

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

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Date of decision: 17th December, 2013

+ RFA 318/2012 & CM No.12925/2012 (of appellant u/O 6 R-17 CPC).

CANARA BANK

..... Appellant

Through: Mr. K.K. Nirmal, Adv.

Versus

M/S PICK UP AUTO PRODUCTS

..... Respondent

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 4th February, 2012 of the Court of the Addl. District Judge (Central-07), Delhi of dismissal of Suit No.147/2010 filed by the appellant Bank for recovery of Rs.3,55,728/- from the respondent / defendant.

2. Notice of the appeal and of the application for condonation of 73 days delay in filing of the appeal and of the application for amendment of the plaint was issued. The said notice was returned back with the report of “no such company in existence at the address given”. Liberty was given to the appellant/plaintiff Bank to serve the respondent at a fresh address. Vide

order dated 30th July, 2013 the respondent/defendant was permitted to be served by publication. Such publication has been effected. None appeared for the respondent/defendant before the Registrar (Appellate) on 27th September, 2013 and before this Bench on 25th November, 2013 when the respondent/defendant was proceeded against *ex parte*, the delay in filing the appeal condoned, the appeal admitted for hearing and the counsel for the appellant/plaintiff Bank was heard and the judgment reserved and the Trial Court record was requisitioned for perusal before pronouncement. The Trial Court record has been received and perused.

3. The appellant/plaintiff Bank instituted the suit from which this appeal arises, pleading:-

- (a) that the respondent/defendant is a proprietary concern of Shri H.L. Virmani;
- (b) that the respondent/defendant on 19th September, 2002 opened a current account with the Arya Samaj Road, Karol Bagh Branch of the appellant/plaintiff Bank with a Temporary Over Draft (TOD) facility;

- (c) that in the routine process the appellant/plaintiff Bank debited two cheques for Rs.1,04,000/- and Rs.2,17,471/- to the account of the respondent/defendant by allowing TOD on 4th February, 2010;
- (d) that on account of these debits the current account of the respondent/defendant was permitted to be over drawn for a sum of Rs.3,21,471/- as on 31st July, 2010, with interest was showing TOD of Rs.3,55,728/-; and,
- (e) the respondent/defendant did not make re-payment of the TOD inspite of repeated requests and reminders.

Accordingly, on 10th August, 2010 the suit for recovery of Rs.3,55,728/- with *pendente lite* and future interest @ 24 + 2% at monthly rest from 1st August, 2010 till realization was filed.

4. The respondent/defendant no.1 failed to appear before the Trial Court also inspite of service by publication and was proceeded against *ex parte*. The appellant/plaintiff Bank led *ex parte* evidence by filing the affidavit by way of examination-in-chief of its Assistant Manager.

5. The learned Addl. District Judge has vide the impugned judgment dismissed the suit, finding/observing/holding:-

- (i) that though the appellant/plaintiff Bank in the plaint had pleaded the respondent/defendant to have opened the account on 19th September, 2002 but the account opening forms proved in evidence were dated 28th March, 1986 and 29th March, 1986;
- (ii) that the appellant/plaintiff Bank in the plaint had not disclosed the date of grant of TOD facility;
- (iii) that in the legal notice issued preceding the suit it was stated that the respondent/defendant no.1 had on 4th February, 2010 approached the appellant/plaintiff Bank for grant of credit facility, without disclosing the nature of the credit facility;
- (iv) that the appellant/plaintiff Bank had failed to prove grant of TOD facility to the respondent/defendant;
- (v) that mere entries in the statement of account proved to show withdrawal of Rs.1,04,000/- and Rs.2,17,471/- are not sufficient

to automatically hold that the appellant/plaintiff Bank granted any such facility to the respondent/defendant; and,

(vi) that the appellant/plaintiff Bank had also failed to prove its claim for interest @ 24% and 2% per annum with monthly rest.

6. The appellant/plaintiff Bank seeks to correct the date of the opening of the current account by the respondent/defendant from 19th September, 2002 to 28th March, 1986 and 29th March, 1986. The counsel for the appellant/plaintiff Bank further states that consequent to the amendment evidence would be required to be led and for which purpose the appeal be allowed and the suit be remanded to the Trial Court.

7. I have enquired from the counsel for the appellant/plaintiff Bank as to what purpose the entire exercise would serve as the respondent/defendant is not available at the address in the records of the appellant/plaintiff Bank and the appellant/plaintiff Bank is not aware of the whereabouts of the respondent/defendant and how the decree even if were to be ultimately passed in favour of the appellant/plaintiff Bank will be executed.

8. The counsel for the appellant/plaintiff Bank states that the appellant/plaintiff Bank being a scheduled bank, cannot on its own write off the debts without obtaining a decree therefor.

9. I have perused the affidavit by way of examination-in-chief of the witness of the appellant/plaintiff Bank. He has though deposed, as in the plaint, of the respondent/defendant having opened account on 19th September, 2002 but proved the account opening forms dated 28th March, 1986 and 29th March, 1986. He has further deposed of the respondent/defendant having requested for a TOD facility and of grant of TOD as pleaded in the plaint and proved the statement of account in proof thereof. Needless to state that the respondent/defendant being *ex parte*, the said deposition remained unchallenged.

10. I see no reason to doubt the version of the appellant/plaintiff Bank. From the account opening form bearing the signatures of the proprietor of the respondent/defendant, the factum of the respondent/defendant being a account holder with the appellant/plaintiff Bank is proved. Similarly from the statement of account of the said account, the transactions on the basis whereof the claim is made also stand proved.

11. The learned Addl. District Judge, in my view has taken a hypertechnical view.

12. Though strictly speaking he may be right in law but it cannot be lost sight of that the monies of scheduled banks as the appellant/plaintiff Bank is, are public money and the loss if any to the appellant/plaintiff Bank is the loss of public monies. It is for this reason only that the Supreme Court in *United Bank of India Vs. Naresh Kumar* (1996) 6 SCC 660 had held that the suit for recovery of money filed by such banks cannot be dismissed on the technical plea of the authority of the signatory of the plaint having not been proved.

13. There is absolutely nothing to suggest that the appellant/plaintiff Bank would file a false case against the respondent/defendant or that its officers pursuing the said claim have anything to gain therefrom.

14. I do not therefore feel the need to first allow the application for amendment and thereafter take fresh evidence and all of which would be a burden on the time of this Court or of the Trial Court and which can be well spent on other deserving contentious cases and deem it appropriate to allow the appeal and decree the suit.

15. The impugned judgment and decree is accordingly set aside. The suit of the appellant/plaintiff Bank against the respondent/defendant is decreed as prayed. The appellant / plaintiff shall also be entitled to costs of the suit and this appeal.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

DECEMBER 17, 2013

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