

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

% **Date of decision: 7th August, 2018.**

+ **RSA 189/2016 & CM No.25911/2016 (for stay)**

INDIA INFOLINE LTD. & ANR **..... Appellants**

Through: Mr. Mukesh M. Goel, Mr. Dilip
Kumar Arya, Advs. with Mr.
Pradeep Mandal, AR of appellants.

Versus

DANA SINGH BISHT **..... Respondent**

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 26th February, 2016 in RCA No.54/2015 (UID No.02401C0358562015) of the Court of Additional District Judge-02 (Central)] of dismissal of the First Appeal under Section 96 of the CPC filed by the two appellants against the judgment and decree [dated 20th April, 2015 in Suit No.59/2013 of the Court of Civil Judge-3 (West)] in favour of the respondent/plaintiff and against the appellants/defendants of recovery of the value of the shares which was in the account of the respondent/plaintiff with the appellants/defendants as on 30th April, 2008, as per the maximum value of each of the said shares between 1st May, 2008 till the date of realisation along with interest @ 9% per annum thereon from 15th May, 2010 till the date of realisation.

2. The appeal came up first before this Court on 22nd July, 2016, when without indicating the substantial question of law arising, notice thereof

was ordered to be issued and operation of the impugned judgment and decree stayed on the statement of the counsel for the appellants / defendants that the appellants / defendants had deposited the decretal amount before the First Appellate Court and the respondent/plaintiff was restrained from withdrawing the amount so deposited till the disposal of the appeal.

3. The counsel for the respondent/plaintiff appeared in response to the notice and vide order dated 15th December, 2016, the following substantial question of law was formulated:

“Whether the findings of the courts below suffer from illegality and perversity.”

4. Thereafter, the appeal has been adjourned from time to time. Though the counsel for the respondent/plaintiff/decreed holder has been appearing in these proceedings, though intermittently, but today none appears for the respondent/plaintiff. Need to await the respondent/plaintiff any further is not felt and the counsel for the appellants/defendants has been heard and the Trial Court record requisitioned perused.

5. The first argument of the counsel for the appellants/defendants is that the respondent/plaintiff was having a trading account with the appellants/defendants, stock brokers with the National Stock Exchange and the disputes of the appellants/defendants as stock brokers with their clients are subject matter of statutory arbitration and the Suit Court and the First Appellate Court erred in passing a decree against the appellants/defendants.

6. On enquiry, whether any application under Section 8 of the Arbitration and Conciliation Act, 1996 was filed, the counsel for the

appellants/defendants though answers in the negative but states that a plea in that regard was taken in the written statement. Reliance is placed on *Sharad P. Jagtiani Vs. Edelweiss Securities Ltd.* 2014 (4) Arb. LR 94 (Delhi) (DB) to contend that even if a plea is taken in the written statement and no separate application is filed under Section 8 of the Arbitration Act, the same suffices.

7. I have however enquired from the counsel for the appellants/defendants that if the plea was so taken, though no separate application filed, whether the said plea was pressed before the Suit Court and reference of the parties to arbitration sought and if so, how was the suit allowed to proceed to the stage of final disposal.

8. The counsel for the appellants/defendants in reply, only states that though the First Appellate Court noticed the said plea of the appellants/defendants but has not decided the same.

9. The question is not of taking the said plea in first appeal. The question is, whether the appellants/defendants, before the Suit Court, sought reference of the parties to arbitration. A perusal of the order sheet of the Suit Court shows that not only did the appellants/defendants, after the filing of the written statement, even if containing the plea of the disputes subject matter of the suit being subject matter of arbitration, at no point of time press the same and allowed the suit to proceed by filing of replication to the written statement but even at the time of framing of issues also did not claim any issue on the said plea or press for the issue, to be treated as a preliminary issue. The appellant/defendants, even at the time of final arguments in the suit, did not press the plea of the disputes being required

to be referred to arbitration and there is no mention thereof in the judgment of the Suit Court. Of course now the counsel for the appellants/defendants states that it was pleaded in the memorandum of first appeal that the plea was pressed before the Suit Court at the time of final arguments. However on being asked to show, he has backed out from the said statement also and states that he was neither the counsel before the Suit Court nor the counsel before the First Appellate Court. It is quite obvious that this Regular Second Appeal is not being given the weightage which it has under Section 100 of the CPC and casual, of the cuff arguments are being raised.

10. As far as reliance on *Sharad P. Jagtiani* supra is concerned, the same does not apply. In that case also, though no separate application was filed under Section 8 of the Arbitration Act and a plea was taken in the written statement, but the said plea was pressed and on which the suit was disposed of by referring the parties to arbitration and it was the plaintiff in the suit who had come up in appeal which was dismissed. The said judgment cannot permit a defendant to, in Second Appeal, for the first time argue that neither the Suit court should have proceeded with decision of the suit nor the First Appellate Court should have proceeded with the decision of the appeal and the parties should be referred to arbitration. The plea of arbitration cannot be used as a plea to delay the proceedings and is a plea to enable the party to a dispute which is subject matter of arbitration to, on being sued in a Civil Court, have the disputes referred to arbitration. The defendant cannot, after losing in two Courts, set up the said plea. In fact, no substantial question of law also was got framed on the aforesaid aspect.

11. There is thus no merit in the first contention.

12. The second contention urged by the counsel for the appellants/defendants is, of the suit claim having been allowed, despite being barred by limitation.

13. The counsel for the appellants/defendants however fairly admits that neither was any such plea taken in the written statement nor was urged before the Suit Court or before the First Appellate Court and is being urged today for the first time. On enquiry, it is however stated that in the memorandum of appeal, a question of law in this respect has been proposed. However, a perusal of the memorandum of appeal shows the said statement also to be incorrect inasmuch as no substantial question of law on the aspect of limitation has been proposed, lest pressed at the time when substantial question of law was being framed.

14. Though, in my opinion, this appeal is liable to be dismissed on the aforesaid ground alone, for the manner in which it is being conducted, but I still deem it appropriate to proceed to deal with the other arguments.

15. The counsel for the appellants/defendants has argued that this Court, under Section 3 of the Limitation Act, 1963 can consider the aspect of limitation, even if not pleaded and urged in the Suit Court or in the First Appellate Court and contends that the suit claim was barred by time, as per a bare reading of the plaint itself. Attention is drawn to para 10 of the plaint where the cause of action is pleaded to have accrued first when the respondent/plaintiff opened the trading account with the appellants/defendant and thereafter on 20th March, 2010 when the respondent/plaintiff was informed by the appellants/defendants about the

shares held in his account. Attention is next invited to the decree of the Suit Court recording that the suit was instituted on 22nd March, 2013. It is argued that once the cause of action had accrued on 20th March, 2010, the suit instituted on 22nd March, 2013 was beyond the period of three years.

16. The counsel, while arguing so, chose to read para 10 selectively and chose to ignore the remaining part thereof wherein pleas are made as to when, from time to time the cause of action arose. Be that as it may, I have enquired from the counsel for the appellants/defendants, which Article of the Schedule to the Limitation Act is being applied to urge that the suit, on a bare reading of the plaint, was barred by time.

17. The counsel for the appellants/defendants at this stage states that he gives up the argument of limitation.

18. The third argument urged by the counsel for the appellants/defendants is that the decree is bad for uncertainty. Attention is drawn to paras 1 to 3, 5 and 8 of the plaint where it is *inter alia* pleaded, that the respondent/plaintiff had deposited shares of six companies in the trading account with the appellants/defendants; that the appellants/defendants however on 20th March, 2010 informed the respondent/plaintiff that shares of only one company remained in the account of the respondent/plaintiff; that the respondent/plaintiff had never traded in the other share or given any instructions to the appellants/defendants therefor; that the respondent/plaintiff called upon the appellants/defendants to restore the shares of the value of Rs.3.40 lakhs with interest and that the appellants/defendants were liable to pay Rs.2.50

lakhs to the respondent/plaintiff along with interest @ 24% per annum. It is argued that no basis for the claim of Rs.2.50 lakhs was disclosed.

19. I have already noted hereinabove the form in which the decree was passed by the Suit Court. The Suit Court has not passed a decree for recovery of Rs.2.50 lakhs but has passed a decree for recovery of the value of the shares which the appellants/defendants have been found to have misappropriated from the trading account of the respondent/plaintiff and also gives the mode of computation of the said value. I have also perused the evidence led by the appellants/defendants in the suit. The appellants/defendants are found to have examined only one witness and who also in cross-examination disclaimed all knowledge of the transaction and could not even support his evidence by way of examination-in-chief.

20. The Court process, especially of Second Appeal, is not to be used by an appellant to spring surprises in this fashion, to seek undoing of what was done before the Suit Court and the First Appellate Court. The judgments of the Suit Court and the First Appellate Court are found to have dealt with the issues with which the parties went to trial, in accordance with law and no substantial question of law is found to arise on this argument either.

21. The last argument of the counsel for the appellants/defendants is, that the Courts below have given undue weightage to the failure of the appellants/defendants to file Certificate under Section 65B of the Evidence Act, 1872. It is argued that the failure of the appellants/defendants to file Section 65B Certificate ought not to have led to a money decree against the appellants/defendants.

22. I am unable to understand the aforesaid argument. Once the law prescribes electronic records to be proved in a particular manner, if the said procedure is not followed, it is not understandable as to how it can be argued that the electronic record should be considered as proved. What the law does not permit, cannot be permitted by the Courts.

23. The counsel for the appellants/defendants has at this stage also argued, that the appellants/defendants in their written statement pleaded having handed over the electronic record to the respondent/plaintiff and the respondent/plaintiff in the replication did not deny receiving the said electronic record.

24. The same still does not constitute proof of the aforesaid documents.

25. I have asked the counsel for the appellants/defendants, whether there is any admission of the contents of the electronic record by the respondent/plaintiff.

26. The counsel for the appellants/defendants has drawn attention to para 6 of the preliminary submissions in the written statement of the appellants/defendants, which is as under:

“6. That all the information regarding trading has been given to the plaintiff by way of emails vide it's designated Email ID:- dan.singh@rediffmail.com and SMS on his designated mobile number 9968263413. That the copy of E-logs and SMC Logs are collectively annexed herewith as ANNEXURE A-2 (COLLY). Further he was also intimated by way of sending contact notes which are annexed herewith as ANNEXURE A-3. Hence all the allegations regarding trade information not provided by the respondents are wrong, false & denied specifically.”

and to the response of the respondent/plaintiff, in replication, thereto as under:

“4-6 That the contents of the preliminary submissions filed by the respondents under these Para are totally wrong false and hence denied. For the reply of these objections kindly read the plaint of the plaintiff as part and parcel to the reply of these objection which is not repeated herein for the sake of brevity.”

27. It is argued that there is no denial of receipt.

28. Not only is there sufficient denial, in the passage of the replication reproduced above, of receipt but the appellants/defendants having failed to prove the electronic record and/or to have the contents thereof admitted from the respondent/plaintiff, cannot be permitted to raise such specious pleas in this second appeal.

29. I am therefore unable to find the findings of the Courts below to be suffering from any illegality or perversity.

30. Supreme Court, in ***Veerayee Ammal Vs. Seenii Ammal*** (2002) 1 SCC 134 held that merely because on appreciation of evidence another view is also possible, would not clothe the High Court to assume jurisdiction on issue of fact framed by the Trial Court by terming the question as substantial question of law.

31. As far back as in ***Sir Chunilal V. Mehta Vs. Century Spinning and Manufacturing Co. Ltd.*** AIR 1962 SC 1314 reiterated in ***Kashmir Singh Vs. Harnam Singh*** (2008) 12 SCC 796, it was held that the proper test for

determining whether a question of law raised in a case is substantial, is whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense it is not finally settled or is not far from difficulty or calls for discussion of alternative views; if the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles, it would not be a substantial question of law. It was further held that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last Court of fact being the first Appellate Court. Mere appreciation of facts, documentary evidence was held to be not raising a question of law.

32. Even in ***Santosh Hazari Vs. Purushottam Tiwari*** (2001) 3 SCC 179, it was held:

“To be “substantial” a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned.”

33. Again, in ***Hero Vinoth Vs. Sheshammal*** (2006) 5 SCC 545, the position was explained as under:

“24. The principles relating to Section 100 CPC, relevant for this case, may be summarised thus:-

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there

is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the

evidence, taken as a whole, is not reasonably capable of supporting the finding.”

34. Applying the aforesaid, principles, though substantial question of law was framed in this Second Appeal and has been answered as aforesaid, but in fact this Second Appeal does not raise any substantial question of law.

35. Dismissed.

36. The stay earlier granted of operation of the impugned judgment and decree, is vacated.

37. The respondent/plaintiff is entitled to withdraw the monies which the appellants/defendants claimed to have deposited in the First Appellate Court, along with all interest accrued thereon and to execute the decree for the balance amount, if any due.

38. Though the respondent/plaintiff has not contested this appeal but owing to the conduct aforesaid of the appellants/defendants, the appellants/defendants are also burdened with costs of Rs.25,000/- of this appeal, payable to the respondent/plaintiff and if not paid, recoverable by the respondent/plaintiff as part of the decretal amount.

39. Decree sheet be drawn up.

40. The Trial Court record be sent back.

41. On request of the counsel for the appellants/defendants, the costs of this appeal are waived.

RAJIV SAHAI ENDLAW, J.

AUGUST 07, 2018/‘bs’