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

Decided on : 29.02.2016

+ **RFA (OS) 57/2015, C.M. APPL.10899/2015, 10901-10902/2015 & 19016-19017/2015**

HAJI MALIK GHULAM AHMED SHAH AND ANR.

.....Appellants

Through: Sh. Anchit. H. Sharma and Sh. Rahul Sharma,
Advocates.

Versus

JUGAL KISHORE

.....Respondent

Through: Sh. J.C. Mahindru, Advocate along with
respondent in person.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. The aggrieved defendants appeal against the judgment of a learned Single Judge decreeing the plaintiff/respondent's suit claiming ₹ 44,69,897.92 with *pendente lite* and future interest at the rate of 18% per annum, in addition to cost.

2. The suit allegations were that the plaintiff with his associates, was dealer in sale of fruits under the name and style of "*Delhi Pulwama Shopian Fruit Company*" which operated from C-19, New Subzi Mandi, Azadpur, Delhi during the period 01.04.2000 to 31.03.2002. He entered into a transaction with the appellants/defendants in *lieu* of payment of commission

for procurement of apples for sale at Delhi. The plaintiff alleged that his associates walked out of the deal struck with the defendants, as a result of which, he was left to bear both responsibilities and risks pertaining to the transaction. In the course of the said transaction, amounts were advanced by the plaintiff- to the defendants, for procuring apples.

3. It was alleged in the suit that a sum of ₹ 21,47,897.92 was advanced on 22.06.2002, in the presence of one Sh. Mohd. Abdullah Naikoo. It was also alleged that the appellants/defendants had charged a guarantee fee of 1% against the amount advanced. The plaintiff alleged that both the commission as well as the money advanced was retained by the appellants/defendants. On the respondent/plaintiff insisting on return of money, he was able to recover a sum of ₹3,000/- only, on 31.05.2005, in the presence of one Major Vikas. As regards the balance sum, assurances were given, even while acknowledging that said sums were due and payable to him.

4. Apparently the second defendant/appellant lodged a criminal complaint against the plaintiff and also got one Sh. Bashir Ahmed Malik to file a complaint; both of which were dismissed on 03.03.2008. It is for these reasons that a suit for recovery along with interest was instituted. Summons in the suit were issued; on 06.04.2009 the Court examined the English translation of the process server's report, and concluded that the appellants/defendants had refused to accept service of summons; resultantly, it was directed that the appellants be set down *ex-parte*. The suit was thereafter proceeded with on 14.07.2009; the plaintiff tendered his evidence by way of affidavit and his evidence was closed. On 12.10.2009, the impugned *ex-parte* judgment and decree was delivered.

5. After delivery of *ex-parte* judgment, execution proceedings were initiated by the plaintiff. The defendants/appellants thereafter approached this Court, seeking the setting aside of *ex-parte* judgment. They contended to becoming aware about the said judgment upon receipt of notice/summons for appearance on 22.11.2010 in connection with an execution petition on 25.11.2010 from District Court at Kulgam, Kashmir. It was submitted- in the application subsequently moved, for setting aside *ex-parte* judgment, that on enquiries being made at the office of the Principal District Judge, the appellants/defendants became aware of the fact that an *ex-parte* judgment and decree dated 12.10.2009 had been passed. It was contended that the appellant was unwell and was not available at his house. His plea in the application moved for setting aside the *ex-parte* decree was that he had no notice and that the *ex-parte* decree ought to be recalled. The learned Single Judge, on 23.02.2012, dismissed this application, I.A. No. 9548/2011. The appeal preferred against that order, FAO (OS) 126/2012, was rejected on 26.03.2012. The appellate order was tested in proceedings under Article 136 of the Constitution of India; however, the Supreme Court declined to interfere with the *ex-parte* decree on the submission made that the appellants had not been served with summons in the suit. The defendants/appellants now challenge the decree on merits, in this belated regular appeal.

6. Mr. Anchit Sharma, learned counsel argues that the impugned judgment is in error of law. He submitted that the learned Single Judge relied on an alleged acknowledgment of debt said to be covered by Section 18 of the Limitation Act and also amounting to admission of liability on part of the appellant. That document was never placed on the record; the Court failed to see that only a photocopy was produced (Ex. PW1/1). This fatal omission on

the part of the plaintiff meant that there was no material to support the findings and decree of the learned Single Judge. He argued that the learned Single Judge failed to apply his mind to the circumstance that Ex. PW-1/2 was not relevant, as it was an *inter se* document as between the plaintiff and his friend, a Major in the Indian Army.

7. Learned counsel submitted that even if the Court were to refuse the grievance against the manner in which the suit was set down after declaring the defendant *ex-parte*, the Court had to satisfy itself on the basis of the material on record if the suit claim had been proved. In the circumstances of the case, the plaintiff did not prove his claim. It was also submitted that the Court should not, therefore, have decreed the suit. Counsel also argued that the suit averments were that the plaintiff was part of a firm; such being the case, the suit in the form that it was instituted, was not maintainable as it did not comply with Order XXX, Civil Procedure Code (CPC).

8. Sh. , J.C. Mahindru, learned counsel for the plaintiff, argued that the impugned judgment does not call for interference. He submitted that the defendant having chosen not to contest the suit, despite due service of notice and having taken his chance, with the *ex-parte* judgment, by challenging the order refusing to set aside the decree, which was unsuccessful at all levels, cannot now be permitted yet another opportunity to ventilate his grievance on a merits appeal, which is not maintainable. It was also submitted that the arguments that the original documents were not exhibited, is without foundation because the photocopy of the account with the original writing containing the acknowledgement of debt is part of the record. He relied on the suit records, in support of this submission.

9. The suit records were considered by this Court. There is no doubt that the signatures, in original, were placed on the record, and exhibited during the trial. This clearly reflects a promise to pay; it amounts to admission as well as acknowledgment of debt. No doubt, the plaintiff had urged that the sum of ₹ 3000 was received from the defendants when the acknowledgment was made; that however, is not the controversy. Nor is the other document, i.e whereby the plaintiff wrote to his friend, of direct relevance. However, it only shows that contemporaneously, the plaintiff had written to someone about the transaction. Yet, as far as the defendants are concerned, it would have no direct evidentiary value. This however, does not detract from the essential point that the first document relied on by the plaintiff- i.e the acknowledgment of debt/admission, supports the suit averments. The plaintiff also deposed during the proceedings. In the given circumstances, since the suit was one for money advanced but not repaid, it cannot be said that the impugned judgment is erroneous or not based on any evidence.

10. Considering the above circumstances, this Court is of opinion that there is no infirmity in the judgment and decree of the learned Single Judge, impugned in the present appeal, which has to fail. It is accordingly dismissed without order as to costs.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

FEBRUARY 29, 2016