

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

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Date of decision: 17th July, 2013

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RFA No.179/2013

SHRI MADANLAL SURYAVANSHI Appellant

Through: Ms. Deepali Gupta, Adv.

Versus

SHRI BHAGWAN DASS Respondent

Through: Mr. Surinder Jain, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This appeal impugns the judgment and decree dated 19.12.2012 of the Additional District Judge, Central-8, Delhi, in CS No.281/2012 (Unique I.D. No.02401C0240922009) in favour of the respondent and against the appellant for recovery of Rs.4,18,000/- with 6% interest per annum from the date of institution till realization.

2. The appeal was admitted vide order dated 12.04.2013 and the Trial Court record requisitioned and the operation of the judgment and decree stayed subject to the appellant depositing the entire decretal amount within four weeks. The deposit was not made and an application filed for relieving the appellant therefrom and which is listed today for consideration.

3. The counsel for the appellant states that the appellant is not in a position to deposit the decretal amount and upon being told that then there would be no stay of execution has sought for the appeal itself to be heard today. The counsel for the respondent agrees and the counsels have been heard on the appeal and the Trial Court record perused.

4. The respondent filed the suit from which this appeal arises, under Order 37 of the CPC for recovery of Rs.6,01,330/- with *pendente lite* and future interest from the appellant and his wife Smt. Sushila Suryavanshi. However the suit was treated as an ordinary suit. It was the case of the respondent / plaintiff:

- (i) that the appellant is the son of the brother of the wife of the respondent;
- (ii) that the appellant in the month of June 2006 had requested the respondent for a friendly loan of Rs.4,18,000/- with the assurance to return the same within one or two months;
- (iii) that the respondent / plaintiff on 12.06.2006 withdrew Rs.4,00,000/- from his savings bank account and loaned Rs.4,18,000/- to the appellant;

- (iv) that the appellant however failed to repay the same as promised and to satisfy the respondent executed a receipt for the said amount in the presence of two witnesses and in which receipt the appellant admitted receipt of such loan on 12.06.2006 from the respondent;
- (v) that the appellant got issued two cheques in favour of the respondent from his wife Smt. Sushila Suryavanshi for Rs.50,200/- and Rs.51,000/- in part payment of the said loan but the said cheques also were returned dishonoured for the reason of insufficiency of funds in the bank account of the wife of the appellant from which the cheques were issued;
- (vi) that upon failure of the appellant and his wife to pay any amounts thereafter also, the suit was filed for recovery of the principal loan amount of Rs.4,18,000/- with interest @18% thereon from 01.01.2007 till the date of institution of the suit of Rs.1,81,830 and for recovery of notice charges of Rs.1,500/- i.e. totaling Rs.6,01,330/-;

5. Summons of the suit were issued to the appellant and his wife who failed to appear despite service and were vide order dated 25.08.2009 of the

learned Additional District Judge proceeded against *ex parte*; the suit was accordingly posted for *ex parte* evidence of the respondent / plaintiff.

6. The appellant and his wife in or about February, 2010 applied for setting aside of the order proceeding *ex parte* against them and the said application remained pending and was ultimately allowed vide order dated 10.10.2011 subject to payment of costs of Rs.500/- by the appellant and his wife; the appellant and his wife were also directed to file written statement within the prescribed period.

7. The appellant and his wife neither filed the written statement nor paid the costs and accordingly vide order dated 29.11.2011 the defence of the appellant and his wife was struck off. Thereafter the *ex parte* evidence of the respondent / plaintiff was recorded.

8. However before arguments in the suit could be heard, the appellant and his wife moved another application for recall of the orders dated 10.10.2011 and 29.11.2011 and sought opportunity to file written statement. Though no written statement was filed even with the said application but during the pendency of the said application and without seeking any leave of the Court before which the suit was pending, written statement was filed on 05.11.2012 when that application was listed for hearing.

9. The learned Additional District Judge vide order dated 05.11.2012 dismissed the said application of the appellant and his wife and posted the suit for final arguments and after hearing arguments has vide the impugned judgment decreed the suit in favour of the respondent and against the appellant, for recovery of the principal amount of Rs.4,18,000/- with interest @ 6% per annum only from the date of institution of the suit and till realization. No interest, even at the rate of 6% per annum, was awarded for the period prior to the institution of the suit. The suit, insofar as against the wife of the appellant, was dismissed holding that the case of the respondent was of the loan to the appellant only and thus the appellant alone was liable.

10. Even though the impugned judgment and decree, as the circumstances aforesaid would show, is in the nature of an *ex parte* decree, the counsel for the appellant has argued on merits. It is contended that the learned Additional District Judge has erred in believing the loan transaction on the basis of the receipt dated 27.07.2008 when the original even of the said receipt was not produced before the Court. It is contended that the appellant has obtained a certified copy of the said receipt which is filed at page 126 of the appeal paper book and which shows the same to have been issued on 'copy to copy' basis and which means that what is in the Trial Court record

also is a photocopy. Relying on Section 62 to Section 65 of the Evidence Act, it is contended that the document should have been proved by primary evidence only i.e. by producing the original and not by producing a photocopy and no foundation for leading secondary evidence also was laid.

11. However a perusal of the Trial Court record shows that though the receipt therein is a photocopy but contains an endorsement of “original seen and returned”. A perusal of the testimony recorded of the respondent / plaintiff appearing as PW1 on 16.03.2012 i.e. while tendering his affidavit Ex.PW1/A by way of examination-in-chief also shows the learned Additional District Judge to have recorded therein that the original of the said receipt had been seen and returned.

12. The counsel for the appellant states that the certified copy of the receipt obtained by her does not contain the endorsement of “original seen and returned”. However, the same is owing to the certified copy having been obtained on 23.09.2011 and the endorsement in the court record having been made thereafter on 16.03.2012 when the evidence was recorded.

13. I am therefore satisfied that the said document was proved by primary evidence in accordance with law and contention aforesaid of the counsel for

the appellant is misconceived. To be fair, the counsel for the appellant also has not agitated the matter further.

14. The respondent, besides examining himself in his *ex parte* evidence, also examined as PW2 and PW3 the two witnesses to the said receipt.

15. The counsel for the appellant has next contended that the receipt has not been proved also for the reason that the two witnesses to the receipt in their examination in chief have identified only their own signatures thereon and have not identified the signatures of the appellant on the said receipt.

16. The affidavits Ex.PW2/A and Ex.PW3/A respectively by way of examination in chief of the said two witnesses have been perused. The said witnesses are found to have deposed that the appellant had executed the said receipt in their presence and had put his signatures thereon in their presence, in acknowledgement of the loan received by him earlier from the respondent.

17. There is thus no merit in the said contention also.

18. The counsel for the appellant has not raised any other challenge to the findings returned by the learned Additional District Judge on the basis of *ex parte* evidence of respondent / plaintiff before him and has next shifted her focus to challenge the order dated 25.08.2009 proceeding *ex parte* against

the appellant. However, upon being pointed out that the appellant had appeared thereafter and the said order was set aside, the counsel next challenges the order dated 29.11.2011 of the Trial Court striking off the defence of the appellant and the order dated 05.11.2012 dismissing the application of the appellant for recall of the order dated 29.11.2011.

19. It was enquired from the counsel whether the appellant has in the present appeal challenged the said orders.

20. The counsel states that though in the prayer paragraph of the appeal it is not so evident but the grounds urged in the appeal do contain a challenge to the said orders. It is contended that both appellant and his wife were in judicial custody from 01.10.2010 to 23.12.2011 and for this reason could not pay the costs and file the written statement in terms of the order dated 10.10.2011.

21. Finding a reference in the record to a CM (M) petition under Article 227 of the Constitution of India having been filed by the appellant against the orders dated 29.11.2011 and 05.11.2012, fate thereof is enquired. The counsel for the appellant though states that the said CM (M) petition has been disposed of on 17.05.2013 is unable to produce the copy of the said order. In the circumstances, a download of the said order from website of

this Court has been taken and the file of the said CM (M) No.56/2013 has also been requisitioned. The same reveals that the appellant had urged similar ground, of the appellant and his wife being in judicial custody therein also in challenge to the orders dated 29.11.2011 and 05.11.2012 and though notice of the said petition was issued and the respondent appeared but the said petition was dismissed as infructuous on 17.05.2013 owing to the main suit having been decreed.

22. It has been enquired from the counsel for the appellant whether not in view thereof the appellant is precluded from urging the same ground in this appeal.

23. Though no reply has been given by the counsel for the appellant but I may state that Order 43 Rule 1A of the CPC permits the appellant to in the appeal against the decree contend that non-appealable orders earlier made in the suit should not have been made and the judgment should not have been pronounced. The order dated 29.11.2011 striking off the defence of the appellant and the order dated 05.11.2012 dismissing the application for recall thereof are non-appealable orders and would thus fit the said bill.

24. I have also considered the effect of dismissal of the CM(M) petition filed by the appellant challenging the orders dated 29.11.2011 and

05.11.2012 but I am of the opinion that since the merits of the said orders were not considered and the said petition was dismissed as infructuous for the reason of the suit having been decreed, it would be open to the appellant to challenge the said orders in this appeal.

25. The counsel for the respondent / plaintiff has argued that even though the appellant had been proceeded *ex parte* on 25.08.2009 but ought to have while in February, 2010 applying for setting aside of the *ex parte* filed the written statement; the same was not filed; not only so the same was not filed thereafter also though the said application remained pending for more than one and a half years till 10.10.2011. It is further contended that though as on 10.10.2011, the appellant may have been in judicial custody but that was not the reason for him to have not pursued and defend the suit once he had knowledge thereof and merely because he was in judicial custody is no reason for finding fault with the orders dated 29.11.2011 and 05.11.2012. It is yet further contended that though the appellant came out of judicial custody in December, 2011 but filed the application for recall of the order dated 29.11.2011 striking off his defence only on 9th April, 2012; even at that stage the written statement was not filed and was filed only on the day when the said application was listed for hearing on 05.11.2012. It is

contended that from the factum of filing of the written statement on 5th November, 2012 without any direction it is evident that the same could have been filed earlier also.

26. I find merit in the contentions aforesaid of the counsel for the respondent / plaintiff. The respondent / plaintiff cannot be made to suffer for the circumstance of the appellant being in judicial custody. Though the counsel for the appellant sought to contend that the appellant was in judicial custody also on the complaint of the respondent / plaintiff but was corrected by appellant present in court and admits that the appellant was in judicial custody on the complaint of some other person. Once the appellant was aware of the suit from which this appeal arises and had applied for setting aside of the *ex parte* and which was allowed, merely because the appellant was in judicial custody was no reason for him to stop attending to the suit and thereafter to seek setting back of the clock at his own volition. It is significant that the appellant has not stated as to who are the other members of his family and with whom he is residing and as to why he could not instruct any other person for filing of the written statement especially when he had chosen earlier to not file the written statement which he could have done.

27. I therefore do not find any error, also in the orders striking off the defence of the appellant for not filing the written statement and / or of dismissal of the application for recall of the said order. The learned Additional District Judge has in order dated 05.11.2012 rightly held that the record showed that the appellant was deliberately delaying the proceedings and seeking adjournments and that his only intention was to delay the proceedings on one ground or the other.

28. Be that as it may, to satisfy the judicial conscience, I asked the appellant present in Court whether the signatures on the receipt aforesaid of money are his. The appellant after studying the same states that they are not his, “as they are very short while his signatures are very long”.

29. I have perused the signatures of the appellant at various places on the Trial Court record and the appeal record and find that the appellant for the last more than three years has been successively lengthening his signatures. The answer given by the appellant in the Court is thus a very thought out one.

30. I may also add that there is no explanation whatsoever of the two cheques aforesaid issued by the wife of the appellant in favour of the respondent / plaintiff, though the appellant today states that an FIR of loss of

cheque book was lodged within two or three days of the date of issuance of the cheques. The said explanation not only does not exist on the record but the lodging of the FIR within two or three days of the dates of the cheques also is found to be suspicious and unbelievable.

31. I am therefore satisfied that there is even otherwise no error in the impugned judgment and decree.

32. The appeal is accordingly dismissed. However, the same having been disposed of expeditiously, no order as to costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JULY 17, 2013

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