

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

+ **RSA No.176/2017 and C.M. No.24156/2017 (stay)**

% **7th November, 2017**

SURJEET KAUR Appellant

Through: Mr. P.P. Ahuja, Advocate.

versus

VIMLA ARORA (DECEASED) THROUGH HER LRS. & ANR.

..... Respondents

Through: Respondent no.2 in person.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of Code of Civil Procedure, 1908 (CPC) is filed by the appellant/defendant no.2 impugning the judgments of the courts below; of the Trial Court dated 6.11.2013 and the First Appellate Court dated 9.1.2017; by which the courts below have dismissed the application filed by the appellant/defendant no.2 under Order XXXVII Rule 4 CPC for setting aside the judgment and decree dated 9.2.2004.

2. I may note that plaintiff in the suit was Smt. Vimla Arora who has since expired and is represented by her four legal heirs who are respondent nos.1A to 1D in this appeal, and these respondent nos.1A to 1D in spite of service are not appearing today. Counsel for the appellant also informs this Court that the respondent no.2 herein and who was the defendant no.1 in the trial court has already paid a sum of Rs.1.50 lacs to the plaintiff i.e Smt. Vimla Arora and which the plaintiff has received in full and final satisfaction of her claims.

3. The limited issue to be decided in this Regular Second Appeal is that whether the suit under Order XXXVII CPC could have been filed by the plaintiff Smt. Vimla Arora as against the appellant/defendant no.2, who is pleaded to be a guarantor as per a verbal guarantee agreement.

4. For disposal of this appeal, the following substantial question of law is framed:-

“Whether the courts below have not erred in dismissing the application under Order XXXVII Rule 4 CPC filed by the appellant/defendant no.2 inasmuch as once the suit itself was not maintainable against the appellant/defendant no.2 under Order XXXVII CPC, then the procedure under Order XXXVII could

not have come into play whether for the filing leave to defend application or for any limitation period for filing leave to defend application or for any limitation period to set aside any *ex-parte* decree obtained under Order XXXVII CPC?”

5. Order XXXVII Rule 1 CPC reads as under:-

“ Order 37 Rule 1. Courts and classes of suits to which the Order is to apply.- (1) This Order shall apply to the following courts, namely:—

- (a) High Courts, City Civil Courts and Courts of Small Causes; and
- (b) other Courts;

Provided that in respect of the courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this order as it deems proper.

(2) Subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely:

- (a) suit upon bills of exchange, hundies and promissory notes;
- (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest arising-
 - (i) on a written contract; or
 - (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
 - (iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.”

6. No doubt, Order XXXVII Rule 1 Sub-Rule 2(b) (iii) CPC only states of a guarantee, and which guarantee can be interpreted to mean an oral agreement or a written guarantee, however, the very intendment of the legislature for bringing the Order XXXVII is that

the debt/liquidated demand is clear because of a written instrument and it for that reason the summary procedure is provided to the plaintiff unlike the ordinary procedure of disposing of the suit after trial. In my opinion, therefore when the expression 'guarantee' is used under Order XXXVII Rule 1 Sub-Rule 2(b)(iii) then such expression 'guarantee', since it is co-relatable to the words debt or liquidated demand in money, therefore, the guarantee would have to be a written guarantee document containing the debt or liquidated amount which the plaintiff in a suit claims.

7. I may note that a learned Single Judge of this Court has similarly held in the case of ***Tarun Sharma Vs. Ali Zulfikar Ahmed and Ors. 2016 (228) DLT 316*** that an Order XXXVII CPC suit is not maintainable on the basis of a verbal/oral guarantee.

8. Admittedly, in the present case, there is no written document of guarantee which is executed by the appellant/defendant no.2. Accordingly as against the appellant/defendant no.2 the suit clearly was not maintainable under Order XXXVII CPC, and therefore, both the impugned judgments have to be set aside and as against the appellant/defendant no.2 the suit will be tried as an

ordinary suit for recovery of moneys. The impugned judgments of the courts below dated 6.11.2013 and 9.1.2017 are set aside and it is directed that the suit as against the appellant/defendant no.2 will be treated as an ordinary suit and will be proceeded in accordance with law.

9. Let the parties appear before the District and Sessions Judge, Central, Tis Hazari Courts, Delhi on 1.12.2017 and the District and Sessions Judge will now mark the suit for disposal to a competent court in accordance with law and the observations made in the present judgment.

10. Appeal is accordingly allowed and disposed of in terms of aforesaid observations, leaving the parties to bear their own costs.

NOVEMBER 07, 2017
Ne/ib

VALMIKI J. MEHTA, J