

IN THE HIGH COURT OF TRIPURA
AGARTALA

R.S.A. No. 44 of 2012

Smt. Manju Sengupta,
wife of late Phani Bhushan Sengupta,
resident of Sonamura Town,
P.S. Sonamura, District – Sepahijala

..... **Appellant**

- V e r s u s -

- 1. Sri Sukrit Bhowmik,**
son of late Sital Chandra Bhowmik,
resident of Banamalipur, Old Thana
Road, P.O. Agartala – 799001, P.S.
East Agartala, District – West Tripura
- 2. Dr. Biswanath Majumder,**
son of late Harendra Majumder,
resident of village & P.O. Durjoynagar,
P.S. Airport, District – West Tripura

..... **Respondents**

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellant : Mr. K.N. Bhattacharji, Sr. Advocate
Mr. S. Acharjee, Advocate.

For the respondents : Mr. D.C. Saha, Advocate

Date of hearing : **19.03.2015**
& delivery of Judgment & order

Whether fit for reporting :

YES	NO
	√

JUDGMENT & ORDER (ORAL)

Heard Mr. K.N. Bhattacharji, learned senior counsel
assisted by Mr. S. Acharji, learned counsel appearing for the
appellant as well as Mr. D.C. Saha, learned counsel appearing for
the respondents.

[2] This is an appeal under Section 100 of the C.P.C. directed against the judgment and decree dated 07.05.2012 delivered in Money Appeal No. 01 of 2011 by the Addl. District Judge, West Tripura, Sonamura which has reversed the judgment and decree dated 05.08.2011 delivered in Money Suit No.01 of 2009 by the Civil Judge, Jr. Division, Sonamura, West Tripura.

[3] By the order dated 21.11.2011 while admitting this appeal, the following substantial questions of law have been formulated:

(i) Whether judgment and decree passed by the First Appellate Court (the court of the Additional District Judge, Sonamura, West Tripura) in Money Appeal No.01 of 2011 suffers from perversity?

(ii) Any other substantial question of law may be formulated at the time of hearing if necessary, on hearing learned counsel of both side.

[4] This Court would like to dispel a little streak of quandary because the substantial question No.2 as formulated is not at all substantial question. It is leave to the appellant to raise some other substantial questions. Mr. Bhattacharji, learned senior counsel has however submitted that he would confine his submissions on the solitary substantial questions of law. The finding returned by the first appellate court, according to Mr. Bhattacharji, learned senior counsel, is entirely on misreading of the oral testimonies of the witnesses produced by the plaintiff. On particularising on this aspect of the matter, which occupies the core of the substantial question of law, he has continued to consolidate his submissions.

[5] The plaintiff is the full blood sister of Bijali Gupta (Bhowmik), the mother of the defendant No.1. She filed the suit for realising a sum of Rs.1,00,000 (Rupees one lakh) which according to the pleadings was lent to Bijali Gupta (Bhowmik), since deceased in presence of the witnesses as Bijali Gupta (Bhowmik) required that sum for completing the construction after death of her husband. The plaintiff has stated that she had some money from the retiral benefits of her husband. Bijali Gupta (Bhowmik) though requested for a sum of Rs.2,00,000/- (Rupees two lakh) but the plaintiff lent her a sum of Rs.1,00,000/-. It was agreed that she would return the money whenever the plaintiff would demand. The plaintiff has further submitted that she promised that there would be no difficulty in returning the said money. It has been pleaded that such agreement was not reduced in writing for proximity. It has been further asserted by the plaintiff that for the trust she was having she had also deposited gold ornaments in her custody. It has been also asserted that the plaintiff with her son and 'another person' came to Agartala from Sonamura on 18.03.1998 and gave Rs.1,00,000/- in cash to the defendant No.1. The defendant No.1 at the time of institution of the suit had been working as the Engineer in the state of Maharashtra. In the month of November, 2002, the defendant No.1 informed the plaintiff and her husband that his mother was seriously ill. Immediately, they came to Agartala to see her. She asked her son, the defendant No.1 to repay the said sum of Rs.1,00,000/- and to return the gold ornaments that she had deposited. But the plaintiff did not insist for any deadline. Soon after

that meeting, the mother of the defendant No.1 expired. On 09.03.2005, the defendant No.1 paid a sum of Rs.10,000/- to the plaintiff and promised to return the balance amount and to return the gold ornaments. On 01.03.2009, the plaintiff sent a notice through her lawyer for returning the money and the gold ornaments. On 28.09.2008, the plaintiff contacted with the defendants over phone and demanded for repayment of the money and for returning the gold ornaments. As the defendant No.1 assured to return the gold ornament, no claim has been made in the suit in respect of the gold ornaments. According to the plaintiff, the cause of action for the suit arose on and from 28.08.2007, 01.03.2009 and on 28.09.2008 when the demand for the return of money was placed. It is admitted fact that no written statement has been filed by the respondents and as such, there is no denial to the oral agreement. However, for the defendant No.1, the plaintiff and her witnesses have been cross-examined.

[6] Mr. Bhattacharji, learned senior counsel appearing for the appellant has further submitted that even though the defendant No.1 at the first appellate stage has raised the issue of maintainability of the suit on the ground of limitation but that issue was not pressed in the hearing and as such, there is no reflection in this regard, in the judgment. Though Mr. D.C. Saha, learned counsel appearing for the respondents sought to raise this issue but from the record as it appears that such issue was not pressed either in the appellate court or in the trial court, that issue of limitation being a mixed-question of fact and law, unless a serious infraction of law is

demonstrated, this Court would in the ordinary course not allow one of the parties to raise such issue. Apart that, if the oral agreement is proved, then it is to be deemed that the suit has been filed within the period of limitation as according to the pleadings, the agreement between the mother of the defendant No.1 and the plaintiff was that the money would be refunded as and when that would be so demanded. The demand was made on 28.08.2007, 01.03.2009 and lastly on 28.09.2008. Mr. Bhattacharji, learned senior counsel has submitted that it has been established by the plaintiff by proving the pleading that she lent a sum of Rs.1,00,000/- to the mother of the defendant No.1 and the defendant No.1 had been directed by her to pay the said amount to the plaintiff. At that time, she was in her death-bed. The observation made contrary thereto by the first appellate court has been seriously criticised by Mr. Bhattacharji, learned senior counsel. The first appellate court has observed as under:

In the present case, the respondent has not put forward the details of the alleged oral agreement and has not put forward the exact date, time, place and even she did not disclose the name of the third person in the plaint as well as in her examination-in-chief in whose presence the alleged agreement took place. It is settled principal that very obvious purpose the name of person was not mentioned in her plaint as well as in her examination-in-chief so that tutored/stock witness may be procured subsequently to give evidence on behalf of such party like parrot fashion. But it is happened in this case. As per para 5 of examination-in-chief, the respondent (plaintiff), respondent came to Agartala with her son and another and gave Rs.1 Lac in cash to the mother of the appellant No.1 in presence of some persons. No where the name of another person was disclosed who accompanied the respondent and her son at the relevant time of alleged transaction. Even it is also no where disclosed

the name of some persons who remained present at the time of transaction. The respondent examined PW.3 who represents the another person. Here, as per plaint and deposition of PW.1, the existence of PW.3 as another person at the time of alleged transaction is purely manufactured afterthought. PW.3 is a stranger and has got no leg to stand upon as another person. Since his specific name was not disclosed by PW.1 in her plaint as well as in her examination-in-chief, undoubtedly, the statement of such stranger witness carries no importance.

Mr. Bhattacharji, learned senior counsel has urged this Court not to treat PW-3 as a stock witness as it is entirely unintelligible how the first appellate court has come to such finding. The ordinary meaning of stock witness is a person who habitually appears in the court proceedings for placing tailored testimony on gratification or making out a living.

For appreciating such finding it would be apposite to revisit the pleading in the plaint. The plaintiff has stated in the plaint as under:

The matter was further discussed with the mother of the defendant No.1 and it was agreed between the plaintiff and the mother of the defendant No.1 that the plaintiff would go to the house of the defendant No.1 at Agartala and give Rs.1,00,000/- and five bhories of gold ornaments to the defendant No.1. Accordingly, the plaintiff with her son and another person came to Agartala on 18.03.1998 and gave Rs.1,00,000/- in cash to the mother of the defendant No.1 in presence of some persons and the money was received by the mother of the defendant No.1 who handed over the same to her son, defendant No.1 for counting and her son after counting found the amount to be Rs.1,00,000/- and received the same. The mother of the defendant No.1 also received 5 bhories of gold ornaments in an ornament box and handed it over to her son who received both the money and the gold ornaments. The defendant No.1 and his mother again renewed their promise that they would return the said amount of money and the gold

ornaments as and when the plaintiff would demand.

[7] The plaintiff has also pleaded in the plaint that:

The defendant No.2 told that in case the defendant No.1 fails to pay the money he would pay the money and if the defendant No.1 did not return the gold ornaments he would pay the value of the gold ornaments to the plaintiff. The defendants made this promise in presence of several persons including the plaintiff.

[8] Mr. D.C. Saha, learned counsel appearing for the respondents has emphatically submitted that there is no adduction of the legal evidence by the plaintiff to prove purported oral agreement of loan. Hence, the impugned judgment and decree suffered from no infirmity.

[9] The first appellate court did not consider that these pleadings were not traversed and even the defendants did not adduce any evidence contrary to what has been pleaded by the plaintiff in the plaint. There cannot be any dispute that what has been pleaded in the plaint has been proved by the oral testimonies of PWs- 1 & 2. Even if, the testimony of PW-3 is not given any weight, no reasonable person would come to a conclusion that the plaintiff has failed to prove his case. The oral agreement with condition that whenever the plaintiff would demand to return the lent out amount, the mother of the defendant No.1 shall refund the same has been proved by the plaintiff. It has also not been rebutted by the defendant No.1 or by the defendant No.2 that the promise to return the money by the defendant No.1 was made in presence of the witnesses, particularly PW-2. There is always some difficulty in

proving an oral agreement but unless the incident of entering into an oral agreement is contested, more so when such agreement is entered between the two full blood sisters, usually its existence has to be presumed favourably as the trust -element is kept in the consideration while entering into any agreement. Any agreement is ordinarily acted upon on that foundation. The defendants neither by filing the written statement nor by any other means have been able to prove anything in contrast, such as, there was no exchange of money as claimed by the plaintiff. According to the court, existence of the oral agreement has been adequately probabolised and as such, the trial court has rightly decreed the suit. The impugned judgment of the first appellate court reversing the judgment and decree of the trial court cannot be sustained and accordingly, the impugned judgment and decree is set aside and quashed.

As consequence thereof, the decree passed by the trial court is restored and affirmed.

In the result, this appeal stands allowed.

Prepare the decree accordingly.

Send down the LCRs thereafter.

JUDGE

Sujay