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

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Date of Judgment: 05.04.2011

+ **RSA No.297/2006 & CM Nos. 12440-41/2006**

BHAGWAN DEVI.

.....Appellant

Through: Ms. Geeta Dhingra, Advocate.

Versus

VIKAS JAIN

.....Respondent.

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)

1 This appeal has impugned the judgment and decree dated 02.03.2006 which had endorsed the findings of the trial Judge dated 09.05.2005 whereby the suit filed by the plaintiff Vikas Jain seeking recovery of ₹1,03,500/- along with interest had been decreed in his favour.

2 The case of the plaintiff as is evident from the plaint that he had advanced a loan of ₹ 60,000/- to the defendant. This was on 15.11.1999. Loan was repayable along with interest @ ₹2.5% per month. Loan was given in two parts; ₹25,000/- was disbursed by a cheque and balance sum of ₹35,000/- was given by cash. A receipt was duly executed by the defendant as also a mortgage deed with

regard to property bearing No. 2/6164, Gali No. 3, East Rohtash Nagar, Shahdara, Delhi. The defendant thereafter turned dishonest and inspite of legal notice, did not pay back the amount of the plaintiff. Suit was accordingly filed.

3 The defence of the defendant was that the defendant had in fact advanced a sum of ₹60,000/- to the plaintiff on 21.03.1998 because of certain problems of the plaintiff qua electricity. The plaintiff, thereafter, returned a sum of ₹25,000/- vide a cheque but the balance sum of ₹35,000/- was not paid.

4 On the pleadings of the parties, the following three issues were framed:-

1. *Whether any loan was advanced by the plaintiff to the defendant in the sum of ₹60,000/- during the month of November 1999 at the interest of 2.5% per month? OPP*
2. *Whether the defendant is entitled to set off for a sum of ₹35,000/- against the claim of the plaintiff? OPD.*
3. *Relief.*

5 Oral and documentary evidence was led which included the testimony of four witnesses on behalf of the plaintiff and one witness was examined on behalf of the defendant. On this oral and documentary evidence, the trial court on the preponderance of probabilities had held that the plaintiff is entitled to the decree of the suit amount.

6 This was assailed before the first appellate court. The first appellate court had reaffirmed the finding of the trial Judge. The extract of the finding of the trial Judge was reproduced by the first appellate court and reads as under:-

“The onus of proof qua this issue was placed upon the defendant as she has claimed that it was the defendant who gave Rs. 60,000/- to the plaintiff on 21.3.1998 to sort out the electricity problems with

regard to the house in which the defendant was residing it is also the case of the defendant that the plaintiff returned Rs. 25,000/- through Cheque No. 235862 and amount of Rs. 35,000/- still remains to be paid by the plaintiff and she is entitled to set off this amount against the claim of the plaintiff. The defendant has not furnished any detail regarding the electricity problems in his house nor she has examined any other witness from the electricity department to substantiate her claim. Admittedly, the defendant is earning Rs. 300/- per month and she has also not furnished any reliable source of her income so that it can be assumed that she was in the capacity to give Rs. 60,000/- for sorting out the electricity problems. Admittedly, till date no action for recovery of the balance amount of Rs. 35,000/- or for directing the plaintiff to return the property documents was ever taken by the defendant. No other witness has been examined by the defendant in her support. Defendant has also failed to furnish any reasonable or cogent explanation with regard to her signatures on the documents in question. During her cross-examination conducted on 27.5.2004 she has also stated that since the day of purchase of property situated at Rohtash Nagar she is using the electricity without paying any electricity charges to the Delhi Vidyut Board as she has not received any bill dated. Further, she has also admitted that there was no other electricity problems at her house except that she had not received any electricity bill till date. Nor she has lodged any complaint in writing with the Delhi Vidyut Board regarding non receiving of any electricity bill, hence it is beyond imagination that a sum of Rs. 60,000/- can be given for sorting out the electricity problems as stated by the defendant. She has also stated that she had given the papers of property of Rohtash Nagar to the plaintiff on 15.11.1999 and the thumb impression on the documents Ex. PW1/A and Ex. PW1/C were not obtained by the plaintiff forcibly. This stand also goes to substantiate the claim of the plaintiff. Though she has stated that the thumb impressions were obtained to solve the electricity 4problems which view cannot be subscribed to. The plaintiff has also exhibited the photocopies of the documents relating to property of Rohtash Nagar as Ex. DW1/P to Ex. DW1/PZ1 after showing the original documents to the defendant admitted the same to be correct and even then she has denied her signature upon the aforesaid document. Taking into consideration the fact and circumstances. In my considered opinion, the defendant has miserably failed to establish that she gave Rs. 60,000/- to the plaintiff for sorting out any electricity problems in her house and the plaintiff returned a sum of Rs. 25,000/- to her by way of Cheque No. 235862. Accordingly, the defendant is not entitled for any set off Rs. 35,000/- against the claim of the plaintiff. This issue is decided against the defendant and in

favour of the plaintiff."

7 The first appellate court had returned this finding after a detailed reappraisal of oral and documentary evidence. These are two concurrent findings of fact and there is no perversity in these findings.

8 This is a second appeal. It had been admitted and on 25.03.2011, the following substantial question of law was formulated:-

"Whether the unregistered documents of an ancestral property is compulsory registerable or not and if so it can be used in evidence to prove the transaction?"

9 On behalf of the appellant, it has been urged that the documentary evidence which is inadmissible cannot be read in evidence; such evidence could not have been exhibited in the courts below. Attention has been drawn to Ex. PW-1/B i.e. 'Bandhak Vilekh' (mortgage deed). It is pointed out that Ex.PW-1/B clearly recites that in case of any dispute, the parties will go to an arbitrator. Attention has also been drawn to Ex.PW-1/C i.e. 'Shapath Patra' (receipt). It is pointed out that both these documents are under-stamped and could not have been admitted in evidence.

10 Perusal of these documents shows that they have been prepared on a stamp paper of ₹2/-. Defence of the defendant in the courts below has also been perused. In the written statement, there is no denial to these documents. It was never the contention of the defendant that the said documentary evidence on which the plaintiff had relied in his plaint were inadmissible for the aforementioned reasons. A plea not emanating from the pleadings cannot be raised in a second appeal. This would not raise a

substantial question of law. This has been reiterated by Hon'ble
RSA No.297/2006

Supreme Court in (2001) 3 SCC 179 Santosh Hazari Vs. Purushottam Tiwari where it was held that a plea not emanating from the pleadings between the parties cannot be raised for the first time before the second appellate court; such a plea would not amount to a substantial question of law.

11 On the preponderance of probabilities, the first appellate Court had drawn a fact finding that the plaintiff is entitled to a decree in his favour. The sum of ₹25,000/- had been paid by cheque to the defendant; encashment of this negotiable instrument was not disputed. Mortgage deed and receipt Ex. PW-1/B and Ex. PW-1/C had been executed in the presence of PW-2. The testimony of PW-1 and PW-2 had been found to credible and trust-worthy. Simple denial by the defendant of the documents Ex. PW-1/B & Ex. PW-1/C did not advance her case. The court had further noted that the defendant was earning only ₹300/- per month and did not have the financial capacity to advance an loan of ₹60,000/- to meet the electricity problem of the plaintiff. These fact-findings call for no interference.

12 Substantial question of law as formulated was never a point in issue. It is accordingly answered against the appellant and in favour of the respondent. There is no merit in this appeal. Appeal as also pending applications are dismissed.

INDERMEET KAUR, J.

APRIL 05, 2011

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