

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

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Date of decision: 11th September, 2013

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RFA No.321/2013

YOGENDER SINGH

..... Appellant

Through: Mr. Praveen Kr. Singh with Mr.
Madhukant Jha, Advs.

Versus

KOTAK MAHINDRA BANK LTD. & ORS. Respondents

Through: Mr. Pratiti Rungta, Mr. Prashant
Singh & Mr. Sumit Dayal, Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns a money decree (dated 25th August, 2012 of the Court of Addl. District Judge (Central-07), Delhi in Civil Suit No.250/2010 filed by the respondent-1 Bank under Order XXXVII of the CPC) against the appellant pursuant to the order of the same date of dismissal of the application for leave to defend filed by the appellant.

2. The respondent no.1 Bank had filed the said suit against the respondents no.2&3 herein and the appellant (impleaded as defendant no.3), pleading:-

- (a). that its predecessor in interest had disbursed commercial vehicle loan to the respondent no.2 Sh. Pratap Singh (defendant No.1 in the suit) and the respondent no.3 Sh. Sohan Singh (impleaded as defendant No.2) was the co-borrower and the

appellant/defendant no.3 the guarantor in the said Contract/Agreement;

- (b). that the appellant/defendant no.3 and the respondents no.2 & 3 failed to adhere to the financial discipline and committed default in regular repayment of the loan by way of equated monthly installments;
- (c) that the predecessor of the respondent no.1 Bank accordingly in accordance with the Agreement recalled the loan but the appellant/ defendant no.3 and the respondents no.2&3 did not even reply to the legal notice;
- (d). that as per the accounts maintained by the respondent no.1 Bank, the appellant/defendant no.3 and the respondents no.2&3, as on 30th November, 2007 were liable to pay a sum of Rs.5,42,096/- towards principal, interest, penal interest and other dues and were also liable to pay interest @ Rs.24% per annum from 30th November, 1997 till realization; and,
- (e). the suit was filed under Order XXXVII of the CPC on the basis of the documents executed by the appellant/defendant no.3 and the respondents no.2&3.

accordingly the decree in the aforesaid amount was sought jointly and severally against the appellant and the respondents no.2&3.

3. The suit was entertained under Order XXXVII of the CPC and summons for appearance issued. Only the appellant/defendant no.3 entered appearance; the respondents no.2&3 failed to even enter appearance.

Summons for judgment were thereafter issued to the appellant/defendant no.3 who filed an application for leave to defend *inter alia* pleading that the respondent no.1 Bank has no cause of action against the appellant/defendant no.3 who was an outsider and had no concern with the respondent no.1 Bank and the respondents no.2&3 in any manner and had not stood as guarantor for the respondents no.2&3.

4. The respondent no.1 Bank filed a reply to the application for leave to defend, denying the contents thereof and reiterating the case in the plaint.

5. The learned Addl. District Judge has vide order dated 25th August, 2012 dismissing the application of appellant/defendant No.3 for leave to defend, held:-

- (a). that though the counsel for the appellant/defendant no.3 had argued that the Deed of Guarantee had not been executed by the appellant/defendant no.3 but the application for leave to defend was silent to this effect;
- (b). that in the application for leave to defend the appellant/defendant no.3 had not denied the Guarantee Agreement and his signature thereon;
- (c). once the respondent no.1 Bank had produced the original Guarantee Deed on record and the appellant/defendant no.3 had even thereafter not pleaded the said fact on record, the said contention was beyond pleadings;
- (d). there appeared some similarity between the signatures of the guarantor on the Guarantee Deed and the sample signature of

the appellant/defendant no.3 taken in the Court on 31st May, 2012; and,

- (e). that the appellant/defendant no.3 had in the leave to defend not denied having received the legal notice and had also not taken the plea of having protested thereagainst;

accordingly the leave to defend application was dismissed and the judgment and decree for recovery of monies aforesaid pronounced against the appellant/defendant no.3 besides against the respondents no.2&3 herein.

6. It is *inter alia* the contention of the appellant/defendant no.3 in the Memorandum of Appeal that the Guarantee Deed on the basis whereof claim was made against the appellant/defendant no.3 as guarantor, was not even filed along with the plaint and was filed subsequent to the filing of application for leave to defend by the appellant/defendant no.3.

7. It was enquired from the counsel for the appellant/defendant no.3 on 16th July, 2013 when this appeal first came up for consideration, whether any copy or photocopy of the said Guarantee Deed was filed along with the suit.

8. Upon the counsel for the appellant/defendant defendant no.3 expressing inability to answer, and being of the *prima facie* view that if at the time of issuance of summons for appearance and summons for judgment there was no document on record on the basis whereof the suit could be maintainable under Order XXXVII, the issuance of such summons would be without jurisdiction, the notice of the appeal was issued and the Trial Court record requisitioned.

9. A perusal of the Trial Court record on 26th August, 2013 showed that the Guarantee Deed, which according to the counsel for the respondent no.1 Bank also was the only document signed by the appellant/defendant no.3, was not filed, neither the original nor any copy thereof, when the suit against the appellant/defendant no.3 was entertained under Order XXXVII or when summons for appearance and summons for judgment were issued and served on the appellant/defendant no.3. The original Guarantee Deed was found to have been filed after the leave to defend application had been filed by the appellant/defendant no.3. It was accordingly enquired from the counsel for the respondent no.1 Bank whether in such circumstances the suit, at least in so far as against the appellant/defendant no.3, could have been entertained under Order XXXVII of the CPC. On request of the counsel for the respondent no.1 Bank the matter was adjourned to today.

10. The counsel for the respondent no.1 Bank has today invited attention to *Neebha Kapoor Vs. Jayantilal Khandwala* (2008) 3 SCC 770. In the said case, the suit under Order XXXVII of the CPC was filed on the basis of a promissory note and dishonoured cheques and even though no application for leave to defend was filed by the defendant, the Court granted unconditional leave to defend for the reason that the original documents had not been filed by the plaintiff and were reported to have been misplaced. The Supreme Court while upholding the said order held/ observed, (i) that for the purpose of obtaining a summary judgment ordinarily the original documents must be produced and in the event of original documents being not available, the plaintiff is obligated to prove the loss of documents; (ii) that only because a suit has been entertained as a summary suit, the same by

itself may not be ground for passing of a judgment on mere asking; (iii) that a decree could not have been granted on the basis of even photostat copies of documents; (iv) where applicability of Order XXXVII itself is in question, which appeared to be the principal reason given by the Courts below for grant of unconditional leave to defend, grant of leave may be permissible; (v) that the Court before passing a decree, is entitled to take into consideration the consequence thereof; (vi) that the CPC does not put any embargo on the Courts exercising a *suo motu* power of granting leave in a case of this nature, even when no application for leave to defend is filed; and, (vii) that the Court can always refuse to exercise its discretion as the original documents were not produced and to call upon the plaintiff to prove that the documents are lost.

11. As the aforesaid analysis of the judgment *supra* would show, the same rather than coming to the rescue of the respondent No.1 Bank is against the respondent No.1 Bank. The counsel for the respondent No.1 Bank has however emphasized that from the observations of the Supreme Court that “ordinarily the original documents must be produced” it follows that it is not mandatory.

12. I may in this regard mention that I have in ***Madan Lal Ltd. Vs. Growth Techno Projects Ltd.*** MANU/DE/1689/2009 held that Rule 5 of Order XXXVII of CPC empowering the Court to order the bill, *hundi* or note on which the suit is founded to be deposited with an officer of the Court, is indicative of there being no mandatory requirement of the original document on the basis whereof the suit is filed being filed and that Order XXXVII of CPC does not prohibit proceeding with the suit in the absence of

the original document, though the Court can, where filing of the original is deemed necessary, refuse to proceed without the original document being produced.

13. I again had occasion to consider the said aspect in ***S.M.V. Agencies Pvt. Ltd. Vs. M/s. Cross Country Heritage Hotel*** MANU/DE/1363/2013 where it was observed that ***Neebha Kapoor*** (supra) was a case where the original document on which the suit under Order XXXVII was filed being not available till the date of consideration of the application for leave to defend and not as laying down that without the original document the suit cannot be maintained.

14. However, the present is a case where what to talk of original, no copy also of the document, on the basis of which claim against the appellant/defendant No.3 under Order XXXVII of CPC was made, was filed. Order XXXVII of CPC prescribes a summary procedure for dealing with the suits upon bills of exchange, *hundis*, promissory notes, written contracts, enactments, guarantees etc. The Legislature in its wisdom has deemed it appropriate to provide for expeditious disposal of suits, claim wherein is based on documents of commercial nature. Though, Rule 2 thereof while prescribing the procedure for institution of summary suits does not provide for the document to be filed along with the suit but in my opinion, there can be no summary suit unaccompanied by the document on which it is based, whether it is original or a copy thereof. I say so because the procedure prescribed for disposal of such suits enables the Court to, upon the defendant not entering appearance despite service of summons for appearance or upon the defendant not filing the leave to defend application despite service of

summons for judgment, to immediately decree the suit. The question of the Court decreeing the suit in such situations would not arise if the document on which the suit is based, is not before the Court.

15. This is also evident from Rule 3 of Order XXXVII of CPC which requires the plaintiff to together with the summons of the suit serve on the defendant a copy of the plaint and annexures thereto. The reference to such annexures has but to be a reference to the document on which the suit is based.

16. The next question which arises is the effect of the subsequent filing of the document.

17. In my view, though non-filing of the document on which the suit is based (original or copy) along with the suit would not be fatal and the Court can grant time to the plaintiff to file the document but the summons for appearance cannot be issued without such document being before the Court and copy thereof being served on the defendant along with the summons for appearance. A defendant who is served with summons for appearance without the document on which the suit is based being before the Court and being served, upon the defendant along with the summons for appearance, would be entitled to even without entering appearance contend that the suit is not maintainable under Order XXXVII of the CPC.

18. This Court in ***Goyal MG Gases Ltd. Vs. Premium International Finance Ltd.*** 138 (2007) DLT 259 held that a suit under Order 37 is necessarily required to be accompanied by the original documents which are the basis of the claim before the Court. Finding, that the same had not been

filed, the decree even though passed was set aside under Order 37 Rule 4 of the CPC.

19. I have in *Aktiebolaget Volvo Vs. R. Venkatachalam* 160 (2009) DLT 100 held that reference in the CPC to documents is not necessarily to originals.

20. In the present case, as aforesaid, the Deed of Guarantee on the basis whereof, the claim in the plaint against the appellant/defendant No.3 under Order XXXVII of CPC was made, was not before the Court neither in original nor any copy thereof and not served on the appellant/defendant No.3 till after the filing of the leave to defend application by the appellant/defendant No.3. The suit against the appellant/defendant No.3 was thus not maintainable under Order XXXVII of CPC and was wrongly entertained.

21. The counsel for the respondent No.1 Bank has argued that the appellant/defendant No.3 in the leave to defend application did not controvert having signed the Guarantee Deed or his signatures thereon and which reason as aforesaid also prevailed with the learned Additional District Judge in dismissing the leave to defend application. However, the said reason losses sight of the fact that if the suit for the aforesaid reason was not maintainable under Order XXXVII of the CPC, the question of the appellant/defendant No.3 filing the leave to defend did not arise. Moreover, without the Deed of Guarantee being served on the appellant/defendant No.3 along with the summons for appearance and the summons for judgment, the appellant/defendant No.3 could not be expected to defend the same or his

signatures thereon and could only state that he was an outsider and had not stood as a guarantor and which he did.

22. The Supreme Court also in *Neebha Kapoor* (supra) has held that the Court is entitled to examine the question of applicability of Order XXXVII of CPC at any stage and merely because a suit has been entertained as a summary suit, is no reason for the Court to even in the absence of a leave to defend application, decree the same.

23. As far as the filing by the respondent No.1 Bank of the Deed of Guarantee after the filing of the leave to defend application is concerned, the same cannot make the suit, which was till then was not maintainable under Order XXXVII of CPC, maintainable. Though the possibility of, in an appropriate case, at that stage reinitiating the procedure prescribed under Order XXXVII of CPC *de novo* but the present is not found to be a case deserving therefor.

24. Thus, the order of the learned Additional District Judge treating the suit maintainable under Order XXXVII and considering the leave to defend application of the appellant/defendant No.3 and dismissing the same, cannot be sustained; axiomatically, the judgment and decree in pursuance thereto cannot also be sustained and are set aside. The suit insofar as against the appellant/defendant No.3 is ordered to be treated as an ordinary suit and remanded to the Trial Court for decision in accordance with law.

25. The appeal therefore succeeds. The order dated 25th August, 2012 dismissing the application of the appellant/defendant No.3 for leave to

defend and the judgment and decree against the appellant/defendant No.3 in pursuance thereto are set aside and the suit filed by the respondent No.1 Bank insofar as against the appellant/defendant No.3 is remanded to the Trial Court for decision afresh in accordance with law. The appellant/defendant No.3 to within four weeks hereof file a written statement with advance copy to the counsel for the respondent No.1 Bank and the parties to appear before the Additional District Judge (Central-07), Delhi on 20th November, 2013 for further proceedings in the suit.

No costs. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 11, 2013

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