

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

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Date of decision: 9th February, 2016

+ RFA 231/2014 & CMs No.9769/2014 (for stay) & 25830/2015 (of R-1 for vacation of interim order dated 30.5.2014)

TARUN SHARMA

..... Appellant

Through: Mr. K.K. Sharma, Sr. Adv. with Mr. Rajiv Bakshi, Mr. D.K. Sharma, Ms. Bhanita Patawary and Ms. Supnita Roy, Advs.

Versus

ALI ZULFIKAR AHMED & ANR

..... Respondents

Through: R-1 in person.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This appeal under Section 96 of the Civil Procedure Code, 1908 (CPC) impugns the judgment and money decree (dated 28th March, 2014 of the Court of Sh. Rakesh Pandit, Additional District Judge (ADJ)-3, South East District, Saket Courts, New Delhi in Civil Suit No.42/2014 filed by the respondent No.1/plaintiff against the appellant and the respondent No.2 Sh. Mahender Singh), consequent to dismissal of the applications of the appellant and the respondent No.2 for leave to defend the suit.

2. Notice of the appeal was issued and subject to the appellant depositing the entire decretal amount in this Court, execution stayed.
3. The respondent No.2 Sh. Mahender Singh failed to appear despite service and was proceeded against *ex-parte*. The Trial Court record has been requisitioned.
4. The respondent No.1/plaintiff has filed an application stating that the appellant had not deposited the entire decretal amount.
5. The counsel for the appellant today states that the entire decretal amount stands deposited.
6. Admit.
7. Considering that in the event of the appeal being allowed, the matter will have to be remanded and the suit will have to go on, it is deemed appropriate to hear the appeal at this stage only.
8. On a reading of the impugned order of dismissal of application for leave to defend, it appeared that the suit was wrongly entertained under Order XXXVII of the Code of Civil Procedure, 1908 (CPC). The respondent No.1/plaintiff claiming to be an Advocate practising at Delhi appears in person and has been heard. The need to call upon the appellant did not arise.

9. The respondent No.1/plaintiff filed the suit pleading:

(i) that the appellant/defendant No.1 had on 24th May, 2012 taken a loan of Rs.15 lakhs from the respondent/defendant No.2 and the respondent No.1/plaintiff had stood guarantor for re-payment of the said loan by the appellant/defendant No.1 to the respondent/defendant No.2;

(ii) that the appellant/defendant No.1 issued two cheques of Rs.7,50,000/- each in favour of the respondent/defendant No.2 towards repayment of the said loan and also deposited the title deeds of his properties with the respondent/defendant No.2 to secure the loan;

(iii) that the said cheques issued by the appellant/defendant No.1 in repayment of the loan were dishonoured and it was also learnt by the respondent / defendant no.2 that the title deeds deposited by the appellant/defendant No.1 of his property with the respondent / defendant no.2 had been stolen by the appellant / defendant no.1 from the office of the GIC Housing Finance Limited; the respondent/defendant No.2, to avoid himself being charged as an

accomplice of the appellant/defendant No.1 in the theft of the documents, returned the said title deeds to the GIC Housing Finance Limited;

(iv) that the appellant/defendant No.1 took back the dishonoured cheques aforesaid and issued a fresh cheque in favour of the respondent/defendant No.2 for Rs.15,00,000/-;

(v) that the respondent/defendant No.2 pressed the respondent No.1/plaintiff for payment as guarantor and the respondent No.1/plaintiff paid Rs.15 lakhs to the respondent/defendant No.2 (on enquiry, the respondent No.1/plaintiff states that the said amount was paid to the respondent/defendant No.2 in cash and he has not filed any documents of withdrawal of the said amount from any bank account and he was not an income tax assessee at that time);

(vi) that the respondent/defendant No.2 issued a receipt of Rs.15 lakhs in cash from the respondent No.1/plaintiff and also assured the respondent No.1/plaintiff that upon encashment of the cheque for Rs.15 lakhs issued by the appellant/defendant No.1 in favour of the respondent/defendant No.2, the respondent/defendant No.2 shall

refund Rs.15 lakhs received from the respondent No.1/plaintiff to the respondent No.1/plaintiff;

(vii) that the respondent No.1/plaintiff called upon the appellant/defendant No.1 as well as the respondent/defendant No.2 to make payment but neither did.

However decree in the suit was claimed against the appellant / defendant No.1 only and no relief was claimed against the respondent / defendant No.2.

10. I may record that not only did the suit on the basis of averments aforesaid in the plaint not lie under Order XXXVII of the CPC but even otherwise the plaint did not comply with the other provisions of Order XXXVII CPC; there is no endorsement immediately before the number of the suit of the same being under Order XXXVII CPC and there is no plea in the plaint to the effect that no relief other than that under Order XXXVII CPC has been claimed in the suit. Nevertheless, the suit was entertained under Order XXXVII CPC and summons under Order XXXVII CPC were ordered to be issued. I may however notice that though on the very first date, the learned ADJ raised the issue of maintainability of the suit under

Order XXXVII CPC but thereafter without recording satisfaction, issued the summons.

11. The appellant filed application for leave to defend.

12. Even though no relief was claimed in the suit against the respondent / defendant No.2 but the respondent / defendant No.2 also filed application for leave to defend.

13. The learned ADJ, vide order dated 28th March, 2014 has dismissed the application of the appellant / defendant no.1 for leave to defend and has decreed the suit of the respondent No.1/plaintiff against the appellant/defendant No.1 reasoning:

(a) that the respondent/defendant No.2 in his leave to defend application had admitted the version of the respondent No.1/plaintiff and had stated that on 24th May, 2012 an amount of Rs.15 lakhs was transferred by way of loan to the account of the appellant/defendant No.1 by the respondent/defendant No.2;

(b) the appellant / defendant no.1 in his leave to defend application has however denied the transaction and any privity with the respondent no.1 / plaintiff and pleaded that it was in fact the

respondent no.1 / plaintiff who had taken the loan from the respondent / defendant no.2 and the appellant / defendant no.1 stood guarantor therefor and issued his cheques as collateral security to respondent / defendant no.2; that the appellant / defendant no.1 in his leave to defend application also controverted that the suit was maintainable under Order XXXVII CPC;

(c) that it was the admitted case of the parties that the respondent/defendant No.2 was a creditor and the appellant/defendant No.1 or the respondent No.1/plaintiff are the principal debtor and the appellant/defendant No.1 or the respondent No.1/plaintiff are the guarantor;

(d) that Order XXXVII permits a suit on a contract of guarantee;

(e) that there was no written contract or document of guarantee but the High Court in ***Reliance Industries Ltd. Vs. Adarsh Packers Pvt. Ltd.*** 71 (1998) DLT 168 has held that suit under Order XXXVII lies on an oral guarantee also;

(f) that though the appellant/defendant No.1 pleaded in his leave to defend application that the loan transaction was between the

respondent No.1/plaintiff and the respondent/defendant No.2 and the appellant/defendant No.1 had given cheques as collateral security but it is the respondent No.1/plaintiff who had lodged FIR No.485/2013 of Police Station Fateh Beri, Delhi against the appellant/defendant No.1 and followed it up with the suit;

(g) that the appellant/defendant No.1 had not sought back the cheque in question of Rs.15 lakhs from the respondent/defendant No.2;

(h) that the appellant/defendant No.1 had also not given any demand notice;

(i) that the conduct of the appellant/defendant No.1 was thus contrary to that of a prudent person;

(j) that money had been shown to have flown from the account of the respondent/defendant No.2 to the account of the appellant/defendant No.1 and the appellant/defendant No.1 had failed to explain the reason therefor;

(k) that the respondent No.1/plaintiff had repaid the said money to the respondent/defendant No.2 and thus the appellant/defendant No.1 was liable to return the said money to the respondent No.1/plaintiff;

(l) that the fact that the respondent/defendant No.2 inspite of having a dishonoured cheque of the appellant/defendant No.1 had not taken any action under Section 138 of the Negotiable Instruments Act, 1881 also supported the respondent No.1/plaintiff having discharged the liability of the respondent/defendant No.2.

(m) that the defence of the appellant/defendant No.1 appears to be a moonshine.

Accordingly, the application of the appellant / defendant no.1 for leave to defend was dismissed; the application of the respondent / defendant no.2 for leave to defend was also dismissed. However because the respondent no.1 / plaintiff had not sought any relief against the respondent / defendant no.2, the decree for recovery of Rs.15,00,000/- with interest in favour of the respondent no.1/plaintiff was passed against the appellant / defendant no.1 only.

14. Before proceeding further, I may notice an interesting facet. Though the respondent no.1 / plaintiff in the suit had not claimed any relief against the respondent / defendant no.2 but without considering the said fact summons under Order XXXVII of the suit appear to have been issued to the respondent / defendant no.2 also and the respondent / defendant no.2, though no relief was claimed against him, filed an application for leave to defend and on the contents of which application for leave to defend the learned ADJ has heavily relied for dismissing the application for leave to defend of the appellant / defendant no.1. It appears that the respondent / defendant no.2 was impleaded in the suit only to elicit admissions from him in favour of the respondent no.1/plaintiff.

15. A suit under order XXXVII can be filed either upon bills of exchange, hundies and promissory notes or where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant and arising on a written contract or on an enactment or on a guarantee where the claim against the principal is in respect of a debt or liquidated demand only. By the amendment of the CPC with effect from 1st February, 2012 (vide Factoring Regulation Act, 2011), a suit for recovery of receivables instituted by any assignee of a receivable also lies under Order XXXVII.

16. Admittedly, the subject suit was not upon any bill of exchange, hundi or promissory note and the claim of the respondent no.1 / plaintiff therein against the appellant / defendant no.1 did not arise by a written contract between the two of them or on any enactment.

17. The learned ADJ has however held that since the claim of the respondent no.1 / plaintiff against the appellant / defendant no.1 was on a guarantee, it was maintainable under Order XXXVII. The guarantee is claimed to have been given by the respondent no.1 / plaintiff to the respondent / defendant no.2 for repayment of the loan taken by the appellant / defendant no.1 from the respondent / defendant no.2. However the said guarantee is also not in writing. The learned ADJ, relying on ***Reliance Industries Ltd.*** supra, has held that the guarantee can be verbal also.

18. Reliance by the learned ADJ on ***Reliance Industries Ltd.*** supra is totally misconceived and appears to have been made without reading the full judgment. The Single Judge of this Court in the said judgment was not concerned with the issue of maintainability of a suit under Order XXXVII on the plea of oral guarantee. What was for consideration before the Court was applications, of the Director of the company which had purchased the goods from the plaintiff in that case and which Director had also been sued

as guarantor for payment of the price, for deletion of his name as defendant and for vacation of the *ex parte* order of injunction restraining him from alienating his property. It was in this context that the observations on which the learned ADJ has relied came to be made to refuse the application of the Director for deletion of his name. The observations are qualified with the sentence “that it was too preliminary a stage to delete the name of the director from the array of defendants”.

19. Interestingly, I find that in ***Reliance Industries Ltd.*** supra the suit was ultimately not pressed against the Director and was dismissed on 5th October, 2012.

20. The observations to the effect that since the word ‘guarantee’ in Order XXVII(1)(2)(b)(iii) is not preceded with the word ‘written’ and since as per Section 126 of the Indian Contract Act, 1872 guarantee may be either oral or written, a suit on a oral guarantee would also be maintainable under order XXXVII in ***Reliance Industries Ltd.*** are thus not found to constitute a precedent.

21. In this regard, it may also be noticed that it was not the claim of the respondent no.1 / plaintiff that any guarantee was given to him by the

appellant / defendant no.1 and on which guarantee he was suing the appellant /defendant No.1 for recovery of money; his case was that he had stood as a guarantor for repayment of loan by the appellant / defendant no.1 to the respondent / defendant no.2. The claim of the respondent no.1 / plaintiff against the appellant / defendant no.1 was thus not on the basis of any guarantee given by the appellant / defendant no.1 to the respondent no.1 / plaintiff as is required to be under Order XXXVII of the CPC. From the language of Order XXXVII Rule 1(2)(b)(iii) “on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only”, it is evident that the suit contemplated thereby is a suit by a creditor against a debtor and the debtor’s guarantor i.e. a person who had stood guarantee for repayment of debt by the debtor to the creditor. Here, the suit, on the basis of the averments in the plaint was by a guarantor against the person on whose behalf he had given guarantee and under which guarantee, he had paid.

22. Section 126 of the Contract Act, 1872 defines a contract of guarantee as a contract to perform the promise, or discharge the liability, of a third person in case of his default; the person who gives the guarantee is called the ‘surety’; the person in respect of whose default the guarantee is given is

called the ‘principal debtor’ and the person to whom the guarantee is given is called the ‘creditor’.

23. Thus, as per the facts pleaded by the respondent No.1/plaintiff, the respondent No.1/plaintiff was the surety, the appellant/defendant No.1 was the principal debtor and the respondent/defendant No.2 was the creditor. The suit was not by the creditor for recovery of money from the principal debtor and the surety/guarantor but was by the surety against the principal debtor. In my view, the suit cannot thus be said to be on a guarantee within the meaning of Order XXXVII Rule 1(2)(b)(iii) of the CPC.

24. Rather, the suit was under Sections 140 & 145 of the Contract Act. Section 140 of the Act provides that “where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor”. Similarly, Section 145 of the Act provides that “in every contract of guarantee there is implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recovery from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully”. Such a suit is not a suit on a guarantee.

25. Thus, *de hors* of the proposition whether the suit under Order XXXVII Rule 1(2)(b)(iii) CPC can be on a verbal / oral guarantee or not, the subject suit was not on a guarantee.

26. I am also unable to hold that a suit under Order XXXVII CPC can be filed on a verbal / oral guarantee. To hold so, would be against the grain of Order XXXVII CPC which lays down a summary procedure for certain kinds of suits. Such suits are upon bills of exchange, hundis, promissory notes, written contract, enactment—all of which are documents in writing. To hold that because the word ‘guarantee’ in Order XXXVII Rule 1(2)(b)(iii) CPC is not preceded by the word ‘written’, a suit under summary procedure can be filed on a verbal / oral guarantee as well, would lead to an anomalous situation, when though on a verbal / oral contract, summary procedure is not available but if the contract is of a guarantee, then it is available. If it were to be held that in the cases of contracts of guarantee, the summary procedure can be availed even where the guarantee given is verbal / oral, the same will make Order XXXVII CPC susceptible to challenge under Article 14 of the Constitution of India as arbitrary and discriminatory i.e. within the same class providing a different procedure for adjudication of suits.

27. I therefore hold that a suit under Order XXXVII Rule 1(2)(b)(iii) CPC has to be by a creditor against a principal debtor and a guarantor / surety on a written guarantee and not on a verbal / oral guarantee.

28. In the present case there was absolutely nothing before the Trial Court, except the admission of the respondent /defendant no.2, to show that the respondent no.1 / plaintiff had so stood guarantee on behalf of the appellant / defendant no.1. The cheques issued by the appellant / defendant no.1 were not in favour of the respondent no.1 / plaintiff. The flow of money even if any from the account of the respondent / defendant no.2 to the account of the appellant / defendant no.1 would at best entitle the respondent / defendant no.2 to sue the appellant / defendant no.1 for recovery thereof. The appellant / defendant no.1 having disputed the transaction, it had but to be determined by evidence whether the respondent no.1 / plaintiff had so stood guarantee and whether the respondent no.1 / plaintiff had so made payment under the guarantee.

29. The order dismissing the application for leave to defend is thus found to be erroneous and without application of mind and without reading of the judgment on which reliance was placed and is axiomatically set aside. Resultantly, the appeal is allowed; the suit in which decree under Order

XXXVII has been passed is held to be not maintainable under Order XXXVII and is ordered to be tried as a summary suit.

30. The parties to appear before the Court of ADJ-3, South East District, Saket Courts, New Delhi and if the said Court no longer exists before the Court of DJ, South East District, Saket, New Delhi on 15th March, 2016. The respondent no.1 / plaintiff is also burdened with costs of Rs.15,000/- of this appeal to be payable before the learned ADJ as a condition for proceeding further with the suit.

Decree sheet be drawn.

The monies deposited by the appellant in this Court be refunded to the appellant with interest if any accrued thereon.

Trial Court record requisitioned in this Court be returned forthwith.

RAJIV SAHAI ENDLAW, J

FEBRUARY 09, 2016

‘bs/gsr’..