

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

+ **RFA No. 565/2018**

% **Reserved on : 23rd July, 2018**
Pronounced on : 26th July, 2018

AMBEEK KHEMKA Appellant

Through: Mr. Rakesh Kumar and Mr.
Rupesh Kumar Sinha,
Advocates.

versus

JASWANT SINGH & ANR. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

CM No. 28654/2018 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

RFA No.565/2018

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the Judgment of the Trial Court dated 31.1.2018 by which the trial

court though has decreed the suit for recovery of Rs. 57 lakhs along with interest @ 9% per annum against the respondent no.2/defendant no. 2/Sh. Surender Kalra, but the suit has been dismissed against the defendant no. 1/Sh. Jaswant Singh/respondent no. 1 and which latter part of the impugned judgment is challenged in the appeal.

2. The facts of the case are that appellant/plaintiff pleaded that a loan was taken of Rs. 50 lakhs by the respondent nos. 1 & 2/defendant nos. 1 & 2 and which was reflected in the Loan Agreement dated 5.8.2003. The loan amount of Rs. 50 lakhs along with the additional sum of Rs. 7 lakhs was to be paid by the respondents/defendants and for which purpose cheques signed by the respondent no. 2/defendant no. 2 were handed over by the respondent no. 1/defendant no. 1 to the appellant/plaintiff. The respondent no. 2/defendant no. 2 also has executed three Promissory Notes on 5.8.2003 in favour of the appellant/plaintiff for the amount of Rs. 35,00,000/-, Rs. 10,00,000/- and Rs. 5,00,000/-. The original Title Deeds of the property E-210, East of Kailash, New Delhi were pleaded to have been deposited as security with plaintiff, but on 22.4.2004 when the respondent no. 1/defendant no. 1 gave a cheque of

Rs. 15.50 to the appellant/plaintiff, the original Title Deeds were taken back. On account of non-repayment of the loan, the appellant/plaintiff deposited the cheque of Rs. 57 lakhs on 7.5.2004, but the same was dishonoured with the remark "Account Closed". Accordingly, the subject suit was filed.

3. Respondent no.2/defendant no. 2 was served by affixation and publication in the suit but did not appear and he was therefore proceeded *ex-parte* vide order dated 30.4.2007.

4. Respondent no.1/defendant no. 1 contested the suit. Respondent no. 1/Defendant no. 1 pleaded that he did not take loan and he is not liable to pay the loan to the appellant/plaintiff because he is not a party but only a witness to the Loan Agreement dated 5.8.2003 which was entered into between the appellant/plaintiff and the respondent no.2/defendant no. 2. Also, the Promissory Notes and cheques which are relied upon by the appellant/plaintiff were issued only by the respondent no. 2/defendant no.2 and not by the respondent no.1/defendant no. 1. Suit was hence prayed to be dismissed as against the respondent no.1/defendant no.1.

4. After pleadings were complete, the trial court framed the following issues:

“1. Whether the plaintiff is entitled to recover a sum of Rs.57 lakh from the defendant alongwith interest as claimed in the suit? OPP

2. Whether there is no privity of contract between plaintiff and defendant no.1 and the suit is bad also for joining defendant no.1 as a party? OPD.

3. Relief.”

5. Evidence which has been led by the parties is recorded in paras 8.1. to 8.3 of the impugned judgment and these paras read as under :

“8. **Evidence Led by the Parties**

8.1 In **plaintiff evidence**, plaintiff examined **himself as PW1** vide affidavit Ex PW1/A. PW1 relied upon documents as under:

- (i) Receipt -cum-Agreement as Ex. P1 (admitted document),
- (ii) Certified copy of cheque bearing no. 353498 dated 04.02.2004 for sum of Rs. 57,00,000/- issued in favour of plaintiff as **Ex. PW1/2**;
- (iii) promissory notes dated 05.08.2003 for sum of Rs. 35 lacs, 10 lacs and 5 lacs as **Ex. PW1/3** collectively;
- (iv) certified copy of cheque bearing no. 122578 dated 22.04.2004 for sum of Rs. 15,50,000/- issued in favour of plaintiff as Ex. PW1/4.

(v) In cross-examination, the witness was confronted with cutting of a newspaper, **Ex. PW1/DX1**.

8.2 Plaintiff further got examined **Sh. Ajay Bhatia as PW2**, a real estate broker dealing in properties at East of Kailash who deposed on the same lines as the plaintiff by way of his evidentiary affidavit. In cross-examination, he was confronted with his statement given to the police which is **Ex. PW2/D1**.

8.3 Defendant got examined himself as DW-1 and tendered his evidence by way of affidavit Ex. DW1/A. However, he had not relied upon any document.”

6. Trial court has in the opinion of this Court rightly dismissed the suit against the respondent no.1/defendant no.1 inasmuch as admittedly the respondent no.1/defendant no.1 has only signed as attesting witness to the Loan Agreement Ex. P-1 dated 5.8.2003. This loan agreement shows the first party to the same as the appellant/plaintiff and the second party as Sh. Surinder Kalra/defendant no. 2/respondent no. 2. Liability under this Agreement is thus only of the second party viz respondent no.2/defendant no.2/Sh. Surinder Kalra. Even the Promissory Notes and cheques which have been executed in favour of the appellant/plaintiff, and proved as Ex. PW1/2 and PW1/3, are signed by the respondent no. 2/defendant no. 2, as he was the person who was liable in terms of the Loan Agreement Ex. P-1 dated 5.8.2003. The

relevant observations of the trial court in this regard are contained in paras 11.2.2 to 11.2.7 and 11.3.2 to 11.3.5 and these paras read as under:

“11.2.2 The moot question for consideration before this court is if the defendant no.1, being a witness to the agreement and an associate of defendant no.2 (who was party to the agreement) can be fastened with the liability of repayment of the loan amount ?

11.2.3 In order to answer the question, it will be necessary to carefully peruse the loan agreement. The relevant recitals of the loan agreement in this context are as under :

“1. The second party alongwith an Associate namely Shri Jaswant Singh son of Late Shri Balwant Singh r/o. e-207, Amar Colony, Lajpat Nagar, part-IV, New Delhi (hereinafter referred to as “ The Associate') has agreed to purchase property bearing no. E-210, measuring 200 sq. yds., situated in East of Kailash, New Delhi, along with the existing structure standing thereon and all fittings and fixtures thereto (hereinafter referred to as the “SAID PROPERTY”) from one Shri Tejinder Mohan Singh son of Late Sh. MMS Gambir Sikngh, R/o. E210, East of Kailash, New Delhi for the consideration and under the terms and conditions as mentioned in the Agreement to Sell entered into for such purchase on the 9th day of June 2003 (hereinafter referred to as the “AGREEMENT”)

2. The Second Party hereby also confirms that it shall along with its Associate redevelop the said property in the manner as it may so deem fit, with due municipal sanctions, in the form of multiple dwelling units which shall be sold in full or in parts to enable the second party and its ASSOCIATE as may have been contemplated or planned by them to generate revenue earnings from such envisaged redevelopment /sale activity.

3. The Second Party to enable it to bear the involved financial outlay for its above detailed proposed venture has approached the first party for a loan of Rs. 50,00,000/- (Rupees Fifty Lacs only) for a period of six months from the date of execution of these presents. In lieu of the First party disbursing this sought loan of Rs. 50,00,000/- (Rupees Fifty lacs only) the Second Party assures a fixed return of Rs. 7,00,000/- (Rupees Seven Lacs only) to the First Party, such return being payable at the time and along with the principal amount of Rs. 50,00,000/- (Rupees Fifty lacs only) to be refunded to the First Party on the expiry of six months from the date of this inadenture, by the Second Party.”

11.2.4 On reading the aforesaid recitals, I come to the inevitable conclusion that defendant no.1 is only a witness to the Receipt-cum-Agreement and promissory note and receipts which have been executed between the parties and has no personal liability towards the repayment of loan taken from the plaintiff on account of following reasons :

11.2.5 At the outset, the agreement categorically mentions that the plaintiff is first party and defendant no.2 is the second party. In the agreement as well as promissory note receipts etc. it is specifically mentioned underneath defendant no.1's signature that he is only a witness thereof. Further, neither any part of the loan amount was transferred to defendant no.1's account nor any security cheque issued by him. Hence, the defendant no.1 did not receive the loan amount in his personal account nor issued any cheque/ promissory note as a guarantor of the loaned amount and therefore, cannot be held personally liable for return of the same.

11.2.6 Furthermore, I find that the defendant no.1 as well as the other witness have only put their respective signatures on Ex. PW1/1 at the place of witnesses only whereas the parties, i.e. First party (plaintiff) and Second party (defendant no.2) have put their respective signatures on each page of the Agreement. Hence, as signatures of defendant no.1 was only on the last page of the loan agreement, he cannot be presumed to be aware of all the terms of the agreement.

11.2.7 Further, even in the cross-examination of PW1, he has admitted at various places that defendant no.1 was merely a witness thereto and did not have any dealing with the plaintiff from his personal account. The relevant portions of his cross-examination in this context are reproduced as under:

“Q. Please see the pages no. 1 to 5 of Ex.P1. Do you find anywhere on the said pages, the signature of Mr. Jaswant Singh / defendant no. 1?”

Ans. Nowhere on the said pages are the signature of Mr. Jaswant Singh

Q. Please see page no.6 of Ex.P1. The signature of Mr. Jaswant Singh is appended below the word witness of point C. Is it correct?

A. It is correct.

Q. Please see Page no. 6 of Ex.P1. Is it correct that your signature and signature of defendant no. 2 / Shri Surender Kalra are appended on the right hand side of the document, where the words First party and Second party are inscribed? (At this stage, the record of the case has been placed before the witness.)

Ans. Yes, it is correct.

Q. Is it correct that the signature of defendant no. 2 / Sh. Surender Kalra, appear at point E and your signature appear at point D on page no. 6 of Ex.P1?

Ans. It is correct.

Q. Please see the promissory Note-cum-Receipts Ex.PW1/3 (colly) (page nos. 9 to 11). These receipts are signed by Mr. Jaswant Singh / defendant no.1 at points A (three places) only as a witness? (At this stage, the record of the case has been placed before the witness.)

Ans. It is correct.

Q. It is correct that these receipts Ex.PW1/3 (colly) and receipt-cum-agreement Ex.P1 were signed by Sh.r Jaswant Singh / defendant no. 1 as a witness in your presence?

Ans. It is correct. Mr. Jaswant Singh signed in my presence.

Q. Is it correct that the amount of Rs. 50.00 lac mentioned embodied in Ex.P1 were given by you only to Mr. Surender Kalra and not to Mr. Jaswant Singh?

Ans. It is correct. Vol. My payment of Rs. 50.00 lac had gone to Mr. Surender Kalra, on the insistence of both Mr. Surender Kalra and Mr. Jaswant Singh by saying that Mr. Jaswant Singh had already paid cash for purchase of the plot and Mr. Surender Kalra was supposed to have bank account and therefore, they wanted the payment through Mr. Surender Kalra.

Q. Please see the certified copy of cheque, Ex.PW1/2. From those account this cheque had been issued, and when was it handed over to you? (At this stage, the record of the case has been placed before the witness.)

Ans. The cheque is from the account of Mr. Surender Kalra and it was handed over to me by both Mr. Surender Kalra and Mr. Jaswant Singh, while we were executing the receipt-cum-agreement (Ex.P1)."

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11.3.2 At the outset, in the entire case set up by the plaintiff, it has not been pleaded that the defendant no.1 and 2 were partners and loan amount had been received by them in their status of being partners of a firm, and therefore, the other partner of the firm was jointly and severally liable for payment of the loan amount. Not having pleaded the same, the plaintiff loses the right to allege implied liability of defendant no. 1 as partner of a firm during evidence or at the stage of final arguments, as it would amount to taking the defendant no.1 by surprise.

11.3.3 Presuming that such an argument was raised at the stage of pleadings, even then I am not convinced that it would help the case of the plaintiff as not a single document has been filed to establish that defendant no.1 was acting in his capacity as partner of defendant no.2, and hence, jointly and severally liable for all his acts.

11.3.4 In this context, questions put to the plaintiff during his cross-examination are also pertinent, which are being reproduced as under for sake of clarity:

Q. Do you have any document to show that the defendants were the partners?

11.Ans. When they purchased the property, against which I have given the money to defendants, they represented that they are the partners and the documents which they showed me, had the names of both the people (defendants) in the agreement to sell. Moreover, even in one of the documents, they have mentioned that they are the associates.

Q. Do you have any documents in the nature of partnership deed, or any other instrument to show that the defendants were the registered partners?

Ans. No, I do not have any such documents, except what I have mentioned hereinabove.

Q. I put it to you that the defendants never formed any partnership firm inter se?

Ans. It is incorrect.

11.3.5 On perusal of the deposition , I find that the defendant no.1 has not admitted anywhere that he was a partner of defendant no.2, or that they were acting on behalf of each other or as an agent of the firm, and as such the law of agency would not be applicable. Merely because the agreement indicates that the defendant no.1 is an associate of defendant no.2 for the purposes of purchase of suit property, rebuilding of the same and sale thereof, it cannot be said that there is any partnership

arrangement between them for purposes of repayment of loan amount.”

7. It is also to be noted that though the appellant/plaintiff pleaded that he had received the original Title Deeds of the property bearing no. E-210, East of Kailash, New Delhi, except the self serving deposition of the appellant/plaintiff, there was no proof filed/led that these Title Deeds were deposited by the respondents/defendants with the appellant/plaintiff as security. In my opinion, therefore, the appellant/plaintiff cannot successfully contend that defendant no. 1/respondent no. 1 was liable to pay the suit amount.

8. Learned counsel for the appellant/plaintiff sought to take this Court through documents being the Agreement to Sell entered into by the respondents/defendants with the owner of the property bearing no. E-210, East of Kailash, New Delhi, and also certain other documents, but these documents are not relevant to determine the matter in controversy inasmuch as the loan was granted in terms of the Loan Agreement Ex. P-1 dated 5.8.2003 and this Loan Agreement is signed only and only by the respondent no. 2/defendant no. 2 as the party

liable as the respondent no.2/ defendant no.2 is referred to as the second party under the Loan Agreement Ex. P-1, and that the defendant no. 1/respondent no. 1 has only signed as a witness to this Agreement. Also, as already stated above, the Promissory Notes as also cheques in favour of the appellant/plaintiff are only signed by the respondent no. 2/defendant no. 2 and not by the respondent no. 1/defendant no. 1.

9. In view of the above discussion, there is no merit in the appeal inasmuch as trial court has rightly dismissed the suit against the respondent no. 1/defendant no. 1. Dismissed.

JULY,26 2018
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VALMIKI J. MEHTA, J