

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

Decided on: 01.10.2013

+ **RFA (OS) NO.68 OF 2013**

MOHD WASIM

..... Appellant

Through: Mr.Shahzad Khan, Mr. Suhail Khan
and Mr. Z. Khan, Advocates.

versus

GABAR SINGH

..... Respondent

Through: Mr.Mobin Akhtar with Mr. M.
Hasibuddin, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE S.RAVINDRA BHAT(Open Court)**

1. This is defendant's appeal impugning the judgment and order dated 21st March, 2013 of a learned Single Judge, directing decree to be drawn under Order XXXVII CPC for Rs.32,50,000/-. By the impugned judgment and order, the learned Single Judge dismissed the appellant's application for leave to defend under Order 37 (3), CPC.

2. Briefly stated the facts of the case are that the plaintiff/respondent alleged that he acquired the suit land measuring 4 bighas 16 biswas in Village Satbari, New Delhi on 22nd August, 2006, but was unable to plot the land due to some impediments caused by

the local residents. In the circumstances, he entered into an agreement with the appellant on 25.08.2006. In terms of that agreement, the defendant/appellant agreed to purchase the land for Rs.32,50,000/-. The defendant did not pay the amount but instead stated (in terms of the agreement) that the consideration would be made after plotting and sale of the plots. It was alleged by the plaintiff/respondent that the defendant/appellant in discharge of his debt and liability, issued a post dated cheque of Rs.32,50,000/-. When the cheque was presented in terms and instructions of the appellant, it was dishonoured on account of 'insufficiency of funds. Accordingly, the plaintiff instituted a summary suit under Order 37 CPC.

3. Upon being served, the appellant entered appearance and sought leave to defend contending that the plaintiff had acquired the suit land on 25.08.2006 for a consideration of Rs.51 lakhs with the intention of plotting and selling it, but was unable to pay the purchase consideration of Rs.51 lacs. It was alleged that appellant in these circumstances agreed to finance the plaintiff/respondent and the cheque in question was issued on the specific request of the

plaintiff/respondent that amount be kept as security only. The appellant allegedly agreed to purchase the plot the land and sell it to prospective buyers. He further alleged that the sellers had not permitted him (plaintiff) to sell the plot unless they were paid, and the appellant / defendant paid the consideration amounts to the plaintiff's sellers. It was alleged that in these circumstances, no amounts were payable or outstanding to the plaintiff/respondent.

4. The appellant strongly relied upon an undated written document styled as 'Panchayatnama', a copy of which was produced along with the leave to defend application filed by him. The said Panchayatnama recorded that a total amount of Rs.51 lakhs was paid by the defendant/appellant to certain individuals including a sum of Rs.32,50,000/- to the respondent/plaintiff.

5. It is argued that the learned Single Judge fell into error in not attaching any significance to, and not giving any credence to the Panchayatnama. It was submitted that this document clearly established that the amounts claimed by the plaintiff were in fact the liabilities of the plaintiff for the land purchased through Agreement to Sell dated 25.08.2006, which were in fact discharged and so recorded.

6. It was submitted that the Single Judge gave undue importance to the post dated cheque which was furnished as security and which could not be enforced in the manner sought by the plaintiff.

7. The impugned judgment noticed that the defendant/appellant did not deny the transaction with respect to the suit land. The learned Single Judge also noted the defendant/appellant's contention that the plaintiff had in fact acquired the land through the Agreement to Sell dated 25.08.2006 and that he (appellant) stepped into the shoes of the plaintiff "*taking over the delivery from latter*".

8. The learned Single Judge, thereafter, proceeded to discard the appellant's case, observing that in the normal course of human conduct agreement dated 25.08.2006 relied upon by the appellant would have been in his possession and custody and yet he could not produce it. This led to the Court drawing an adverse inference. The learned Single Judge also rejected the defence based upon the Panchayatnama for the following reasons:-

"11. The pleas of the defendant in the application for leave to defend are not only totally unsubstantiated, save for the Panchayatnama but are also incoherent and illogical. According to the defendant, the plaintiff was unable to pay the purchase consideration of Rs.51 lakhs and for which

reason the defendant stepped in to cover the deal. If that was to be the position, there is no explanation as to what was the need for the defendant to give the cheque for Rs.32,50,000/- to the plaintiff as security or for the defendant to pay the amount of cheque in cash to the plaintiff. Had the defendant taken over the deal from the plaintiff, the defendant would have paid the consideration of Rs.51 lakhs to the persons from whom the plaintiff had agreed to purchase the property and not to the plaintiff. It defies logic as to why the defendant at the time of making payment of Rs.32,50,000/- to the plaintiff in cash, neither took any receipt from the plaintiff nor took back the cheque for the said amount admittedly issued to the plaintiff.

12. As far as the reliance by the defendant on the Panchayatnama is concerned, though the same is disputed by the plaintiff and admittedly does not contain the signatures of the plaintiff but even if the same were to be perused, that also does not support the case of the defendant for leave to defend. The said Panchayatnama does not bear any date. While according to the application for the leave to defend, the plaintiff had entered into an Agreement to Sell dated 25th August, 2006 with the persons from whom he had purchased the property, according to Panchayatnama, the defendant had agreed to purchase the land from the plaintiff for Rs.51 lakhs. The defendant as aforesaid, though has not disputed the Agreement to Sell dated 25th August, 2006 but has chosen not to place the same on record. The question of the defendant, if had agreed to purchase the land for Rs.51 lakhs, paying Rs.20 lakhs out of the same to any other person without the authorization of the plaintiff, does not arise. There is nothing to show that the plaintiff had so authorized the defendant. Again, had the defendant paid Rs.20 lakhs to the persons from whom the plaintiff had agreed to purchase the property, the defendant would have obtained receipt thereof and which has also not been produced. The Panchayatnama under the signatures of the members of the so called Panchayat, is not sufficient to put

the matter to trial.”

9. This court has considered the pleadings (including the plaint along with the documents, as well as the leave to defend application filed by the appellant, with its accompanying documents) materials on record and the submissions.

10. The Panchayatnama admittedly is an undated document. It appears to be a tentative one in the sense that there are several blank spaces, leading one to assume that the individual who had drawn it up was not sure as to the total number of people who attended the proceedings. Apart from this informal nature of the document, what further emerges is that the members of the Panchayat are not recorded.

11. In these circumstances, the Panchayatnama which is the basis for stating that the appellant did not owe any amount to the plaintiff was, in opinion of this Court, correctly rejected on an overall appreciation of the facts and circumstances of the case.

12. Proceeding beyond this, if any amount was paid on 25.8.2006 as has been contended now, there was no reason why the

Panchayatnama should not have recorded the date or even not mentioned the cheque which was issued on 27th August, 2006.

13. The learned counsel for the appellant had relied upon the decision reported in *Raj Duggal V. Ramesh Kumar Bansal, 1991 Supp (1) SCC 191* to say that the true test to see whether a triable defence arises is on an interpretation of the document to ascertain whether it is a real document and not a sham one. That if the facts alleged by the defendant are established, there would be a good or plausible defence. It is emphasised by counsel that the interpretation of the document would fall within the class or matter of triable issue for which the leave should be granted. While there is no doubt about the proposition of law that a triable issue would not only mean a credible or a reasonably good case, the Supreme Court has stated that an untenable or a baseless defence, or what has been described 'moonshine' cannot qualify as a triable issue, whether it involves interpretation of a document or not.

14. In the facts of the present case, what the appellant is calling upon the Court is to interpret a highly suspect, undated document, which does not record the participation of the plaintiff/respondent and

appears to be tentative. This, to the court's mind, falls within the description of 'moonshine' and, therefore, the Learned Single Judge cannot be faulted in holding that no triable issue arose qualifying for grant of leave, to the appellant.

15. For the forgoing reasons, this court finds no reason to interfere with the impugned judgment and order of the learned Single Judge. The appeal is devoid of any merit and accordingly, the same is dismissed.

**S. RAVINDRA BHAT, J
(JUDGE)**

**NAJMI WAZIRI, J
(JUDGE)**

**OCTOBER 01, 2013
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