

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

Date of decision: 29th October, 2013

+ **RFA 319/2013 & CM No.10483/2013 (for filing addl. documents).**
SACHIN KUMAR **Appellant**
Through: Mr. Shiv Charan Garg & Mr.
Shashank Mittal, Adv.

Versus

KARTAR SINGH **Respondent**
Through: Mr. Shantanu Bhardwaj, Dr. H.S.
Chaudhary & Mr. K.S. Goswami,
Adv.
Dr. L.S. Chaudhary for Mr. Shantanu
Bhardwaj, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 23rd February, 2013 of the Court of Addl. District Judge, East District, Karkardooma Courts, Delhi in Civil Suit No.342/2011 filed by the respondent/plaintiff) of recovery of Rs.4 lacs with interest @ 8% per annum from the date of institution of the suit till realization 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 subject to the appellant depositing the decretal amount in this Court, execution stayed. The appellant/defendant did not deposit the decretal amount; resultantly the interim order was vacated, the Trial Court record requisitioned and the appeal posted for hearing for today.

3. The counsels have been heard and the Trial Court record perused.

4. The respondent/plaintiff instituted the suit from which this appeal arises pleading that he had advanced a sum of Rs.4 lacs as a friendly loan to the appellant/defendant in July, 2010, to be repaid in a year's time; that the appellant/defendant failed to repay the amount and after much persuasion issued a cheque dated 9th August, 2011 for Rs.4 lacs in repayment of the said loan; however the said cheque was dishonoured.

5. The suit was entertained under Order XXXVII of the CPC and summons for appearance and thereafter summons for judgment issued;

6. The appellant/defendant sought leave to defend on the grounds:-

- (a). that he had on 2nd March, 2010 purchased a Innova car from the respondent/plaintiff for a consideration of Rs.6,77,400/- out of which Rs.2 lacs was paid immediately in cash and the balance

sale consideration was payable in 36 monthly instalments of Rs.13,261/-;

- (b). that the appellant/defendant had given the cheque on the basis of which the suit is filed to the respondent/plaintiff on 2nd March, 2010 by way of security though this fact was not mentioned in the document executed on that date;
- (c). that the appellant/defendant subsequently learnt that the vehicle so sold by the respondent/plaintiff to the appellant/defendant was hypothecated with the ICICI Bank and which fact had been concealed by the respondent/plaintiff at the time of sale;
- (d). that the respondent/plaintiff inspite of repeated reminders did not clear the outstandings of ICICI Bank and owing where to the appellant/defendant was facing difficulty in plying the said vehicle;
- (e). that the appellant/defendant paid the instalments of the vehicle till May, 2011 and thereafter in August, 2011 returned over the vehicle to the respondent/plaintiff; and,

(f). that though the respondent/plaintiff was to return the said cheque taken by way of security but did not do so and has misused the same for filing the suit.

7. The respondent/plaintiff filed a reply to the leave to defend application, not controverting the transaction of sale/purchase and return of the vehicle by the appellant/defendant, but controverting that the respondent/plaintiff had concealed the factum of the car being hypothecated with the ICICI Bank and contending that the dues of the ICICI Bank were cleared in October, 2010 itself and that since the appellant/defendant was unable to pay further instalments, the respondent/plaintiff was forced to take back the car.

8. It was thus the case of the respondent/plaintiff, that the loan transaction was independent from the transaction of sale of vehicle.

9. The learned Addl. District Judge dismissed the application of the appellant/defendant for leave to defend and consequently decreed the suit, reasoning (i) that had the cheque on the basis of which the suit was filed been given by way of security in the sale/purchase transaction, the same would have found mention in the document prepared of the sale/purchase

transaction; (ii) that if the cheque had been given by way of security for the sale/purchase transaction, the appellant/defendant would not have delivered back possession of the vehicle without taking back the cheque; and lastly, (iii) drawing adverse inference from the appellant/defendant having not responded to the legal notice preceding the suit.

10. I have enquired from the counsel for the respondent/plaintiff as to how the loan amount of Rs.4 lacs was given and whether any document of the loan transaction was prepared.

11. The counsel for the respondent/plaintiff has stated that the loan of Rs.4 lacs was given in cash and no document was executed because of the good relations between the parties, the parties having already entered into an agreement for sale/purchase of a car prior to the loan transaction.

12. I have further enquired from the counsel for the respondent/plaintiff whether the respondent/plaintiff has taken any action against the appellant/defendant for non-fulfilment of the sale/purchase transaction and whether anything is outstanding from the appellant/defendant to the respondent/plaintiff towards the sale purchase transaction as it cannot be

lost sight of that the appellant/defendant was admittedly in custody of the car since 2nd March, 2010 till August, 2011.

13. The counsel for the respondent/plaintiff states that nothing is due from the appellant/defendant to the respondent/plaintiff towards the sale/purchase transaction as the appellant/defendant returned the vehicle and thus there was no need for taking any action in that regard.

14. On further enquiry, it is stated that at the time of return of the vehicle no document was signed and no full & final receipt issued.

15. On yet further enquiry, it is informed that the vehicle inspite of remaining in the custody of the appellant/defendant as purchaser from 2nd March, 2010 to August, 2011 was not transferred in the name of the appellant/defendant; the reason given is of the same being hypothecated with the ICICI Bank.

16. In the aforesaid state of affairs, I am of the opinion that though it may not be a case for grant of unconditional leave to defend, especially considering that the appellant/defendant did not even comply with the condition imposed while granting stay of the decree in this appeal, but the pleas urged by the appellant/defendant in the leave to defend application

cannot be said to be a sham or which are so improbable and farfetched which need not be put to trial.

17. I am unable to agree with the reasoning of the learned Addl. District Judge of, the defence of the appellant/defendant being unbelievable for the reason of the giving of the cheque as security being not mentioned in the sale/purchase document or for the reason of the appellant/defendant having returned the vehicle without insisting on return of cheque. It cannot be forgotten that it is the case of the respondent/plaintiff himself that the relations between the parties were cordial and for which reason the respondent/plaintiff gave loan in cash without writing. It is not the case that the cheque was given at the time of advancement of loan, as security for repayment thereof. On the same parity of reasoning, the appellant/defendant also could have given the cheque by way of security in sale/purchase transaction, without the same being mentioned in the document. Similarly, it being the case of the respondent/plaintiff that he was forced to take back possession of the vehicle upon the appellant/defendant being unable to pay installments thereof, there could be no occasion for the appellant/defendant insisting on return of cheque at the time of such forcible taking back possession of the vehicle. Admittedly no writing was made at the said time;

had there been any writing of full and final settlement, the position would have been otherwise. As far as the adverse inference from not responding to legal notice is concerned, the same alone cannot be a ground, though along with other factors may have some value.

18. I am also inclined to find the grounds, on which leave to defend is sought, to be plausible for the reasons, (i) of the loan in repayment of which cheque is claimed to have been given, being in cash and without any writing; (ii) there being nothing to show that there was a loan transaction; (iii) when the parties executed a document of sale/purchase of vehicle, they, in the ordinary course would have a document of loan also; (v) the proximity of the amount of Rs.4 lacs to the balance amount due in the sale/purchase transaction; (v) there being no document of closure of sale/purchase transaction; and (vi) there being no claim of respondent/plaintiff against appellant/defendant with respect to sale/purchase transaction though appellant/defendant is stated to be in breach thereof also.

19. The impugned judgment and decree is thus set aside. The appellant/defendant is granted leave to defend subject to deposit of the sum of Rs.4 lacs with the Trial Court within ten weeks of today.

20. The counsel for the appellant/defendant states that the appellant/defendant be permitted to furnish a Bank Guarantee to the Trial Court in the sum of Rs.4 lacs and the said Bank Guarantee shall be kept alive till two months after the decision of the suit by the Trial Court.

21. The aforesaid is found to be acceptable. The appellant/defendant is granted leave to defend the suit subject to furnishing the Bank Guarantee to the satisfaction of the learned Addl. District Judge in the sum of Rs.4 lacs within ten weeks as sought from today.

22. The parties to appear before the District Judge, East District, Karkardooma Courts on 17th January, 2014 for further proceedings.

23. It is made clear that if the Bank Guarantee is not furnished within ten weeks, the leave to defend shall stand refused.

24. The Trial Court record be returned forthwith to the District Judge, East District.

25. No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

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