IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.113 OF 2016
along with
CIVIL APPLICATION NO.168 OF 2016
in
SECOND APPEAL NO.113 OF 2016

Syndicate Bank .. Appellant/Applicant
Vs.
Pradip Jaysen Jaykar .. Respondent

Mr.Jayprakash Kapre for the appellant/applicant.
Mr.R.V. Govilkar a/w Mr.Nikhil Jaykar i/by Mr.Mayuresh Borkar for the respondent.

CORAM : R.D. DHANUKA, J.
DATE : 10th February 2016

P.C.

. By this second appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellant seeks to impugn the order dated 10th December 2015 dismissing the appeal filed by the appellant (original defendant). In the said appeal, the appellant had impugned the order and decree dated 19th December 2011 passed by the learned trial Judge thereby partly decreeing the suit and directing the appellant to pay Rs.1,02,325/- at compound rate of interest @9% p.a. quarterly rest from the date of filing of the suit till realisation of the decreetal amount.

2. It was the case of the plaintiffs that the plaintiffs had fixed deposit of Rs.50,000/- with appellant-Bank which was issued by the appellant on 26th April 1980 under cumulative interest scheme for a period of 87 months. It was also the case of the plaintiffs that one M/s.

Hotel Mount View situated at Khandala had some dealing with the appellant-Bank and the said hotel had taken over draft facility in the year 1980 from the appellant-Bank. The plaintiffs had kept the said fixed deposit as security by surrendering the same to the appellant-Bank. It was the case of the plaintiffs that the said security was only for the said particular transaction and after the dues of the bank were cleared, they were to return the said Vikas Cash Certificate. It was averred in the plaint that after clearance of the liability under over draft facility by the said M/s.Hotel Mount View, the Vikas Cash Certificate was given back to the plaintiffs and the surety stood terminated in the year 1983. The plaintiffs have also placed reliance on the letter of surety dated 1st March 1980 which stood cancelled on the return of the certificate. It was the specific case of the plaintiffs that after 1983, the plaintiffs did not stand as a surety to the said M/s.Hotel Mount View or its Proprietor. It was urged that the said Vikas Certificate was free from any lien or charge and the appellant-Bank could not withhold the payment after the maturity of the certificate.

3. Learned counsel appearing for the appellant-Bank states that there was no averments in the plaint to the effect that there was no lien on the said security i.e. Vikas Cash Certificate issued by the appellant-Bank and in absence of such pleadings, learned trial Judge could not have passed decree in favour of the plaintiffs. In support of this submission, learned counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of ***National Textile Corp. Ltd. Vs. Naresh Kumar Badrikumar Jagad & Ors.,*** reported in ***2011 SAR (Civil) 897.***

4. Mr.Govilkar, learned counsel appearing for the respondent (original plaintiff) invited my attention to the written statement filed by the appellant-Bank in the said suit and more particularly paragraph 5 thereof. He submits that except bare denial to the averment made by the plaintiff in paragraph 2 of the plaint stating that the said security stood discharged and was returned to the plaintiffs, the appellant-Bank has not stated whether the said security continued to be with the appellant or not.

5. A perusal of the said paragraph 5 of the written statement clearly indicates that except bare denial in paragraph 5 of the written statement, the appellant-Bank has not controverted the averment made in paragraph 2 of the plaint in detail. Learned counsel appearing for the appellant-Bank has conceded before this Court that the original of the said security is in custody of the original plaintiff. Mr.Govilkar, learned counsel appearing for the original plaintiff states that the said security which was returned by the appellant-Bank after the liability of the said M/s.Hotel Mount View was discharged and the same was never given back to the appellant-Bank for claiming as a general lien thereon.

6. A perusal of the orders passed by both the Courts below clearly indicates that the learned trial Judge as well as the Lower Appellate Court have rendered a finding of fact that the appellant-Bank had failed to prove any lien on the said security after the said loan of M/s.Hotel Mount View was discharged. Learned trial Judge also considered the oral evidence led by the witnesses examined by the appellant-Bank who could not prove the claim made by the appellant.

In my view, the findings rendered by both the Courts below are concurrent findings which are not perverse and thus cannot be interfered with under Section 100 of the Code of Civil Procedure, 1908.

7. In so far as the judgment of the Supreme Court in the case of *National Textile Corp. Ltd. (supra)* relied upon by the learned counsel for the appellant-Bank is concerned, Supreme Court has held that a party has to take proper pleadings and prove the same by adducing evidence. No evidence can be permitted to be adduced on a issue unless factual foundation has been laid down in respect of the same. In my view, on the contrary in this case, there is no denial to the pleadings of the plaintiff that the said security is discharged on payment of the loan by the said M/s. Hotel Mount View to the appellant-Bank. There is no dispute about the propositions laid down by the Supreme Court in the case of *National Textile Corp. Ltd. (supra).* The said judgment, however, does not assist the case of the appellant. Reliance is placed on the said judgment by the learned counsel for the appellant-Bank is thus misplaced. Appeal, in my view, is totally devoid of merits and is accordingly dismissed. In view of dismissal of the appeal, civil application filed by the appellant does not survive and is accordingly dismissed. No order as to costs.

8. At this stage, learned counsel appearing for the appellant-Bank states that pursuant to the order passed by the Lower Appellate Court, the appellant has already deposited a sum of Rs.9,39,472/-in the Lower Appellate Court. It is submitted that the said amount deposited by the appellant in the Lower Appellate Court may be allowed to be

withdrawn by the original plaintiff as and by way of full and final settlement. Mr.Govilkar, learned counsel for the original plaintiff has no objection to accept the said amount deposited by the appellant in full and final settlement in execution of decree along with interest, if any, accrued thereon if the same is invested by the Lower Appellate Court. Statements made by both the learned counsel for the parties are accepted. If the amount deposited by the appellant is not invested by the Lower Appellate Court, the Lower Appellate Court shall permit the plaintiff to withdraw the said amount of Rs.9,39,472/- expeditiously in full and final settlement and in satisfaction of the decree.

9. Parties as well as the Lower Appellate Court to act on the authenticated copy of this order.

R.D. DHANUKA, J.