit or the appeal on its merits. This has neither been pleaded nor urged.

Section 149 of the Code empowers the Court to allow any person, by whom court fee is payable to pay whole or part as the case may be of such a court fee. This discretion which is conferred in the Court under Section 149 of the Code is unfettered and is over and above the obligation under Order 7 Rule 11 of the Code. Order 7 Rule 11 only states the circumstances under which the plaint shall be rejected; it is not an enabling provision; but only a disabling one.

A conjoint reading of the aforementioned provisions show that this argument of the appellant is also without any merit.

12. No substantial question of law as formulated in the body of appeal has arisen. Appeal as also pending application is dismissed in limine.