IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A. No. 5673 of 2014 (O&M)
Date of decision : 21.07.2015

Remal Dass Dudeja

...........Appellant

Vs

Avdesh Kumar Upadhaya

...........Respondent

Coram : Hon'ble Mr. Justice Naresh Kumar Sanghi

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present : Mr. Rohit Rana, Advocate
for the appellant.

NARESH KUMAR SANGHI, J. (oral)

CM No. 13472-C of 2014

The present application has been filed under Section 5 of the Limitation Act for condonation of delay of 56 days in filing the appeal.

After hearing the learned counsel for the applicant-appellant and going through the contents of the application which is duly supported by an affidavit the delay of 56 days in filing the appeal is condoned.

C.M. disposed of.

R.S.A. No. 5673 of 2014

Challenge in the present regular second appeal is to the judgment and decree dated 09.04.2014 passed by learned District Judge, Gurgaon, whereby the appeal filed by the appellant- plaintiff challenging the order dated 30.11.2012 passed by learned Addl. Civil Judge (Sr. Divn.), Gurgaon dismissing the suit filed by the appellant-plaintiff, was dismissed.

The learned counsel for the appellant submits that from the material available on record it was well proved that the defendant-respondent had borrowed ₹2,10,000/- (Rupees two lacs and ten thousand only) from the appellant against pronote and receipt and when he failed to repay the same then the appellant-plaintiff was constrained to file the suit before learned Addl. Civil Judge (Sr. Divn.), Gurgaon. Both the Courts below without appreciating the facts and the law on the subject have rejected the prayer of the appellant-plaintiff.

I have heard the counsel for the appellant and with his able assistance gone through the material available on record.

Brief facts leading to filing of the present regular second appeal are that the appellant-plaintiff had filed a suit for recovery of ₹2,10,000/- (Rupees two lacs and ten thousand only) on the basis of pronote and receipt (Ex. PW1/1 and PW1/A). As per the case set up by the appellant-plaintiff on 30.08.2004, the respondent-defendant had taken a friendly loan of ₹2,10,000/- (Rupees two lacs and ten thousand only) against the pronote (Ex. PW1/1) and receipt (Ex. PW1/A). It was assured by the respondent-defendant that he would repay the loan amount within two months but failed to do so. Despite the repeated requests of the appellant-plaintiff, the respondent-defendant did not adhere to the same. The appellant-plaintiff issued legal notice dated 26.07.2005 (Ex.PW1/2) by way of registered post but still the respondent-defendant did not pay the loan amount and hence the suit was filed before the learned trial Court.

On notice issued by the Court, the respondent-defendant appeared and filed the written statement taking the preliminary objections that the appellant-plaintiff had not filed the suit on the basis of true facts. In fact the material facts were concealed by the appellant-plaintiff. It was alleged that appellant-plaintiff was running a committee consisting of 15 members. At the request of the appellant-plaintiff, the respondent-defendant became member of the two committees and he had to pay ₹90,000/- (Rupees ninety thousand only). The respondent-defendant also became partner of half share with regard to payment of ₹90,000/-(Rupees ninety thousand only) with Rajiv Kumar Upadhaya . The respondent-defendant had paid all the instalments as per settlement. It was also alleged that the respondent-defendant had not obtained any amount from the committee. It was further averred in the written statement that appellant-plaintiff was a very clever person and had a mala fide intention. Pronote and the receipt were forged. It was also averred that the defendant-respondent had neither obtained the loan from the appellant-plaintiff nor executed the documents as alleged. He also prayed that the appellant-plaintiff be prosecuted for the offence punishable under Section 420 of the Indian Penal Code.

On the basis of the pleadings of the parties, the following issues were framed :-

> "*1. Whether plaintiff is entitled to a decree for recovery of ₹2,10,000/- alongwith interest at the rate of 2% per month from the date of filing of suit?OPP*
>
> *2. Whether the suit is not maintainable?OPR*
>
> *3. Whether the plaintiff has no locus standi to file the present suit?OPD*
>
> *4. Whether the plaintiff has no cause of action to file the present suit?OPD*
>
> *5. Relief.*"

In order to prove his case the appellant-plaintiff appeared as PW-1 and tendered his affidavit Ex. PA to be read in evidence. The facts mentioned in the plaint were reiterated in the affidavit. The appellant-plaintiff also examined Asha Rani as PW-2 and she proved the postal receipt Ex. PW-1/3 regarding the sending of the notice to the respondent-defendant. Ashok Malik, Advocate was examined as PW-3 who proved legal notice Ex. PW-1/2 and Ex. PW-1/4. Rakesh Kumar Dudeja was examined as PW4, who tendered his affidavit Ex. PW-4/A to be read in evidence but at the time of cross-examination the said witness was not produced.

To rebut the evidence led by the appellant-plaintiff, Avdesh Kumar respondent-defendant was examined as DW-1 who tendered his affidavit Ex. DW-1/A to be read in evidence. Satydev was examined as DW-2 who tendered his affidavit Ex. DW-2/A to be read in evidence. He deposed that Remal Dass appellant-plaintiff had to give money to Avdesh Kumar respondent-defendant pertaining to lottery and whenever Avdesh Kumar demanded money, Remal Dass would lodge the complaint with the police. Suresh Kumar was examined as DW-3 who tendered his affidavit Ex. DW-3/A alleging that complaint dated 24.07.2006 was moved by Remal Dass against Avdesh and both parties were called and it was found that the complaint presented by Remal Dass was false and he (Remal Dass) admitted that he had to pay money to Avdesh. It was found that Remal Dass had been doing the lottery business and he used to give money of the committee after taking signatures on blank papers. Remal Dass had to repay the lottery money to Avdesh. Radhey Shyam was examined as DW-4, who also tendered his affidavit Ex. DW-4/A and deposed that Remal Dass had to give the lottery money to Avdesh. At the time of payment of money

Remal Dass used to obtain signatures on the blank papers.

Learned counsel for the appellant has submitted that the Courts below have not considered the material available on the file and as such fell in error while dismissing the suit and the appeal, respectively. The case of the respondent-defendant is that of denial. He has denied the execution of the pronote Ex. PW-1/1 and receipt Ex. PW-1/A. The execution of the pronote as well as the receipt have been disbelieved not only by the trial Court but the said finding has also been affirmed by the learned first Appellate Court. While dealing with the said issue in para Nos. 12, 13, 14 & 15 learned trial Court held as under :-

> *"12. Now if we take a look on the evidence on judicial file plaintiff R.D. Dudeja has filed his affidavit Ex. PA in his examination-in-chief reiterating the stand taken in the plaint. The cross examination of PW-1 R.D. Dudeja is very important. This witness has admitted that there is difference of ink in the pronote Ex. PW-1/1 but volunteered that the writing is one. He denied that in receipt Ex. PW-1/A where the year "2004" has been mentioned, "4" has been mentioned with different ink. He denied that the fluid has been put over the said writing and thereafter volunteered that the same has been put behind the digit. He further stated that he has never used one pen and thereafter again stated that first pen was not working and hence he used another pen. In the further cross examination PW-1 R.D. Dudeja*

stated that he pays income tax and he has shown the amount lent of Rs. 2,10,000/- in his income tax return and copy of return is with his counsel but he did not remember the name of the counsel. The witness volunteered that he cannot bring the copy of the return. The witness stated that he did not know if the return is with the advocate. The witness stated that he did not remember the PAN number and thereafter he again stated that he has not having any pan number. PAN number was issued to him but there is some mistake and he return the same to the department. The witness stated that he did not remember when the PAN card was issued and did not remember the same was returned to department. The witness stated that he had filed the return of the previous year and thus the copy of the same must be with the counsel but he did not remember the name. Thus the conduct of the plaintiff in replying the answers is dilly-dallying.

13. Now if we take a look at the receipt Ex. PW-1/A the same appears to have been filled in 3 different inks. The bottom portion of Ex. PW-1/A where "Rakesh Kumar Dudeja" has been written with pen of dark ink and the upper most portion of receipt Ex. PW-1/A where filling the blanks have been filled as "Avdesh Kumar Uppadhay" has been in different ink. Similarly portion of receipt Ex. PW-1/A where the amount of Rs. 2,10,000/- has been written is in different ink. The receipt reveals that Avdesh Kumar Uppadhay son of Neterpal Uppadhay R/o Ram Mandi Partap Nagar Gurgaon had acknowledged of having received Rs.

2,10,000/-, half of which is Rs. 1,05,000/- and the amount had been taken on 30.8.2004. It appears that the numeric "10" was pre-fixed to the amount of "5000" making it as Rs. 1,05,000/- and the numeric "10" have been written in different ink than "5000" has been written. In addition to this last digit "4" of the year 2004 has been written after putting fluid over the same. Not only this the back side of pronote Ex. PW-1/1 also appears to be tampered since the writing at the back has been erased by putting the fluid. In addition to this due execution of the pronote has not been proved and although witness Rakesh Kumar Dudeja has filed his affidavit Ex. PW-4/A but this witness was not produced for cross examination so filing of the affidavit Ex. PW-4/A is of no consequence for the plaintiff.

14. Faced with this difficulty learned counsel Sh. Sandeep Aneja appearing on behalf of plaintiff submitted that there is no explanation of the defendant as to how the signatures of the defendant appear on the pronote and no police complaint was given by the defendant regarding any forgery. It is stated that Raj Kumar was not produced by defendant as a witness who was a member of the committee and no office address of the committee has been given so due to this reason also the claim of the plaintiff should be admitted.

15. I do not find any force in the contention raised on behalf of plaintiff. It may be mentioned that the specific stand has been taken by the defendant in the written statement that defendant has not taken any loan and the *alleged pronote and receipt are forged and fabricated. The plaintiff is required to stand upon his own legs and the initial onus was upon the plaintiff to have proved that the loan was taken by defendant and in consideration of the same the pronote and receipt was executed by defendant. Even though the defendant has not filed any complaint to the police, complainant cannot be allowed to take advantage of the weakness of the defendant. Ex. D2 which is certified copy of the Nakal Rapat which was filed in the complaint titled as Remal Das VS. Mamta and another the same goes on to show that there was dispute of the lottery and the matter had been got compromised. Ex. D.4 also shows that no loan transaction was there between the plaintiff and defendant. The defendant has discharged the initial onus to prove by saying that existence of consideration was improperable or the same are illegal and hence onus shifted upon plaintiff to have proved it as a matter of fact that such loan had been given and since plaintiff has failed to prove the same, it would disentitle him for getting the relief on the basis of the pronote and receipt. The balance of probability leans in favour of defendant."*

Not only that there was over writing in the receipt Ex. PW-1/A but the material available on record would reveal that different inks were used while scribing pronote Ex. PW-1/1. During cross-examination the appellant-plaintiff admitted that two separate pens were used at the time of execution of the documents. During cross-examination the appellant-plaintiff though admitted that he was an income tax assessee and the factum of advancement of the money of ₹2,10,000/- (Rupees two lacs and ten thousand only) was explained in the income tax return but when further questions were put to place on record the said income tax return then appellant-plaintiff avoided to answer the said questions. He even pleaded ignorance with regard to the name of his counsel who had filed his income tax return. He even refused to disclose his Permanent Account Number.

Since both the Courts below have come to a definite conclusion that pronote Ex. PW-1/1 and receipt Ex. PW-1/A were the forged documents, hence this Court has no material to upset the abovesaid well reasoned findings.

In addition to the above, Rakesh Kumar Dudeja son of the plaintiff was examined as PW-4 who had witnessed the execution of the documents Ex. PW-1/1 and Ex. PW-1/A but he was not produced for the purpose of cross-examination. In the absence of cross-examination, the affidavit tendered by the witness has no value. Therefore, the appellant-plaintiff has even failed to prove the factum of execution of the said documents.

Since both the courts below have disbelieved the factum of execution of the documents under the signatures of the respondent-defendant, therefore, this Court has no reasons to upset the said findings.

No substantial question of law, as raised, arises for consideration before this Court and as such, the present appeal sans merit and is hereby dismissed.

(NARESH KUMAR SANGHI)
JUDGE

21.07.2015
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