

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

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Date of decision: 24th October, 2013

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RFA 268/2013 & CM No.8499/2013 (for stay).

SURESH KUMAR VERMA

..... Appellant

Through: Mr. Chandra Shekher Yadav, Adv.

versus

DILIP KUMAR GUPTA

..... Respondent

Through: Mr. Rajkumar Jain, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 23rd March, 2013 of the learned Addl. District Judge-03 (East), Delhi for recovery of Rs.4 lacs with interest and costs against the appellant pursuant to dismissal of the application filed by the appellant for leave to defend the suit under Order XXXVII of the CPC filed by the respondent.

2. Notice of the appeal was issued and the Trial Court record requisitioned and subject to the appellant depositing the entire decretal amount in this Court, execution was stayed. In compliance of the said direction, a sum of Rs.4,30,000/- has been deposited which has been kept in a fixed deposit.

3. The appeal was listed last on 22nd October, 2013 when, finding the same to be entailing a short question and being of the view that if ultimately the appeal was to be allowed, the trial is to proceed, with the consent of the counsels, final hearing of the appeal was commenced. However after some argument, upon questions being put by this Court, the counsel for the appellant/defendant sought adjournment and the hearing was adjourned to today. The counsels have been heard further.

4. The respondent/plaintiff instituted the suit from which this appeal arises, under Order 37 of the CPC, for recovery of Rs.5,04,000/- pleading:-

- (a). that the parties were having cordial relation for a long time;
- (b). that the appellant/defendant approached the respondent/plaintiff for taking loan of Rs.4 lacs for a period of one year and to which the respondent/plaintiff agreed;
- (c). accordingly a sum of Rs.4 lacs was paid in cash by the respondent/plaintiff to the appellant/defendant on 5th March, 2011 and in consideration thereof the appellant/defendant executed a promissory note-cum-receipt in the presence of witnesses;

- (d). that the appellant/defendant however failed to re-pay the loan along with interest at 2% per month as agreed;
- (e). that the appellant/defendant had earlier also taken a loan of Rs.1 lac from the respondent/plaintiff in the month of June, 2007 and in discharge of his liability for that loan had issued a cheque in favour of the respondent/plaintiff for the said amount of Rs.1 lac but the said cheque was also dishonoured for the reason of insufficiency of funds in the bank account of the appellant/defendant and the appellant/defendant had repaid the said amount of Rs.1 lac in cash in instalments; and,
- (f). that the respondent/plaintiff ultimately got served a legal notice dated 3rd April, 2012 on the appellant/defendant with respect to the amount of Rs.4 lacs but the appellant/defendant neither repaid the loan with interest nor gave any reply to the legal notice.

accordingly, on the basis of pronote cum receipt, the suit for recovery of principal amount of Rs.4 lacs and Rs.1,04,000/- towards interest till the date of institution of the suit was filed.

5. Summons for appearance and thereafter summons for judgment were served on the appellant/defendant. The appellant/defendant applied for leave to defend on the grounds:-

- (i). denying that the appellant/defendant had borrowed any amount of Rs.4 lacs from the respondent/plaintiff;
- (ii). denying that the appellant/defendant had executed the pronote cum receipt on the basis of which the suit was filed; and,
- (iii). that the legal notice dated 3rd April, 2012 was not for filing a Civil Suit but accusing the appellant/defendant of criminal breach of trust and on the basis of said legal notice a Civil Suit under Order 37 could not be filed.

though several other allegations, of the claim of the respondent/plaintiff being *mala fide*, the respondent/plaintiff having suppressed material facts and the suit being an act of extortion, were also taken but no factual basis therefor was disclosed.

6. Needless to state that the respondent/plaintiff contested the application for leave to defend, denying the grounds aforesaid on which leave to defend was sought.

7. No rejoinder was filed by the appellant/defendant.

8. A perusal of the Trial Court record shows that the respondent/plaintiff along with the plaint had filed the original pronote-cum-receipt (with photograph of appellant/defendant affixed thereon) in which the appellant/defendant acknowledged receipt of Rs.4 lacs and promised to repay the same with interest at 2% per month. The respondent/plaintiff besides the said pronote-cum-receipt also filed, photocopies of the Voter Identity Card and the Driving License of the appellant/defendant contending that the same were handed over by the appellant/defendant at the time of execution of pronote-cum-receipt as proof of his identity, the dishonoured cheque for Rs.1 lac and the copy of the legal notice preceding the suit and the postal receipts of dispatch thereof.

9. The learned Addl. District Judge, vide the impugned order has dismissed the application of the appellant/defendant for leave to defend and decreed the suit, for the reasons:-

- (A). that the denial by the appellant/defendant of his signatures on the pronote-cum-receipt was unbelievable the photograph of the appellant/defendant was also affixed as on the same and the appellant/defendant has not disclosed as to how the respondent/plaintiff came into possession of his photograph, if not so affixed at the time of execution of the pronote-cum-receipt.
- (B). similarly the appellant/defendant had not explained as to how the respondent/plaintiff came into possession of the photocopies of the Voter Identity Card and the Driving License of the appellant/defendant if these had not been handed over by the appellant/defendant at the time of execution of the pronote or receipt;
- (C). that the appellant/defendant inspite of admitted receipt of the legal notice preceding the suit, neither replied thereto nor filed any complaint of the documents, on the basis whereof allegation was made in the legal notice, having been fabricated.

however the decree was passed only of Rs.4 lacs with interest at 6% per annum from the date of institution of the suit till the date of decree.

10. While issuing notice of the appeal, the reasons which prevailed with the learned Addl. District Judge were expressly set out in the order.

11. As such when the hearing began on 22nd October, 2013, it was enquired from the counsel for the appellant/defendant as to what was his challenge to the said reasons. The counsel for the appellant/defendant had then sought adjournment for today.

12. Today the counsel for the appellant/defendant has argued:-

- (I). that the signatures of the appellant/defendant on the pronote cum receipt and on the cheque for Rs.1 lac are different and have been forged;
- (II). that the request of the appellant/defendant for sending the said signatures to the Forensic Science Laboratory was not allowed;
- (III). that the appellant/defendant can produce a certificate from his bank to the effect that the signatures on the pronote-cum-receipt are not of the appellant/defendant (the counsel for the

appellant/defendant at this stage interjects and states that the appellant/defendant admits his signatures only on the cheque for Rs.1 lac);

(IV). that the affidavit of the witness to the pronote namely Sh. Vikram Singh, to the effect that the appellant/defendant had not executed the pronote can be filed; and,

(V). that the said Sh. Vikram Singh and the appellant/defendant work in the same office and the appellant/defendant had handed over his photograph and the photocopies of his Voter Identity Card and Driving License to the said Sh. Vikram Singh to obtain a insurance policy (on enquiry it is stated that the said Sh. Vikram Singh is not an insurance agent but his wife is an LIC agent).

13. It has been enquired from the counsel for the appellant/defendant whether any application was filed before the learned Addl. District Judge for sending the document for forensic examination.

14. The counsel for the appellant/defendant states that such request was orally made.

15. It has further been enquired from the counsel for the appellant/defendant whether the appellant/defendant in the memorandum of appeal has pleaded that such a request was made.

16. The answer is again in the negative. Rather, the counsel states that unfortunately he was not the Advocate for the appellant/defendant in the Trial Court and thus could not so advise the appellant/defendant.

17. It has next been enquired whether not that means that the aforesaid plea is a figment of the imagination of the present counsel, between 22nd October, 2013 and today. The counsel has candidly admitted so.

18. The counsel further admits that the affidavit of Sh. Vikram Singh, who is the witness to the pronote, has been obtained now only and on 16th April, 2013. However the counsel admits that neither was it filed along with the appeal which is dated 3rd May, 2013 nor is there any reference to such affidavit in the memorandum of appeal.

19. The explanation given by the counsel for the appellant/defendant for the respondent/plaintiff's custody of the photograph and documents of identity of the appellant/defendant is the same—that it is the counsel who has now advised the said pleas to the appellant/defendant.

20. Needless to state that none of the arguments raised were before the learned Addl. District Judge and cannot be a ground to challenge the judgment. Even in the memorandum of appeal, the case now argued has not been set up. Mere engagement of a new counsel cannot allow the litigant to take new factual pleas which are the result of the professional acumen of the new counsel.

21. The counsel for the respondent/plaintiff has argued that the inaction on the part of the appellant/defendant after the receipt of the legal notice shows that the denial of the pronote-cum-receipt in the leave to defend application as well as the pleas now taken are afterthought.

22. The counsel for the appellant/defendant in rejoinder has contended that leave to defend ought to be granted merely on denial of signatures on the documents on the basis of which the suit is filed.

23. I am unable to agree. A mere denial of signatures on the document on the basis of which the suit is filed cannot be a ground for grant of leave to defend, converting a suit of the nature for which a summary procedure has been provided in law, into an ordinary/regular suit. If the same were to be done, considering the manner in which pleas are taken in the Courts, no

claim can be allowed under the summary procedure. Whenever a defendant in a suit under Order 37 of the CPC denies his signatures, he has to satisfy the Court that such denial is *bona fide*. The appellant/defendant in the present case, in the face of the documents filed along with the suit, ought to have explained as to how the respondent/plaintiff came into possession of his photograph and the copies of the documents of his identity. No error can thus be found in the judgment of the learned Addl. District Judge. In addition thereto I may add that it was the express plea of the respondent/plaintiff of there being an earlier loan transaction also between the parties and in support whereof the dishonoured cheque of Rs.1 lac was filed. The said pleas remained uncontroverted in the leave to defend application and are to be deemed to have been admitted by the appellant/defendant. The counsel for the appellant/defendant has today in Court expressly admitted the signatures on the dishonoured cheque of Rs.1 lac and has further stated that the said amount was subsequently paid by the appellant/defendant to the respondent/plaintiff in cash. The same fortifies that there were other transactions, in cash between the parties and which also satisfies the judicial conscience of this Court as to the claim of the respondent/plaintiff.

24. There is no merit in the appeal; the same is dismissed. However, the appeal having been disposed of expeditiously, I refrain from imposing any cost on the appellant/defendant.

25. The amount deposited by the appellant/defendant in this Court be now forthwith released to the respondent/plaintiff.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

OCTOBER 24, 2013

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