

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

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Date of decision: 16th December, 2013

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RFA No.581/2013

SUNIL GUPTA

..... Appellant

Through: Mr. Amrit Pal Singh, Adv.

Versus

HARISH KARRA (KARTA HUF)

..... Respondent

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The appeal impugns the judgment and decree dated 03.08.2013 (of the Court of Additional District Judge (ADJ) (Central-07), Tis Hazari Courts, Delhi in civil suit No.378/2012 filed by the respondent) of recovery of Rs.7,50,000/- along with interest at 9% per annum from the date of institution of the suit till realization and costs against the appellant consequent to the dismissal of the application under Order 37 Rule 3(5) of the Code of Civil Procedure (CPC), 1908 filed by the appellant for leave to defend.

2. Though this is a First Appeal and comes up before this Court for the first time today but considering the nature of the controversy and since the

appellant along with the memorandum of appeal has filed the copies of the relevant Trial Court record, need is not felt to requisition the Trial Court record and further not finding any merit in the appeal, the counsel for the appellant has been given ample opportunity to satisfy this Court.

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

- (a) that he is the Karta of Harish Karra and family (HUF);
- (b) that the appellant / defendant was known to him for the last many years and having friendly relations;
- (c) that the appellant / defendant carries on business as sole proprietor in the name and style of Shyam Textile Impex;
- (d) that the appellant / defendant requested the respondent / plaintiff for a personal and friendly loan for a brief period;
- (e) that the respondent / plaintiff having regard to the business relation agreed to the request of the appellant / defendant and vide cheque No.000001 drawn on Kotak Mahindra Bank

advanced a sum of Rs.7,50,000/- to the appellant / defendant as personal / friendly loan;

- (f) that the aforesaid cheque was duly encashed on 24.06.2010 in the bank account of the appellant / defendant in the name of M/s Shyam Textile Impex;
- (g) that the appellant / defendant had promised to repay the said loan by the end of the financial year 2010-11 i.e. after March, 2011;
- (h) that towards discharge of the said debt / liability the appellant / defendant issued cheque bearing No.765193 dated 01.04.2011 for Rs.7,50,000/- in favour of the respondent / plaintiff;
- (i) however the aforesaid cheque upon being presented was returned dishonoured for the reason of 'Insufficiency of Funds' in the bank account of the appellant / defendant on which the said cheque was drawn;

- (j) that the appellant / defendant assured that payment under the aforesaid cheque would be received when presented after two months;
- (k) however the said cheque upon re-presentment was again returned dishonoured for the same reason;
- (l) that no payment was made despite legal notice; and,
- (m) that a complaint of offence under Section 138 of the Negotiable Instrument Act, 1881 had also been filed.

4. Summons for appearance and thereafter summons for judgment were issued to the appellant / defendant.

5. The appellant / defendant sought leave to defend on the following grounds:

- (i) that the suit had been filed on false, frivolous and vexatious facts;
- (ii) denying that the appellant / defendant had borrowed any money from the respondent / plaintiff;

- (iii) that the cheque issued by the appellant / defendant which was given as security to the brother of the respondent / plaintiff (whose name was not given) with whom the appellant / defendant was having business relation, had been misused by the respondent / plaintiff;
- (iv) that the respondent / plaintiff's family is dealing in yarns and the appellant / defendant was a commission agent "between the brother's firm of plaintiff";
- (v) that the present suit had been filed as a counter blast to the demand made by the appellant / defendant on the brother of the respondent / plaintiff 'to repay the balance commission and some F forms, which have to be provided / given for interstate goods transactions';
- (vi) that the appellant / defendant had no relations whatsoever with the respondent / plaintiff and had not even seen the respondent / plaintiff till in the proceedings under Section 138 of the NI Act;

(vii) that the appellant / defendant had issued a reply to the legal notice preceding the suit and of which no mention has been made in the plaint; and,

(viii) that if any loan had been given by the respondent / plaintiff to the appellant / defendant, then some documents like receipt, promissory note etc. would have been executed.

6. Needless to state that the respondent / plaintiff filed a reply denying the allegations in the application for leave to defend and highlighting that the appellant / defendant in the leave to defend application had not disputed receipt of Rs.7,50,000/- vide cheque as pleaded in the plaint from the respondent / plaintiff.

7. The appellant / defendant has not filed copy of any rejoinder filed to the reply aforesaid and it is thus presumed that no rejoinder was filed, though copies of written arguments filed by both the parties have been filed.

8. The learned ADJ has dismissed the application for leave to defend, finding / observing / holding:

- (A) that the appellant / defendant nowhere in the leave to defend application had denied issuing the cheque for Rs.7,50,000/- on the basis whereof the suit was filed;
- (B) that the appellant / defendant in the reply to the legal notice preceding the suit had stated that the said cheque was given as security to the respondent / plaintiff as the appellant / defendant was having business relationship with the respondent / plaintiff and that it was mutually agreed that the respondent / plaintiff would return the said cheque when the appellant / defendant asked for the same – however the averments in the application for leave to defend were totally inconsistent with the stand taken in the reply to the legal notice – as such adverse inference was drawn against the appellant / defendant;
- (C) that the appellant / defendant had not mentioned the quantum of balance commission and number of F forms asked by him from the brother of the respondent / plaintiff and had made only vague averments to that effect;

- (D) that the appellant / defendant had not denied encashment in his account of the cheque for Rs.7,50,000/- issued by the respondent / plaintiff – this showed that the appellant / defendant had received Rs.7,50,000/- from the respondent / plaintiff;
- (E) that the appellant / defendant had failed to explain that if he had no business relationship with the respondent / plaintiff and had not taken any loan from the respondent / plaintiff then on what account he accepted Rs.7,50,000/- from the respondent / plaintiff;
- (F) the only inference was that the said amount of Rs.7,50,000/- had been received by the appellant / defendant from the respondent / plaintiff as loan;
- (G) that the presumption was that the appellant / defendant had issued his cheque for Rs.7,50,000/- towards discharge of his liability;

- (H) that though the appellant / defendant in his written arguments had also contended that the respondent / plaintiff had filled up the date in the said cheque later on and that the appellant / defendant had handed over the said cheque on 23.06.2010 i.e. prior to 24.06.2010 when the cheque of the respondent / plaintiff was encashed in the bank account of the appellant / defendant but neither was any such stand taken in the reply to the legal notice nor in the application for leave to defend; and,
- (I) that the statement of respondent / plaintiff in Section 138 proceedings on which also reliance was placed in the written arguments was also of no consequence.

It was accordingly held that no triable issue arises.

9. The counsel for the appellant / defendant has argued that once the appellant / defendant in the leave to defend application had denied taking any loan from the respondent / plaintiff and had taken a plea of the cheque on which the suit was based though having been issued by him but by way of security to the brother of the respondent / plaintiff with whom the appellant / defendant had business dealings, the same was sufficient for

grant of leave to defend. It is argued that unless the appellant / defendant has an opportunity to cross examine the respondent / plaintiff and to lead his own evidence, the appellant / defendant cannot prove his case. Reliance in this regard is placed on paras No.15 and 16 of ***Wada Arun Asbestos (P) Ltd. Vs. Gujarat Water Supply & Sewerage Board*** AIR 2009 SC 1027.

10. It is further argued that had the suit been filed as a ordinary suit and not a summary suit, issues would have been struck on the pleadings aforesaid and the suit would not have been decreed immediately. It is contended that on the same parity, even though the suit has been filed under Order 37 of the CPC, the appellant / defendant has to be given an opportunity to contest the same.

11. I am unable to agree. The argument looses the distinction between a ordinary suit and a summary suit. The legislature in its wisdom has deemed it appropriate to provide a summary procedure for trial of certain category of suits, where the defendant, before getting a right of trial as in an ordinary suit, is required to satisfy the Court that he has a substantial defence to raise and that the defence raised by him is not frivolous and vexatious.

12. I have enquired from the counsel for the appellant / defendant, whether not the non traverse in the application for leave to defend and thereby admission of the appellant / defendant of receipt of Rs.7,50,000/- vide cheque from the respondent / plaintiff is not enough to hold that the case set up by the appellant / defendant of having given the cheque on which the suit is based to the brother of the respondent / plaintiff and not to the respondent / plaintiff is false, vexatious and frivolous and how it constitutes a substantive defence.

13. The counsel for the appellant / defendant states that the said cheque by which the respondent / plaintiff claims to have given the loan, was also received by the appellant / defendant from the brother of the respondent / plaintiff towards commission.

14. I have enquired from the counsel for the appellant / defendant whether it was so stated either in the reply to the legal notice preceding the suit or in the leave to defend application.

15. The counsel fairly admits that it is not so stated but contends that this plea is implicit in the plea of the cheque on which the suit is based having

been issued by the appellant / defendant to the brother of the respondent / plaintiff and not to respondent / plaintiff.

16. I fail to see how it could be implicit, without the appellant / defendant stating so.

17. The counsel for the appellant / defendant then blames the Advocate in the Trial Court for not stating so.

18. I have however enquired from the counsel for the appellant / defendant whether the appellant / defendant has pleaded so in the memorandum of appeal.

19. The counsel is unable to show any such plea having been taken in the memorandum of appeal either.

20. The counsel for the appellant / defendant has also argued that since the respondent / plaintiff in the plaint claimed to be the Karta of the HUF and in which his brother also would be a member, this Court should presume that the cheque by which the respondent / plaintiff claims to have given the loan must have been issued by the HUF for the liabilities of the brother of the respondent / plaintiff.

21. I do not find any merit in the said contention either.

22. Firstly, there is no presumption that the brother of the respondent / plaintiff would be a member of the HUF of which the respondent / plaintiff claims to be the Karta. Moreover, the plea of the appellant / defendant in the application for leave to defend is not of having any business dealings with the said HUF but of having business dealings with the respondent / plaintiff's 'brother's firm'. Neither was the brother named nor was the brother's firm named. The counsel for the appellant / defendant now states that the name of the brother of the respondent / plaintiff is Vijay Kumar and the name of the firm is M/s Vaishali Traders.

23. I have enquired from the counsel for the appellant / defendant that if the dealings of the appellant / defendant were with M/s Vaishali Traders, why would the appellant / defendant in discharge of the liabilities of M/s Vaishali Traders accept a cheque issued by the respondent / plaintiff or by the HUF of the respondent / plaintiff; more so in the absence of any plea even to the said effect.

24. No answer has been forthcoming

25. The learned ADJ is further right in holding that no particulars or account even of the dealings if any of the appellant / defendant with the firm of the brother of the respondent / plaintiff have been given. Rather there is nothing to show that a sum of Rs.7,50,000/- was so receivable by the appellant / defendant from the firm of the brother of the respondent / plaintiff on the day when the cheque for Rs.7,50,000/- from the bank account of the respondent / plaintiff in favour of the appellant / defendant was issued or that the said amount of Rs.7,50,000/-, in the books of account of the appellant / defendant has been adjusted towards dues from the said firm of M/s Vaishali Traders. Further there is also no explanation as to give security for what was the cheque on which the suit is based was given.

26. The counsel for the appellant / defendant faced therewith states that the stage of filing documents had not come as yet and the question of the appellant / defendant leading evidence would arise only after leave to defend is granted and issues framed. The counsel for the appellant contends that at the stage of grant of leave to defend only, the pleas have to be seen and not the documents.

27. I am again unable to agree. As far as the reliance placed on the judgment in *Wada Arun Asbestos (P) Ltd.* supra is concerned, in that case the Court had found the “facts given in the affidavit (to be) clear and precise” and it was observed that “the defence could hardly have been clearer”. The position is not so here. The appellant / defendant as aforesaid has not given any particulars of the transactions with the firm of the brother of the respondent / plaintiff and has taken inconsistent pleas. If inspite of such vague / inconsistent and faltering pleas it were to be held that an opportunity has to be given, the same would sound the death knell of Order 37 of the CPC. Rather the Supreme Court in the judgment cited has itself observed that the test is to see whether the defence raises a real issue and not a sham one. Here the defence raised is found to be sham rather than real. Even at this stage, in the memorandum of appeal no particulars whatsoever have been given.

28. Else, I agree with the learned ADJ that the plea of appellant / defendant being a stranger to the respondent / plaintiff is inconsistent with the stand taken in the reply to the legal notice preceding the suit.

29. No merit is thus found in the appeal which is dismissed. No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

DECEMBER 16, 2013

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