

R-224

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

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Judgment reserved on: 01.04.2011

Judgment delivered on: 05.04.2011

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RSA No.359-62/2006 & CM No.15445/2006

M/S RAM AVTAR SUNEET KUMAR & ORS. Appellants

Through: Mr. Siddharth Bambha & Mr. Nishant
Nandan, Advocates

Versus

SHRI VINAY KUMAR & ANR. 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.

1 This appeal has impugned the judgment and decree dated 25.04.2006 which had modified the findings of the trial Judge dated 20.04.2005. Vide judgment and decree dated 20.04.2004, the suit filed by the plaintiff Vinay Kumar seeking recovery of Rs.65,000/- along with interest had been decreed against defendant No. 5 only. The impugned judgment had modified the finding; the suit stood decreed against all the five defendants.

2 The plaintiff had granted a loan to defendant No. 1 which was a partnership firm carrying on business of wholesale cloth merchants. Defendants No. 2 to 5 were its partners and looking

after its day to day affairs. On 27.10.1997, the defendants approached the plaintiff for a loan of Rs.50,000/- which had been given by him at monthly interest @ 1.25% i.e. 15% per annum. The amount was payable on demand. A loan deposit receipt was executed by the defendants in favour of the plaintiff. This document is dated 27.10.1997 (Ex.PW-1/1). In spite of legal notice dated 27.01.2000, the defendants have failed to make the payment. Suit was accordingly filed.

3 Defendants No. 1 to 4 have contested the suit. Defendant No. 5 was proceeded ex-parte. Defendants No. 1 to 4 were the only contesting defendants. It was denied by defendants No. 1 to 4 that defendant No. 5 was ever their partner; contention was that the defendant No. 5 was only an employee of defendant No. 1 which was admittedly a partnership firm. It was denied that any loan was advanced by the plaintiff to the defendants.

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

- 1. Whether the plaintiff is entitled to recovery of the amount of Rs.65,000/- from the defendants as alleged in the plaint? OPP*
- 2. Whether the plaintiff is entitled to recover the interest, if so, at what rate and for what period? OPP*
- 3. Whether the defendant No. 3 and defendant No. 5 are the partners of defendant No. 1? OPP*
- 4. Relief.*

5 Oral and documentary evidence was led. Two witnesses were examined on behalf of the plaintiffs; they had proved the documents Ex. PW-1/1 to Ex. PW-1/5. Defendant No. 2 had entered into the witness box on behalf of the defendants; he had examined

and proved Ex. DW-1/1. Contention of the defendants was that Ex. PW-1/1 is a forged and fabricated document. On the basis of oral and documentary evidence led before the trial court, the court was of the opinion that the plaintiffs had failed to prove their claim against defendants No. 1 to 4. Defendant No. 5 was proceeded ex-parte; the testimony of defendant No. 1 qua defendant No. 5 was not assailed. Suit was decreed against defendant No. 5 alone.

6 The impugned judgment had modified this finding. It has reappreciated and rescrutinized the oral and documentary evidence and returned a finding that defendants No. 2 to 5 were all partners of defendant No. 1. Ex. PW-1/1 was a receipt of loan which had been executed by the defendant firm; it is on the letterhead of defendant No. 1; it is in the handwriting of defendant No. 5; all the defendants were jointly and severally liable to repay the amount. Suit of the plaintiff was decreed against all of them.

7 This is a second appeal. It had been admitted and on 14.01.2011 the following substantial question of law was formulated:-

“Whether the findings in the impugned judgment dated 25.04.2006 are perverse, if so, its effect?”

8 On behalf of the appellant, it has been urged that defendant No. 5 was an ex-parte; the trial Judge had also evaluated the evidence and drawn a conclusion that the plaintiff has failed to prove his case against defendants No. 1 to 4 and had exonerated them of liability. The impugned judgment had modified this finding. It is pointed out by the defendants their defence all along was that defendant No. 5 was never their partner. The onus of discharge to

prove the issue was on the plaintiff. The impugned judgment had wrongly noted that defendants had failed to show that defendant No. 5 was not their partner; onus could not have been shifted upon the defendant; it was for the plaintiff to stand on his own legs. This amounts to a perversity which has raised a substantial question of law.

9 None has appeared for the respondents. Record has been perused. This is a second appellate court. It can interfere with the findings of fact only if the same are perverse and on no other count.

10 Record has been perused. PW-1 has deposed that Ex. PW-1/1 was a receipt issued by the defendant on the loan which had been advanced by the plaintiff to the defendants. This document is dated 27.10.1997. It is on the letterhead of defendant No. 1 who is partnership firm namely "Ram Avtar Suneet Kumar" Wholesale Cloth Merchants. The revenue stamp bears the signatures of Ram Avtar i.e. defendant No. 2 ; he had appeared in the witness box as DW-1; DW-1 in his cross-examination has admitted that this document on the letterhead of defendant No. 1 and it bears the revenue stamp of the firm. He has, however, denied his signatures on this document. He has also not denied that this document is in the handwriting of Krishan Kumar Maheshwari; contention was that he was only an employee of the firm and act of defendant No. 5 is not binding on the firm. DW-1 has further admitted that the partnership deed is with him but it has not brought in court today. The impugned judgment had correctly noted that when DW-1 had admitted that defendant No. 1 was a partnership firm of which

defendants No. 2 to 4 were the partners and defendant No. 5 was not its partner; further he had a partnership deed but he had chosen not to produce it in evidence; an adverse inference for not producing the said document was rightly drawn; meaning thereby had this document been produced, it would have gone against the interest of DW-1. This presumption was rightly raised in the impugned judgment; this statutory provision is contained in Section 114 (g) of the Evidence Act, 1872.

11 The whole edifice of the case of the plaintiff is based on Ex. PW-1/1; contention being that the loan of Rs.50,000/- had been advanced by the plaintiff to the defendant which was repayable with interest; Ex. PW-1/1 had been executed by defendant No. 2 on behalf of defendant No. 1; document was in the handwriting of defendant No. 5. Nothing could shake this testimony of PW-1. DW-1 had also admitted that defendant No. 1 is a partnership firm; he had not disputed that Ex. PW-1/1 was not on the letterhead of defendant No. 1 or it was not in the handwriting of defendant No. 5 or that it did not bear the stamp of the firm. Contention of DW-1 that defendant No. 5 was not their partner could only have been answered by producing the partnership deed which was admittedly in his custody; he however chose not to produce this document. Adverse inference for not producing this document was rightly drawn against him.

12 The impugned judgment had decreed the claim of the plaintiff against all the 5 defendants after reappreciation of the entire evidence to arrive at the aforementioned finding and to hold that all defendants are jointly and severally liable.

13 Relevant extract of the finding in the impugned judgment reads as under:-

"16. The entire suit of the appellant is based on Ex. PW 1/1. According to the appellant, on 27.10.97 he had advanced a loan of ` 50,000/- to all the four respondents and Sh. Krishan Kumar Maheshwari at a monthly interest @ 1.25% i.e. 15 % per annum month by month. The respondents and Sh. Krishan Kumar Maheshwari executed a loan deposit receipt dated 27.10.97 in favour of the appellant which is Ex. PW 1/1.

17. The appellant has examined himself as PW1 before the learned Trial Court. He has stated in his affidavit that respondents paid interest to him for a period of six months i.e. upto 26.4.98 amounting to ` 3,750/. Thereafter they failed to pay the interest as well as the loan amount. In cross-examination he has deposed that Ex. PW 1/1 was written by Sh. Krishan Kumar Maheshwari and was signed by Sh. Ram Avtar respondent no.2. He has further deposed that Ex. PW 1/1 was brought by Sh. Krishan Kumar Maheshwari. He paid ` 50,000/- to Sh. Krishan Kumar Maheshwari.

18. Sh. Ram Avtar Bagari respondent number 2 appeared as a witness on behalf of the respondents. He has stated in his affidavit Ex. DW 1/A that respondent number 1 is a partnership firm. He along with respondents number 3 & 4 are the partners of respondent number 1. He has denied that Sh. Krishan Kumar Maheshwari was ever partner of respondent number 1. He was only a muneem/employee of respondent number 1 whose services were terminated by respondent number 1 on 31.7.98. He has further stated that Sh. Krishan Kumar Maheshwari never managed the business of respondent number 1 at any time. He has also deposed that in M/s. Jagdamba Textiles. He has stated that the firm M/s. Jagdamba Textiles comprised of himself and Sh. Sanjeev Kumar Bagari. The said firm was dissolved on 31.3.97 and after that Sh. Suneet Kumar is the sole proprietor of the said firm.

19. Thus, the respondents have raised the defence that Sh. Krishan Kumar Maheshwari was only an employee of respondent number 1 and the receipt Ex. PW 1/1 is forged and fabricated document. However, in cross-examination DW 1 Sh. Ram Avtar Bagaria has admitted that respondent number 1 M/s. Ram Avtar Suneet Kumar is partnership firm dealing in wholesale cloth from the premises at 1095 Kucha Natwa, Chandni Chowk, Delhi. He has also admitted that he was doing cloth business in the name of M/s. Jagdamba Textiles. The witness further admitted that Sh. Krishan Kumar Maheshwari was a partner of M/s. Jagdamba Textiles till 31.3.97. Thus, it is evident that

M/s. Jagdamba Textiles as well as M/s Ram Avtar Suneet Kumar are the two partnership firms of which respondent number 2 is a common partner. He has also admitted that Sh. Krishan Kumar Maheshwari was a partner in the said firm. Both the firms were dealing in wholesale cloth and carrying on business from same premises 1095 Kucha Natwa, Chandni Chowk, Delhi.

20. *The respondents have merely denied that Sh. Krishan Kumar Maheshwari was their partner. However they have kept back the best evidence i.e. the partnership deed which they were liable to produce in order to prove that Sh. Krishan Kumar Maheshwari was not a partner in respondent number 1 firm. DW 1 has specifically admitted that respondent number 1 was a partnership firm and the partnership deed is with him. Since Sh. Krishan Kumar Maheshwari was a partner in their another firm M/s Jagdamba Textiles and the respondents have denied that he was not a partner in respondent number 1 firm. Thus they were required to produce the partnership deed to prove that Sh. Krishan Kumar Maheshwari was not a partner in the said firm but was only a numeen in respondent number 1 firm.*

21. *Moreover, it is case of the appellant that Sh. Krishan Kumar Maheshwari had brought the receipt Ex. PW 1/1/ and he had handed over ` 50,000/- to him. On behalf of the respondents, it was vehemently argued that appellant has failed to prove the receipt Ex. PW 1/1 as the said receipt was never written in his presence nor he was acquainted with the writing and the signatures of the person who had executed the said receipt. DW1 has admitted that the receipt Ex. PW 1/1/ was written on the letterhead of respondent number 1 and it also bears the stamp of respondent number 1. DW 1 has also deposed that receipt Ex. PW 1/1 is in the handwriting of Sh. Krishan Kumar Maheshwari as employee.*

22. *Section 67 of Indian Evidence Act, 1872 provides the modes of proving signature of handwriting of a person. Section 67 (iv) of the Act lays down: 'By calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written.'*

23. *Sh. Krishan Kumar Maheshwari has been proceeded ex-parte by the learned Trial Court. Thus, he did not come forward to rebut his handwriting on Ex. PW 1/1. The said handwriting stands proved through the testimony of DW 1 who has admitted the handwriting of Sh. Krishan Kumar Maheshwari on Ex. PW 1/1 as he was his employee. However, respondent number 2 he has merely denied his signatures on Ex. PW 1/1. In order to prove the said defence, the respondents did not examine any handwriting expert to prove that Ex. PW 1/1 does not bear the signatures of respondent number 2. Furthermore, DW 1 has*

also admitted that he had taken a loan of ` 50,000/- from the appellant on 22.7.98. DW 1 has admitted that respondent number 1 and M/s. Jagdamba Textiles both partnership firms had been dealing with the partnership firm of PW 2 namely M/s. Raghunath Sahai Ram Prakash and M/s. Ravi Trading Corp. for about last 20 years.

24. PW 2 Sh. Ram Parkash has deposed that the appellant had given the loan of ` 50,000/- to the respondents on his saying on telephone which was paid either to Sh. Krishan Kumar or Munshi Ram. He has also deposed that the appellant is his grandson. PW 1 Sh. Vinay Kumar has also deposed on the same lines. He has testified that he had agreed to advance the loan of ` 50,000/- on 27.10.97 as his grandfather asked on his behalf. Thus it is evident that the two partnership firms of the respondents were doing business with the family of appellant since many last years. Moreover, DW1 has also admitted that he had subsequently taken a loan of ` 50,000/- from the appellant. The respondents have not produced the partnership deed to rebut the fact that Sh. Krishan Kumar Maheshwari was not their partner. The handwriting of Sh. Krishan Kumar Maheshwari had been admitted on Ex. PW 1/1.

25. Thus the findings on the issues are modified all the respondents being the partners of respondent number 1 are liable to pay the amount of ` 65,000/- with interest @ 9% per annum from the date of filing of the suit till the date of decree to the appellant."

14 This finding in no manner can be said to be perverse. It cannot be faulted with.

15 The last argument urged by learned counsel for the appellants that defendant No. 5 was not made party in the appeal and without him the appeal before the first appellate court is not maintainable is baseless. Perusal of the record belies this submission. Before the first appellate court all five defendants were arrayed as respondents; defendant No. 5 was arrayed as respondent no. 5. On 06.07.2005, the date on which date the appeal was received and registered, notice had been issued to all the five respondents. Thereafter on 26.09.2005 i.e. on a subsequent date statement of the appellant was recorded to the effect that he

does not wish to press his appeal against respondent No. 5; he had been permitted to be deleted from the array of the parties. This submission of learned counsel for the appellants is thus devoid of any force.

16 Substantial question of law is accordingly answered in favour of the respondents and against the appellants. There is no merit in this appeal. Appeal as also pending application are dismissed .

(INDERMEET KAUR)

APRIL 05, 2011

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