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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RSA 91/2017**

UDAY NARAYAN GUPTA Appellant

Through: Mr. Abdesb Chaudhary, Ms. Shakshi
Arora and Mr. D.C. Atri, Advs.

versus

ACCORD FINANCIAL SERVICES & ORS Respondents

Through: Mr. Arvind Sah and Mr. Pawan
Agrawal, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **11.09.2018**

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 1st December, 2016 in RCA No.24/14 of the Court of District/Sessions Judge (South-East)] in First Appeal under Section 96 of the CPC preferred by the appellant/plaintiff as well as in the cross-objections therein filed by the respondents/defendants, against the judgment and decree [dated 28th February, 2014 in CS No.77/13 of the Court of Civil Judge (South)] in a suit filed by the appellant/plaintiff against the respondents/defendants for recovery of Rs.1,97,200/- with future interest.

2. This appeal came up first before this Court on 20th March, 2017 when though notice thereof was ordered to be issued but without recording any satisfaction that the appeal entails a substantial question of law and without framing a substantial question of law, as required to be done as per the recent dicta of the Supreme Court in *Surat Singh Vs. Siri Bhagwan* (2018) 4 SCC 562 and *Vijay Arjun Bhagat V. Nana Laxman Tapkire* 2018 SCC

OnLine SC 518, and the Trial Court record requisitioned.

3. The appeal has thereafter been adjourned from time to time.

4. Since the substantial question of law has not been framed as yet, the counsels have been heard for the purpose of the same and the Suit Court record as well as First Appellate Court record requisitioned in this Court perused.

5. What is not in dispute is, (i) the appellant/plaintiff was in employment of the respondent/defendant no.1, of which the respondents/defendants no.2&3 are partners; (ii) the appellant/plaintiff ceased to be in the employment of the respondent/defendant no.1 on 31st December, 2009; (iii) the appellant/plaintiff, on 20th January, 2012 instituted the suit, from which this appeal arises claiming recovery of Rs.1,45,000/- towards the balance out of the loan given by the appellant/plaintiff to the respondent/defendant no.1 of Rs.3,60,000/- along with interest thereon till the date of institution of the suit.

6. The appellant/plaintiff, in the plaint itself pleaded that the payment of Rs.1,22,000/- received by the appellant/plaintiff from the respondent/defendant no.1 was not in repayment of loan but towards incentive. The respondents/defendants contested the suit pleading, that the entire loan amount of Rs.3,60,000/- had been repaid by various cheques. With respect to the payment of Rs.1,22,000/-, it was denied that the same was towards any incentive due from the respondent/defendant no.1 to the appellant/plaintiff.

7. However notwithstanding the controversy aforesaid, omnibus issues

as under were framed in the suit on 6th February, 2013:-

- “1. Whether the plaintiff is entitled to a decree of Rs.1,97,200/- as prayed in clause (i) of the prayer clause? OPP*
- 2. Whether the plaintiff is entitled to interest? If so, at what rate and for what period? OPP*
- 3. Relief.”*

8. The Suit Court held that the payment of Rs.1,22,000/- was in repayment of loan. The reasons given therefor were that, (a) as per the terms and conditions of appointment of the appellant/plaintiff, the appellant/plaintiff was not entitled to any amount towards incentive; (b) the said payment of Rs.1,22,000/- had been made by the respondent/defendant no.1 to the appellant/plaintiff on 26th October, 2009 and the appellant/plaintiff in his communication dated 4th February, 2010 to the respondent/defendant no.1 had stated that though the respondents/defendants had also promised to give incentive to the appellant/plaintiff but till then had not paid any incentive. It was thus reasoned that the stand taken in the plaint, of the amount of Rs.1,22,000/- being towards incentive, was false.

9. The Suit Court however found that after taking into account all the payments claimed by the respondent/defendant no.1 to have been made in repayment of loan, a sum of Rs.50,000/- still remained outstanding towards the said loan. Accordingly, a decree in favour of the appellant/plaintiff and against the respondents/defendants, for recovery of Rs.50,000/- with interest was passed.

10. The appellant/plaintiff preferred First Appeal as aforesaid and the

respondents/defendants filed cross-objections therein.

11. The First Appellate Court has upheld the finding of the Suit Court with respect to the payment of Rs.1,22,000/- and has otherwise on going through the accounts, held that no monies were outstanding from the respondent/defendant no.1 to the appellant/plaintiff and rather the respondent/defendant no.1 had paid an amount of Rs.15,000/- in excess to the appellant/plaintiff. Accordingly, the appeal of the appellant/plaintiff was dismissed and the cross-objections of the respondents/defendants were allowed and the decree for recovery of Rs.50,000/- in favour of the appellant/plaintiff was set aside.

12. I have in the scenario aforesaid enquired from the counsel for the appellant/plaintiff, whether not the disputes are factual, relating to accounts, and what is the substantial question of law which arises.

13. The counsel for the appellant/plaintiff has drawn attention to page 105 of the paper book being a copy of the document proved as Ex. 'X', copy of which when produced by the appellant/plaintiff was denied by the respondents/defendants. The counsel for the appellant/plaintiff states that the said document was submitted by the respondent/defendant no.1 to the Income Tax Authorities and was got summoned by the appellant/plaintiff from the Income Tax Authorities.

14. The aforesaid document Ex. 'X' is a computerised statement of account titled 'Full & Final Settlement', of December, 2009 of the respondent/defendant no.1 relating to the appellant/plaintiff and giving particulars of employment of the appellant/plaintiff. The said statement,

under the column 'Earning', shows a sum of Rs.68,933/- and under the column 'Deduction', shows a sum of Rs.29,583 and shows the amount of Rs.39,350/- as net payable by the respondent/defendant no.1 to the appellant/plaintiff. The subsequent column in the said document is titled 'Income Tax Works Sheet for the M/o December, 2009' and under the column 'Taxable Income', besides showing the basic salary, house rent allowance and special allowance, contains an entry titled 'Other Earning' of Rs.1,22,000/- aforesaid.

15. The counsel for the appellant/plaintiff, on enquiry states that the amount of Rs.39,350/- was paid by the respondent/defendant no.1 to the appellant/plaintiff vide cheque dated 15th February, 2010.

16. The contention of the counsel for the appellant/plaintiff is that the substantial question of law which arises for consideration in the present appeal is "whether the respondent/defendant no.1, after showing payment of Rs.1,22,000/- to the appellant/plaintiff towards 'other earning', can be heard to say that the said payment was in repayment of loan".

17. Per contra, the counsel for the respondents/defendants has contended that the payment of Rs.1,22,000/- was wrongly shown in the document aforesaid as 'other earning', when it was towards repayment of loan and the tax deducted at source thereon was shown as refundable by the Income Tax Department. Attention in this regard is drawn to pages 531 and 533 of the suit record. However the said document is not found to be proved and has not been admitted by the appellant/plaintiff. Moreover the document is a photocopy and no attempt to obtain even the certified copy thereof from the

Income Tax Office has been made.

18. The counsel for the respondents/defendants has then drawn attention to pages 467 and 469 of the Suit Court record, where the same document has been proved as Ex.PW1/3. In fact the said pages show it to be admitted as a document. There is however nothing to show that the refundable tax is on account of tax deducted on the amount of Rs.1,22,000/-. In fact Ex. 'X' does not show any tax deductible under Chapter VI A of the Income Tax Act on the said amount of Rs.1,22,000/-. The total tax deducted shown of Rs.21,600/- is mentioned against the basic of Rs.1,80,000/- only.

19. I am unable to find any substantial question of law arising qua the interpretation of the aforesaid documents and it cannot be said that the consistent view taken by the two Courts with respect to the said payment of Rs.1,22,000/- being towards repayment of loan and not towards any incentive to which the appellant/plaintiff claimed to be entitled to, are not such which no reasonable person could have taken, and thus perverse.

20. In fact I have enquired from the counsel for the appellant/plaintiff, the date when the loan was given by the appellant/plaintiff to the respondent/defendant no.1.

21. The counsel for the appellant/plaintiff though contends that the loan was admitted but states that the loan was given from time to time.

22. I have next enquired from the counsel for the appellant/plaintiff, what is the substantial question of law if any with respect to the balance amount which was decreed in favour of the appellant/plaintiff by the Suit Court and

which decree was set aside by the First Appellate Court.

23. The counsel for the appellant/plaintiff draws attention to para 19 of the judgment of the First Appellate Court where the First Appellate Court has tabulated the repayment made by the respondent/defendant no.1 to the appellant/plaintiff and which includes payment of 30th April, 2007 of Rs.30,000/-. The counsel for the appellant/plaintiff has next drawn attention to the cross-examination by the counsel for the appellant/plaintiff on 16th January, 2014 of the respondent/defendant no.2 Pawan Kumar Aggarwal where he has stated:-

“It is correct that Email Ex.DW1/2 does not mention the payment of Rs.20,000/-, Rs.18,000/- and Rs.30,000/- and Rs.30,000/- made to the plaintiff. It is correct that two cheques of Rs.30,000/- each dated 30.04.2007 and 03.08.2007 were never given to the plaintiff.”

24. It is contended that the judgment of the First Appellate Court setting aside the decree for recovery of Rs.50,000/- in favour of the appellant/plaintiff is perverse, being contrary to the evidence. On enquiry as to in what context the suggestion that the cheques dated 30th April, 2007 and 3rd August, 2007 were not given by the respondent/defendant no.1 to the appellant/plaintiff, was put in cross-examination, attention is drawn to Ex.DW1/2 being a communication dated 14th April, 2010 of the respondent/defendant no.2 Pawan Kumar Aggarwal to the appellant/plaintiff and in which the said payments are mentioned. The counsel for the respondents/defendants admits that it has been the stand of the respondent/defendant no.1 that the cheques dated 30th April, 2007 and 3rd

August, 2007 for Rs.30,000/- each were not given. It is however stated that the First Appellate Court *de hors* the same, has held excess payment to have been made. Attention in this regard is drawn to para 26 of the judgment of the First Appellate Court.

25. The counsel for the appellant/plaintiff, during cross examination of plaintiff had also drawn attention to Ex. DW1/1 being the communication dated 23rd March, 2010 of the appellant/plaintiff to the respondents/defendants wherein the appellant/plaintiff claimed to have given an amount of Rs.2,35,000/- only during his service with the respondent/defendant no.1 as loan and demanded repayment thereof.

26. I have enquired from the counsel for the appellant/plaintiff, that once the appellant/plaintiff on 23rd March, 2010 had claimed a loan amount to be Rs.2,35,000/-, how did the appellant/plaintiff in the suit claim the loan to be in the sum of Rs.3,60,000/-. Significantly, in the communication dated 23rd March, 2010 the amount of Rs.2,15,000/- which in the plaint was claimed to have been received in refund of the loan, was not mentioned.

27. The counsel for the appellant/plaintiff, with reference to para 26 of the judgment of the First Appellate Court, states that the same does not deal with satisfaction qua the entire loan amount having been received. With respect to Ex. DW1/1, it is stated that Rs.2,35,000/- was the balance due then.

28. However, the communication dated 23rd March, 2010 does not read so and categorically mentions advancement of loan of Rs.2,35,000/- as well as the cheques of which the loan was advanced. The said communication

cannot be read as conveying that Rs.2,35,000/- was outstanding towards loan. Moreover, it is admitted that after 23rd March, 2010 no payment was received by the appellant/plaintiff from the respondent/defendant. There is no explanation as to how the outstanding amount, by the date of filing of the suit, stood reduced to Rs.1,45,000/-.

29. All that can be observed in the aforesaid state of affairs is that the view taken by the Courts below is plausible, even on the evidence on record and it is not within the scope of Second Appeal to enter into disputes of fact of which the First Appellate Court is the final adjudicatory.

30. It has been held in *Damodar Lal Vs. Sohan Devi* (2016) 3 SCC 78 that no amount of error in the order of the First Appellate Court permits the Second Appellate Court to, in the garb of perversity, enter into an adjudication of facts.

31. Thus, this Second Appeal does not raise any substantial question of law and is dismissed with costs of Rs.10,000/-

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 11, 2018

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