

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

Judgment reserved on: 09.10.2013

% Judgment delivered on: 21.10.2013

+ CS(OS) 1092/2010

SANJAY VERMA

..... Plaintiff

Through: Sermon Rawat, Advocate

versus

SADHANA AGRAWAL & ANR

..... Defendant

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

JUDGMENT

VIPIN SANGHI, J.

1. The plaintiff has filed the present suit to seek recovery of the amount of Rs. 23,70,000/- from the two defendants jointly and severally, along with interest from the date of institution of the suit till realization @ 5% per month in terms of the agreement between the parties. The plaintiff also seeks a decree of permanent injunction restraining defendant No. 1 from creating any third party interest in the share of 7% in land (with built in structure) bearing Khasra No.657 situated at village Ghookna, Pragana Loni,

Tehsil & District Ghaziabad (U.P.) and to seek a restraint against alienation of the said property in any manner.

2. The case of the plaintiff is that the husband of defendant No. 1-Smt. Sadhana Agrawal, i.e. Shri Alok Agrawal was known to one Shri Mukesh Chauhan, son of late Shri C.K.Chauhan resident of House No. 296, Nilgiri Apartment, Alak Nanda, New Delhi. The said Shri Mukesh Chauhan was, in turn, known to the plaintiff through his cousin brother, namely, Shri Pawan Verma son of Shri B.S.Verma. In the month of November, 2009, Shri Alok Agrawal, husband of defendant No. 1 was arrested by Ghaziabad police for non-payment of trade tax dues and was sent to Dasna Jail, Ghaziabad. Defendant Nos. 1 and 2 (defendant No. 2 is the son of defendant No. 1 and Shri Alok Agrawal) approached Shri Mukesh Chauhan and Shri Pawan Verma for financial assistance of Rs. 15 lacs, immediately, to deposit the same with the Trade Tax Authorities to seek the release of Shri Alok Agrawal from jail. Shri Mukesh Chauhan and Shri Pawan Verma, in turn, approached the plaintiff along with defendant Nos. 1 and 2 for advancing the loan of Rs. 15 lacs for a period of three months. On the pleading of defendant No. 1 that Shri Alok Agrawal was a diabetic and a blood pressure patient and that he could die of stress and tension in jail, and that her daughter was of marriageable age – whose engagement could break if Shri Alok Agrawal was not released from jail, the plaintiff, on the request of Shri Mukesh Chauhan and Shri Pawan Verma agreed to help defendant No. 1 in her hour of crisis. With a view to secure the financial assistance expected from the plaintiff, defendant No. 1 informed that she was the owner of 7% share in the land falling in Khata No. 670 in Khasra No. 657 village Ghookna, Pargana Loni, Distt. & Tehsil Ghaziabad, U.P., which she

was ready to keep as a collateral security with the plaintiff. A copy of the family settlement filed before the Civil Court in Ghaziabad in Suit No. 947/2004 titled Atul Vs. Alok was provided by defendant No. 1 to the plaintiff in this regard. Defendant No. 1 agreed to execute the relevant documents to clear the timely repayment of the loan. She executed post dated cheques for the principal amount and the interest amount, loan agreement, GPA, Affidavit, Will, Receipt and promissory note, in respect of her own transaction. She also granted authority to the plaintiff to take possession of her 7% share in the aforesaid property, in case of default in the repayment of the loan amount. The plaintiff states that he was also taken to a godown, which defendant Nos. 1 and 2 claimed to have been constructed in the 7% share of the land aforesaid - in terms of the family settlement. Defendant No. 2 also affirmed the ownership of the godown in favour of defendant No. 1. In the aforesaid background, the plaintiff advanced a loan of Rs. 15 lacs to defendant No. 1 on 30.11.2009 at 20, National Park, Lajpat Nagar – IV, New Delhi. The plaintiff claims that though the plaintiff was desirous of advancing a cheque for the said amount, the defendant insisted on taking cash payment on the plea that the said amount had to be deposited on the same day with the Trade Tax Department, Ghaziabad. Accordingly, the loan was advanced in cash by the plaintiff to the defendants. Defendant No. 2 stood a guarantor for repayment of the loan taken by defendant No. 1. They also assured that he would issue post-dated cheques of the principal amount so that, in the eventuality of defendant No. 1 not being able to clear the loan amount along with interest, he would clear the same. .

3. The plaintiff further states that he explained to the defendants that the plaintiff had to buy a property in March, 2010 and that the said amount was

a saving for the said purchase and that in no circumstance, the loan agreement would be renewed / extended beyond 28.10.2010. The plaintiff states that a loan agreement was executed at Delhi on 30.11.2009 which was duly signed by defendant Nos. 1 and 2 in front of witnesses which included defendant No. 2, Shri Pawan Verma and Shri Mukesh Chauhan. The agreement was duly notarized by a Notary Public and registered vide entry No. 665/2009 by the Notary Public. Defendant No. 1 also executed a General Power of attorney (GPA) registered with the Notary Public vide register entry No. 664/2009 in presence of witnesses. She also executed an affidavit pertaining to the execution of the loan agreement and GPA and other documents which were notarized vide entry No. 665-A/09. She also executed a Will in favour of the plaintiff pertaining to her 7% share in the aforesaid land which was also executed at Delhi before the Notary Public and diarized vide register entry No. 667/2009. She executed a promissory note and receipt which were diarized vide registry No. 666-B/09 and registry No. 666-A/09 respectively. Defendant No. 2 not only witnessed the aforesaid documents but also executed a Guarantee Deed in favour of the plaintiff admitting the advance of the loan to defendant No. 1 and undertook to repay the entire amount in case defendant No. 1 defaulted in the payment of the principal as well as the interest amount. He undertook to pay the amount due within 48 hours upon the due amount being demanded by the plaintiff from the Guarantor. Upon receipt of the loan, defendant No. 1 executed a receipt for Rs. 15 lacs vide register entry No. 665-A/09 duly witnessed by defendant No. 2 Shri Pawan Verma and Shri Mukesh Chauhan. Defendant No. 1 also issued post dated cheque dated 01.03.2010 drawn on HDFC Bank, Preet Vihar, New Delhi, for Rs. 15 lacs bearing No. 043131

for repayment of the loan amount. Similarly, defendant No. 2 also issued a cheque for Rs. 15 lacs drawn on ICICI Bank Ltd., Ghaziabad, bearing No. 787695 dated 01.03.2010 as surety, in case the loan is not repaid by defendant No. 1. He also promised by way of a guarantee deed that he would pay the entire outstanding including interest in case of default in repayment by defendant No. 1.

4. After taking the loan amount, defendants informed the plaintiff the same evening that the money had been deposited with the Trade Tax Department.

5. In December, 2009, defendant No. 1 requested the plaintiff not to present the cheque as she was not able to pay the interest amount due to financial hardship faced by her family. The plaintiff was assured that the defendants would pay the interest for the month of December, 2009 in January, 2010 and that the loan amount would be repaid by the due date. The plaintiff narrates that the defendants, however, did not repay the loan amount or the interest despite efforts and reminders of the plaintiff. The plaintiff states that the defendant promised to clear the entire interest by 28.02.2010 and that the principal amount would also be paid on the said date, but to no avail. The due date came and went, but no payment was made. The plaintiff states that the cheque was presented on the asking of the defendant No. 1 on 31.03.2010. However, the same was dishonoured for the reasons "funds insufficient". The defendant No. 1 had no explanation or satisfactory reply. She only apologized and sought more time to make the payment. The plaintiff granted one last opportunity for repayment of the amount along with interest by 15.05.2010. However, no payment was made and further time was sought. The plaintiff states that once again, the cheques

were presented for encashment on 17.05.2010 only to be dishonoured on account of 'insufficiency of funds'. The plaintiff states that the defendants thereafter started avoiding the plaintiff. The plaintiff states that the defendants appeared to have become dishonest. The plaintiff states that interest @ 5% per month till the date of filing of the suit comes to Rs. 4,50,000/-. In para 24 of the plaint, the plaintiff states that the first dishonor of cheque occurred on 31.03.2010 and, accordingly, there was a delay of 54 days till the filing of the suit. As per clause (6) of the loan agreement dated 30.11.2009, the defendant No. 1 had agreed to pay penalty of Rs. 500/- per day per lakh i.e. Rs. 7,500/- per day for the full delayed period. The plaintiff, therefore, claims an amount of Rs. 4,20,000/- on that account. Consequently, the plaintiff claims Rs. 15 lacs as principal amount, Rs. 4,50,000/- as interest till the filing of the suit and Rs. 4,20,000/- under clause (6) of the Loan Agreement aggregating to Rs. 23,70,000/-. The plaintiff also states that he learnt from Shri Mukesh Chauhan and Shri Pawan Verma that the defendants, in connivance with Shri Alok Agrawal, were trying to sell off the property which was kept as a collateral security and to run away, as Shri Alok Agrawal is indebted in the market by crores of rupees. Consequently, the plaintiff seeks an injunction, as aforesaid, to prevent his suffering an irreparable loss which cannot be compensated.

6. The suit was filed by the plaintiff on 26.05.2010. Summons were issued to the defendants on 31.05.2010. Efforts were made to serve the defendants but to no avail. The plaintiff furnished the fresh address of the defendants, and summons were issued to the defendants returnable on 06.05.2011 which was served. However, none appeared for the defendants on 06.05.2011. On 05.08.2011, once again, none appeared for the

defendants despite service. Accordingly, the defendants were proceeded ex-parte and the plaintiff was permitted to file ex-parte evidence on affidavit. The plaintiff filed his own ex-parte evidence on affidavit on 10.10.2011. The plaintiff tendered his affidavit by way of evidence on 19.10.2011 which is Ex.PW1/1. The documents relied upon and marked in the affidavit were exhibited as Ex.PW1/A to Ex.PW1/W. I shall refer to some of the exhibited document which appear to be relevant for the purpose of disposal of the suit.

7. It appears that the matter was heard ex-parte by the Court on 15.12.2011 when the plaintiff desired to file an additional affidavit by way of evidence. The additional affidavit by way of evidence was filed by the plaintiff Shri Sanjay Verma on 21.01.2013 which was tendered in evidence on 10.09.2013 as Ex.PW1/2. The plaintiff relied upon two documents mentioned in the affidavit as Ex.PW1/X and Ex.PW1/Y. The deposition of the plaintiff in his affidavits towards examination-in-chief dated 12.10.2011 (Ex.PW1/1) is in tune with the averments made in the plaint. Ex.PW1/A is the loan agreement dated 30.11.2009 entered into between the plaintiff and defendant No. 1-Smt. Sadhana Agrawal. In this agreement, defendant No. 1 acknowledges the receipt of the loan of Rs. 15 lacs from the plaintiff for a period of three months i.e. between 30.11.2009 to 28.02.2010. The loan agreement records the rate of interest @ 5% per month with monthly interest to be paid on the 7th of each month in advance. It also acknowledges that defendant No. 1 gave post dated cheque for Rs. 15 lacs and three post-dated cheques for monthly interest amount of Rs. 75,000/- each to the plaintiff for the period December, 2009 till February, 2010. Clause (8) records that defendant No. 1 shall create collateral security in respect of her share of 7%

share in land (with built up structure) bearing khasra No. 657 situated at Village Ghookna, Pragana Loni, Tehsil and Distt. Ghaziabad, U.P., where a warehouse has been constructed with area 5130 sq. ft. (570 sq. yds.) in possession of Central Warehousing Corporation (tenants) paying monthly rent of Rs. 25,548/-, and that she will create a mortgage in favour of the plaintiff by execution of Power of Attorney, Will and Affidavit. Clause (9) records that in the event of default by defendant No. 1 in the repayment of the amount due towards principal, interest and penalty, the plaintiff would be authorized to take immediate and complete possession of the said property.

8. Ex.PW1/E is the General Power of Attorney executed by defendant No. 1 in favour of the plaintiff in respect of the aforesaid property. Ex.PW1/G is the Will executed by defendant No. 1 in respect of the aforesaid property and Ex.PW1/H is the receipt dated 30.11.2009 executed by defendant No. 1, and witnessed by defendant No. 2, Shri Mukesh Chauhan and Shri Pawan Verma acknowledging the receipt of Rs. 15 lacs in cash, towards loan, from the plaintiff. Ex.PW1/I is the promissory note dated 30.11.2009 executed by defendant No. 1, undertaking to pay a sum of Rs. 15 lacs with interest as aforesaid with effect from 01.03.2010. Ex.PW1/J is the Guarantee Deed executed by defendant No. 2 in favour of the plaintiff thereby guaranteeing the repayment of the loan taken by defendant No. 1 along with interest. Ex.PW1/L is the cheque for Rs. 15 lacs dated 01.03.2010 drawn on HDFC Bank, issued by defendant No. 1 in favour of the plaintiff. Ex.PW1/M is the cheque for Rs. 15 lacs drawn on ICICI Bank, issued by defendant No. 2 in favour of the plaintiff, also dated 01.03.2010. Ex.PW1/N and Ex.PW1/O are the return memos issued by

Allahabad Bank, Lajpat Nagar, i.e. the banker of the plaintiff in respect of the cheque of Rs. 15 lacs issued by defendant No. 1. Ex.PW1/O is the return memo issued by Allahabad Bank in respect of cheque of Rs. 15 lacs issued by defendant No. 2. Ex.PW1/P is the legal notice issued by the plaintiff's counsel Pipania & Associates, dated 01.06.2010 issued to defendant No. 1 demanding the amount due in terms of the loan agreement dated 30.11.2009. Ex.PW1/Q and Ex.PW1/R are the postal receipts and certificate of post issued by the postal department in respect of the aforesaid notice. Ex.PW1/S is the legal notice issued by Pipania & Associates to defendant No. 2, dated 01.06.2010, demanding the amount due from defendant No. 2, as guarantor. Ex.PW1/T and Ex.PW1/U are the postal receipts issued by postal department in respect of the registered notice and that dispatched under Certificate of Posting. The plaintiff has disclosed that in respect of the dishonoured cheques, he has already initiated proceedings under Section 138 of the Negotiable Instruments Act. Ex.PW1/V is the complaint filed by the plaintiff in the Court of the ACMM, Patiala House Courts, under Section 138 of the Negotiable Instruments Act, against defendant No. 1 and Ex.PW1/W is a similar complaint filed by the plaintiff against defendant No. 2.

9. By way of his additional affidavit towards examination-in-chief, the plaintiff has produced as Ex.PW1/X the certified copy of the order dated 09.11.2004 passed by the Court of Senior Civil Judge, Ghaziabad, along with English translation, which shows that a decree was passed in terms of the family settlement dated 08.07.2002. In the said suit, Shri Alok Agrawal, the husband and father of defendant Nos. 1 and 2 respectively was declared as the owner in possession of land shown in Blue colour of the site plan.

The witness also produced the certified copy of the decree passed in the suit bearing No. 947/2004 i.e. Ex.PW1/Y.

10. The testimony of the plaintiff as his own witness has gone unrebutted as the defendants have not filed their written statement, or cross-examined the plaintiff when he appeared to tender his evidence. From the testimony of the plaintiff and the exhibited documents, it is abundantly clear that the plaintiff advanced a sum of Rs. 15 lacs to the defendant No. 1, duly guaranteed by defendant No. 2 by his personal guarantee and collaterally secured by the aforesaid property of Shri Alok Agrawal, the husband of defendant No. 1 and father of defendant No. 2. The loan had been advanced to secure the release of Shri Alok Agrawal who had been claimed to have been detained by the trade tax authorities. It is also established from the evidence on record that the cheques issued by the defendant Nos. 1 and 2 for Rs. 15 lacs were dishonoured upon presentation. The claim of the plaintiff that the said loan amount, interest, and penalty have not been paid has not been controverted and there is no reason to disbelieve this testimony of the plaintiff. Accordingly, I find that the plaintiff is entitled to the decree under the loan. The plaintiff is also entitled to interest as claimed in the suit since it is based on the term contained in the agreement itself. The parties are bound by their agreement with regard to payment of interest. Clause (2) of the loan agreement (Ex.PW1/A) reads as follows:

“2. That the FIRST PARTY shall pay interest at the rate of 5% per months, rests on the 7th of each month in advance, to the SECOND PARTY.”

11. Clauses (5) and (6) prescribe the payment of penalty of Rs. 7,500/- per day. In my view, no penalty can be imposed or claimed by the plaintiff

since the plaintiff is claiming and is held entitled to receive interest in terms of the loan agreement (Ex.PW 1/A).

12. Accordingly, the suit is decreed for the principal amount of Rs. 15 lacs along with interest at the agreed rate of 5% compounded monthly. The interest shall run from 01.04.2010 onwards till realization. The suit stands decreed accordingly. The plaintiff shall also be entitled to costs quantified at Rs. 50,000/-.

(VIPIN SANGHI)
JUDGE

OCTOBER 21, 2013
sl