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

+ **Date of Decision: 31.08.2015**

% **RSA 317/2015 & C.M. Nos.17571-73/2015**

JAIBEER SINGH

..... Appellant

Through: Mr. Sameer Jain, Mr. Sandeep Bajaj
and Ms Ritika Seth, Advocates

versus

JAI BHAGWAN SINGH

..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The present second appeal is directed against the judgment rendered by the learned ADJ-II (Central) Tis Hazari Courts, Delhi in RCA No.02/2014, whereby the first appeal preferred by the appellant/defendant in the suit to assail the judgment rendered by the learned Civil Judge in CS No.61A/2013 filed by the respondent/plaintiff to seek recovery has been dismissed, and the judgment and decree passed by the Trial Court decreeing the suit of the respondent/plaintiff for Rs.2,40,500/- along with pendente lite and future interest @ 18% p.a. till realisation has been upheld.

2. The facts, in brief, are that the respondent/plaintiff filed a suit for recovery of Rs.2,40,000/- on the ground that he had advanced a sum of Rs.2,00,000/- to the appellant/defendant on friendly terms by three cheques dated 11.05.2005 for Rs.50,000/-; 24.09.2005 for Rs.50,000/-, and; 25.08.2006 for Rs.1,00,000/-. The plaintiff claimed that the assurance given by the defendant was that the said amount would be returned alongwith interest @ 18% p.a., but the defendant failed to liquidate the outstanding amount and avoided its liability on one pretext or the other.

3. The plaintiff issued a legal notice dated 23.02.2007 to the defendant demanding the outstanding amount. The said legal notice was responded to by the appellant/defendant by setting up a defence that, in fact, it was the plaintiff who was in need of a loan to save his business; he had asked the appellant/defendant to arrange for a sum of Rs.9,00,000/- as a friendly loan; that the appellant/defendant had advanced a sum of Rs.6,20,000/- to the respondent/plaintiff in instalment on different occasions, i.e. Rs.3,25,000/- on 01.04.2004; Rs.50,000/- on 06.04.2004; Rs.30,000/- on 14.04.2004; Rs.1,00,000/- on 02.06.2004; Rs.65,000/- on 02.11.2004 and Rs.50,000/- on 11.12.2004; the said amount had been given in cash; the plaintiff had put his signatures on some documents pertaining to the said loan amount, which the appellant claimed would be produced at the appropriate time. The appellant/defendant also claimed that the factum of the loan amount being advanced to the plaintiff was in the knowledge of the entire society, i.e. the relatives and family members.

4. The defendant/appellant urged that the plaintiffs brother-in-laws, namely, one Sanjay Pal and Sandeep, both sons of Sh. Mool Chand Pal,

resident of village Dhoom Manikpur, Dadari, Distt. Gautam Budh Nagar were instigating the plaintiff not to return the defendant/appellant the loan amount and they had been threatening the defendant directly or indirectly. The defendant also stated in this reply that on his demand for return of the loan, the plaintiff assured to return the loan within a short period. In May 2005, the plaintiff had drawn two cheques amounting to Rs.50,000/- each from his banker and an assurance was given to return the balance amount within a short span of time, but to no avail. Lastly, in July 2006, the panchayat of customary relatives was organised at the premises of the plaintiff, wherein about 20-25 members/relatives assembled. The matter of issue of loan amounting to Rs.6,20,000/- towards the plaintiff by the defendant was amicably resolved, wherein the plaintiff accepted the taking of loan of Rs.6,20,000/- from the defendant, and thereafter the plaintiff agreed to return the amount of Rs.6,20,000/- in three instalments to the defendant.

5. The defendant further stated that on 20.08.2006, the plaintiff had come to the defendants premises and delivered the cheque dated 25.08.2006 for Rs.1 lakh towards partial return of the loan amount. Thereafter, the defendant demanded the balance amount of Rs.4,20,000/- from the plaintiff but to no avail. The defendant further stated that the plaintiff had promised to return the balance amount of Rs.4,20,000/- by 25.02.2007, but cunningly he had sent three legal notices – one to the appellant/defendant and two members of the panchayat, which was organised in July 2006. Various other allegations were made by the appellant/defendant in the said reply, which, it appears, was marked as Ex PW-1/C.

6. In his written statement, the appellant/defendant stated that the plaintiff was his distant brother-in-law. He repeated his stand with regard to the demand of Rs.9 lacs by the plaintiff and the advancement of Rs.6,20,000/- in instalments, as aforesaid. He also repeated his averment with regard to partial return of loan in May 2005 amounting to Rs.1 lakh and about the customary panchayat of relatives of about 20-25 members being held for resolution of the said dispute. The defendant also stated that Rs.1,00,000/- was returned vide cheque dated 25.08.2006 when the plaintiff went to the defendant and tendered the cheque on 20.08.2006.

7. The Trial Court framed the following issues on the basis of the pleadings of the parties:

- 1) Whether the suit has not been properly valued for the purpose of court fees and jurisdiction?
- 2) Whether the plaintiff is entitled to a decree for the sum of Rs.2,40,500/-?
- 3) Whether the plaintiff is entitled to interest, if any, at what rate?
- 4) Relief.

8. The plaintiff examined himself as PW-1. He exhibited the statement of account as Ex. PW-1/A, legal notice as Ex. PW-1/B, reply to the legal notice as Ex. PW-1/C. Three other documents were marked as Mark A to C. The defendant examined himself as DW-1.

9. The defendant did not lead any other evidence apart from his own testimony with regard to his alleged advancement of loan of Rs.6,20,000/- to the plaintiff. The Trial Court, consequently, held that the defendant was not

able to establish his defence and the advancement of the amount of Rs.2 lacs by the plaintiff stood established, since the payment had been made by cheques which, admittedly, have been encashed by the appellant/defendant.

10. Before the First Appellate Court, the appellant/defendant moved an application under Order 41 Rule 27 CPC. The appellant, inter alia, stated in this application that:

“.... a panchayat was organised by both the parties for the resolution of the dispute. That in the said panchayat which was conveyed in July 2006 it was noticed that although the respondent had advanced a sum of Rs.6,20,000/- but the deliberations it was agreed that a sum of Rs.3,00,000/- shall be paid back by the respondent”

“.... The appellant engaged the services of the advocate and apprised him of all the facts of the case. Although the counsel has taken various pleas but subsequently for unknown reasons did not examined the member of the panchayat in order to prove the case”.

“3. That although a later stage the said counsel moved an application which was not allowed by the Hon'ble Court. The appellant has been able to obtain affirmation from various members who were present at the relevant time to resolve the dispute between the parties. The examination of the said persons is just and necessary in order to prove the fraud played by the respondent in obtaining the decree. That since the decree has been obtained by fraud as such is liable to be set aside and appeal was filed accordingly”.

11. This application was rejected by the First Appellate Court while passing the impugned judgment which affirmed the judgment and decree

passed by the Trial Court. The First Appellate Court, in relation to the said application Order 41 Rule 27 CPC, observed as follows:

“The appellant in support of his application under order 41 rule 47, has filed a notarised affidavits of some person as his witnesses as on dated 27.9.2014 which are highly belated and not admissible at stage of hearing of this appeal. It is stated that the aforesaid witnesses are not properly entered as per Notary Act and respondent has apprehension that the appellant is playing a fraud by placing said affidavit before this Hon’ble Court”.

12. The submission of Counsel for the appellant is that, concededly, Counsel for the appellant/defendant did not conduct the case properly at the trial stage and did not lead the evidence of the panchas who were part of the panchayat. Learned counsel submitted that even the appellant/defendant was recalcitrant in this regard.

13. Learned counsel submits that along with the application moved under Order 41 Rule 27 CPC i.e. C.M. No.17572/2015, the appellant has filed the notarised affidavits of seven of the panchas who were part of the panchayat and who have sworn their affidavits in September 2014, apart from entries made by the appellant in his diary with regard to advancement of the sum of Rs.6,20,000/- in instalments to the plaintiff.

14. The submission of Counsel for the appellant is that the appellant is desirous that the appellant should be permitted to lead the evidence of the said seven witnesses, apart from leading in evidence the extract from the diary maintained by the appellant/defendant. In support of his submission, Counsel for the appellant has placed reliance on the judgment of the

Supreme Court in *Adil Jamshed Frenchman v. Sardar Dastur Schools Trust & Ors.*, (2005) 2 SCC 476, wherein the Supreme Court held that if the documents sought to be produced Order 41 Rule 27 CPC are material and, if substantiated, would have a material effect on the case of the party, the same should be permitted to be lead in evidence. The submission is that the evidence of the seven panchas/witnesses would have a material bearing on the defendant establishing his defence that the payment of Rs.2 lacs made by the plaintiff to the defendant was towards partial repayment of the loan of Rs.6,20,000/-.

15. Having heard learned Counsel for the appellant and perused the documents placed on record as well as the application moved Order 41 Rule 27 CPC by the appellant/defendant before the First Appellate Court - which has been shown to the court by learned counsel from his own record, as well as the reply sent by the defendant to the legal notice (Ex. PW-1/C) - which too has been shown by Counsel for the appellant from his record to the court, I am of the view that there is no merit in the submission of Counsel for the appellant, and the First Appellate Court rightly rejected the application moved under Order 41 Rule 27 CPC while passing the impugned judgment.

16. When an application Order 41 Rule 27 CPC is moved before the appellate court, it is for the appellate court to, at least, examine whether the evidence sought to be led at the appellate stage is worthwhile for being permitted to be brought on record. In the present case, I find that there are innumerable contradictions and discrepancies in the stand of the appellant/defendant taken from time to time, which render the additional

evidence sought to be led by the appellant unworthy of belief. The Supreme Court in ***Adil Jamshed Frenchman*** (supra) in para 9, which is relied upon by the appellant, observed as follows:

“9. It cannot be denied that the documents sought to be produced by the tenants are material and if substantiated, would have a material effect on the case of the landlords of their bona fide need of the suit premises. If, in fact, the landlord has entered into negotiations with M/s. Godrej Boyce Co. Ltd. for selling or use by them of the property, the need cannot be said to be genuine. Similarly, a change in the construction plan may show that the alleged need of the landlord for the construction may not be genuine. The third document proposes to demolish the case of availability of the funds for construction with the landlord. Two of the documents came into existence after the passing of the decree by the trial court. Similarly, the correspondence entered into by the landlord with a third party could not have been within the knowledge of the tenant and therefore, the tenants' statement that the documents could not have been produced before the trial court, in spite of the exercise of due diligence, was highly probable. In such circumstances, the High Court was not justified in interfering with the discretion exercised by the first appellate court permitting additional evidence”.

17. From the aforesaid extract, what emerges is that, firstly, it should appear to the Court that the evidence sought to be led is of such a nature that it is material so that, if it is substantiated, it would have a material effect on the case of the parties. Secondly, the evidence sought to be led at the appellate stage could not have been led earlier at the trial stage despite due diligence, because either it did not exist, or was not within the knowledge of the applicant.

18. In the present case, there is absolutely no reason given by the

appellant as to why the evidence of the seven so-called panchas was not led by the appellant/defendant in his defence. The appellant, if he is to be believed, would have been aware as to who all constituted the panchas. He had himself stated that some 20-25 family members were panchas at the residence of the plaintiff/respondent. Pertinently, he does not disclose the names of the other so-called panchas. The notarised affidavits, all sought to be produced of the seven so-called panchas are all identical and clearly have been prepared by the same person as a format, and executed by the seven alleged panchas. All the seven persons in their respective affidavits purportedly state that they were part of the panchayat which was organised in July 2006, wherein the appellant/defendant had claimed that he had advanced a sum of Rs.6,20,000/- on various occasions to the respondent/plaintiff. All of them state that after hearing both the parties, the plaintiff Sh. Jai Bhagwan Singh had agreed to return back the money as obtained from the appellant/defendant Sh. Jaibeer Singh in instalments, and that the decision of the panchayat was accepted by both the parties. However, no formal document in this regard was executed. All of them state that the plaintiff had issued a cheque of Rs.1 lakh each towards return of the loan amount. All these affidavits have been attested on 27.09.2014 by the notary public. These persons did not disclose in their affidavit as to who the other panchas were. Even though the claim of the appellant/defendant was that the total advancement was Rs.6,20,000/-, out of which Rs.1 lakh (in two instalments of Rs.50,000/- each) had already been returned even before the holding of panchayat on 11.05.2005 and 24.09.2005, the said persons in their affidavits did not make a mention of the so-called partial return by the plaintiff of Rs.1 lakh and do not state that the outstanding amount of liability

was Rs.5,20,000/-. In fact, all of them claimed – if their affidavits are to be believed, that the outstanding amount was Rs.6,20,000/- and that the plaintiff had agreed to refund the entire amount in instalments.

19. As noticed above, the stand taken by the appellant in his application under 41 Rule 27 CPC moved before the First Appellate Court was that though he had allegedly advanced a sum of Rs.6,20,000/- to the plaintiff, “*with deliberations it was agreed that a sum of Rs.3,00,000/- shall be paid back by the respondent*”. Thus, the stand taken by the appellant/defendant before the First Appellate Court was that though the amount advanced was Rs.6,20,000/- , the plaintiff/respondent had agreed to settle the said amount by making payment of Rs.3 lakhs and that this decision was arrived at in the panchayat. Thus, the stand taken by the appellant/defendant before the First Appellate Court is contrary to the stand sought to be projected by the appellant, by filing seven affidavits of the alleged panchas.

20. Pertinently, in the reply to the legal notice as well as the written statement, the appellant/defendant claimed that the plaintiff had, in fact, acknowledged the receipt of the alleged loan or at least some part of it, and the appellant stated that he would produce the said acknowledgment at an appropriate time. However, in his defence, the appellant/defendant did not lead any evidence in this regard. In the reply to the legal notice, the appellant/defendant stated that the plaintiff had issued three legal notices, including to two members of the panchayat, but he did not elaborate on this aspect in his written statement, much less lead any evidence on those aspects.

21. Though it is argued by learned counsel that the said panchas were not

ready and willing to come forward in support of the appellants defence at the trial stage and, therefore, they were not produced by the witnesses before the trial court, no such averment is found to have been made either in the application before the First Appellate Court or even in the application moved before this Court. Even if this submission were to be accepted, that could not have been a reason not to name the panchas as witnesses, as they could have been summoned through the court process and would have been bound to depose the truth on oath, on pain of prosecution in the event of their lying. As noticed herein above, though it was claimed in the application before the First Appellate Court that “*although a later stage, the said counsel moved an application which was not allowed by the Hon’ble Court*” - meaning thereby that the appellant/defendant had moved an application to lead further evidence at the trial stage, on a query by the Court, learned counsel submits that no formal application had been moved to lead additional evidence at the trial stage and only at the stage of arguments, a verbal submission was made for the said purpose. So far as the diary is concerned, it is a self serving document prepared by the appellant/defendant; it does not have any acknowledgement of the plaintiff, and the defendant does not explain why it was not produced before the Trial Court.

22. In the aforesaid background, the evidence now sought to be brought on record by the appellant is not credible at all. The said evidence cannot be said to be of a nature which, if permitted to be lead, would have a material bearing. Moreover, in the aforesaid background, it cannot be said that the said evidence can even be substantiated. As noticed above, there is no

explanation for not leading the said evidence before the Trial Court. It cannot be said that the appellant/defendant acted with due diligence, or that the appellant was not aware that the evidence of the alleged panch witnesses was available or could be led.

23. In view of the aforesaid discussion, the application preferred by the appellant under Order 41 Rule 27 CPC being C.M. No.17572/2015 is dismissed.

24. The Trial Court and the First Appellate Court have rendered their judgments premised on appreciation of evidence led by the parties. The defendant could not substantiate its defence at all, while the plaintiff established the advancement of Rs.2 lakhs by three cheques, as aforesaid. The appellant has not been able to point out any perversity or gross illegality in the approach of the courts below in their consistent findings. Consequently, I find absolutely no merit in the present appeal. No substantial question of law arises for consideration by this Court. Accordingly, the appeal is dismissed.

VIPIN SANGHI, J

AUGUST 31, 2015

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