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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 10th December, 2019
+ **CM(M) 1457/2019 and CM APPL. 44339/2019, 44340/2019**
HEMANT KUMAR SINGHAL Petitioner
Through: Mr. H.S. Gautam, Advocate (M:
9818203060).
versus
INDIAN OVERSEAS BANK & ANR Respondents
Through: Mr. Prem Chhetri, Mr. Promod
Kumar and Ms. Sebika Lama,
Advocates (M: 7908547433).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J(Oral)

1. The Petitioner/Defendant No. 2 - Mr. Hemant Kumar Singhal (*hereinafter* 'Defendant No.2') is aggrieved by the impugned order dated 17th August, 2019 passed by the Id. ADJ allowing the application under Order XVIII Rule 3 CPC for leading evidence in rebuttal and evidence of an expert witness.
2. The Respondent No. 1/Plaintiff - Indian Overseas Bank (*hereinafter* 'Bank') filed a suit for recovery of Rs.5,71,920/- along with interest against Respondent No.2/Defendant No.1 - Mr. Praveen Kumar Jain who had allegedly taken a loan vide application dated 2nd March, 2006 for a sum of Rs.6 lakhs. The same was for the purpose of purchase of a car – Ford Fiesta. It is the case of the Bank that the Defendant No.2 had stood guarantor for the said loan and that both the Defendants are therefore jointly and severally liable.
3. In the written statement, the case of Defendant No.2 was that he had taken a loan for purchase of a Honda City car in February, 2006 and had

fully repaid the loan by 2009. When he had sought a No Dues Certificate in respect of the said loan, the same was not issued by the Bank. Defendant No.2 thereafter served notice dated 21st January, 2011 upon the Bank. In reply to the said notice dated 21st February, 2011, it was alleged by the Bank that Defendant No.2 had stood guarantor for the loan of Defendant No.1 which was denied by the Defendant No.2. The stand of Defendant No.2 was that Defendant No.1 may have produced forged signatures of Defendant No.2 and that he had never stood guarantor for any loan of Defendant No.1.

4. The following issues were framed in the suit:

- “1. Whether the plaint is liable to be rejected under order 7 rule 11 of CPC? OPD.*
- 2. Whether the plaintiff is entitled for decree of recovery of the suit amount? OPP.*
- 3. Whether the plaintiff is entitled for pendentelite and future interest on decreetal amount? if so, at what rate? OPP.*
- 4. Relief.”*

5. Defendant No.1 – the principal borrower, was proceeded *ex-parte* in the suit. The Bank led the evidence of its Senior Manager – Mr. Vijay Kumar Mehra, PW-1. Defendant No.2 thereafter led evidence. He himself appeared as DW-1 and he also led the evidence of handwriting expert as DW-3. DW-2 was a witness who appeared from the Police Station who was investigating the complaint of forgery. DW-3 – Deepak Jain, in his evidence, stated that he is a handwriting expert since 1990. He submitted a report after comparing the signatures of Defendant No.2. DW-3 was not cross-examined initially by the Bank. At that stage an application was moved by the Bank seeking permission to cross-examine the said witness. In the said application, the Bank also sought permission to lead evidence in

rebuttal. The said application was rejected by the Trial Court vide order dated 28th March, 2018. The said order reads as under:

“Arguments heard on the applications of the plaintiff pending on record.

In its application u/o 18 rule 17 CPC, the plaintiff is seeking opportunity to cross-examine DW2 Deepak Jain, the handwriting expert as the opportunity was closed on 25.01.2017. Keeping in view the totality of the circumstances, one last opportunity is granted to the plaintiff to cross-examine DW2 Deepak Jain subject to costs of Rs.4,000/- payable to defendant No. 2 and the diet money shall also be paid by the plaintiff.

In the remaining application u/o 18 Rule 3 CPC, the plaintiff is seeking to produce its own handwriting expert in rebuttal to the examination of DW2 Deepak Jain, handwriting expert by the defendant No. 2. The way plaintiff is trying to examine its own handwriting expert is not rebuttal evidence but is an endeavor to fill the lacunae of the case. The defendant No. 2 had always been defending the case on the ground that his signatures on the alleged loan documents were forged by defendant No. 1. Meaning thereby, it was always within the knowledge of the plaintiff that the defendant No. 2 is disputing his signatures whereby the plaintiff ought to have examine its own handwriting expert at the very first instance instead of waiting for an opportunity to fill the lacunae of the case once the defendant No. 2 has examined his own handwriting expert favouring his contentions. This sort of liberty cannot be granted whereby the application is dismissed.

Issue fresh summons to the DW2 Deepak Jain as per the particulars on record on filing PF returnable for 25.07.2018.”

6. Thereafter, the Bank again moved an application for leading rebuttal evidence which was permitted by the Trial Court by the impugned order.
7. Ld. counsel for Defendant No.2 has submitted that the rebuttal

evidence by the Bank could not have been permitted as this very prayer of the Bank was rejected vide order dated 28th March, 2018. The Ld. ADJ could not have taken a different view than what was earlier decided by the Court. The said order dated 28th March, 2018 being unchallenged and having attained finality, there was no permissibility to permit rebuttal evidence once again. Reliance is placed on *Suman Kapoor v. Rakesh [CM(M) 181/2015, decided on 29th June, 2015]*.

8. On the other hand, it is submitted by ld. counsel for the Bank that under Order XVIII Rule 3 CPC, evidence in rebuttal can be permitted even without the right being reserved. One of the issues which is to be adjudicated is an issue on which onus is on the Defendant. Thus, on this issue, rebuttal evidence ought to be permitted by the Court. Reliance is placed on *Wazirpur Small Industries Association v. Union of India [CM(M) 718/2007, decided on 27th January, 2010]*.

9. A perusal of the pleadings on the record clearly shows that since inception i.e. since the issuance of the notice itself, the case of Defendant No.2 has been that he has cleared the loan which he had taken from the Bank. In reply to the said notice, the Bank took a stand that there is another loan for which Defendant No.2 had stood guarantor. This was denied by Defendant No.2 at the initial stage itself. The plea in the written statement reads as under:

“G. That the melafide intention of the plaintiff bank is also clear from the contents of reply of notice dated 21-02-11. It is submitted that it is admitted facts according to reply of notice also that answering defendant had took loan in the month of Feb. 2006 and defendant no. 1 had took loan in the month of March 2006. Further from the contents of para no.4 and 5 of reply on merits

of reply of notice dated 21-02-11, it is very much clear that intention of plaintiff, bank is melafide and the plaintiff bank wants to recover the loan amount from the answering defendant in an illegal manner, however answering defendant neither stood guarantor for the defendant no. 1 nor he is liable to make payment of the loan amount allegedly exist against the defendant no.1.

H. That, plaintiff also admitting that defendant no. 1 is a cheater and has cheated several other bank by forging and fabricated documents and in bogus name and presently he is absconder and not traceable and answering defendant already submitted that he never stood guarantor for defendant no.1 and defendant no.1 might have produce forged documents by making forged signature of the answering defendant, despite plaintiff filed the above said suit against answering defendant.

I. That in the above said suit answering defendant received notice in the above said case without documents for 02-02-11 and on 02-02-11 counsel for the answering defendant appeared and filed his Vakalatanama and requested to this hon'ble court to direct to the plaintiff to supply copy of documents annexed with the suit and this hon'ble court was also pleased to direct to the plaintiff to supply documents annexed with the suit and plaintiff on 15-02-11 supplied the documents to the counsel of the answering defendant and answering defendant after gone through the documents again shocked and surprised seeing forged signature of the answering defendant not only number of documents, but also alleged revival letter dated 28-01-09. That from the documents it is clear that not only defendant no. 1 liable for making forged signature of the answering defendant, but the bank is also liable for forging signature of the answering defendant on the revival letter dated 28-01-09.”

10. The above pleadings clearly show that Defendant No.2's case has

always been that he has never stood guarantor to Defendant No.1 and that there has been a forgery. A perusal of the issues shows that the Bank had a positive obligation to prove that it is entitled to seek recovery from Defendant No.2. Defendant No.1, is clearly absconding and has also been proceeded *ex-parte*. The Bank, on the basis of the pleadings had an obligation to establish that the documents relied upon by it were genuine, were not fraudulent and were not forged. These documents were in the exclusive possession of the Bank. The only witness produced by the Bank is PW-1 who is a Senior Manager at the Pitampura Branch. His cross-examination is very telling. He admitted that none of the documents were executed in his presence. He was also not aware about the person who had filled the loan documents. He also admitted that Defendant No.1 was guilty of producing forged documents and taking loans from several banks. He also admitted that Defendant No.2 had cleared the loan in respect of the Honda City car. Thus, both the Bank and the witness were fully aware of Defendant No.2's case, not only from the pleadings, but also from the cross-examination conducted on PW-1.

11. PW-1 had also perused the expert report of Mr. Deepak Jain who was produced as DW-2 to establish that the signatures were forged. Thus, in the evidence which was led by the Bank, the Bank had adequate opportunity to deal with the question of forgery and fraudulent nature of documents as alleged by Defendant No.2. The cross-examination of PW-1 is set out below:

“ ...

I am posted at Branch B-155, Lok Vihar, Pitampura, Delhi since August, 2010.

...

It is correct that Document Ex. PW-1/2 has not been executed in my presence.

...

In the present case, I do not know the person who has filled the loan documents like agreement, revival letter, demand promissory note, guarantee deed, consent/hypothecation letter etc.

...

It is correct that we have not filed any proof regarding service of notices Ex. PW-1/12 & 1/13 to defendant no.2.

...

It is correct that defendant no.1 had took loan from several banks by producing forged documents. The said fact has also been mentioned by my counsel at the time of replying legal notice of defendant no.2. It is correct that defendant no.1 is not traceable. It is correct that defendant no.2 has already cleared the loan which he had took to purchase Honda City Car bearing No., DL 4CAB 7592.

...

It is correct that we have not given NOC to defendant no.2 in respect of loan given to defendant no.2 regarding his Honda City car bearing No.DL4CAB7592.

...

It is correct that defendant no. 2 with the permission of this hon'ble court already got expert opinion from one hand writing expert regarding his forged signatures on number of documents produced by bank with the present suit and said expert Sh. Deepak Jain already filed expert opinion regarding hand writing of defendant no. 2 alongwith his evidence by way of affidavit.

...

It is wrong to suggest that Ex. PW1/6, Ex. PW1/7 are also forged and fabricated documents and signatures

of defendant no. 2 have been forged to release car loan to defendant no. 1. It is wrong to suggest, that Ex. PW1/11 are also forged and fabricated and signatures of defendant no. 2 are forged to create grounds to file the present suit.

...

I know that defendant no. 1 has also cheated some other, banks on the basis of forged and fabricated documents, it is correct that defendant no. 1 has also cheated by forging and fabricating documents as well as using bogus name of Sanjeev Mittal. It is wrong to suggest that I am deposing falsely.”

12. In the first application filed under Order XVIII Rule 3 CPC dated 29th March, 2017, the case of the Bank is that Mr. Deepak Jain – the expert, could not have been cross-examined as the counsel was not available on 25th January, 2017. In the said application, it is stated that the Bank has obtained an opinion from M/s. Truth Labs, who are experts in comparing handwriting. Thus, the prayer in the first application is as under:

“It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to allow the plaintiff to lead evidence in rebuttal and call/summon the witness namely Shri S.C. Gupta from Truth Labs, in the interest of justice.”

13. In reply to this application, Defendant No.2 clearly pleaded that sufficient opportunity has been given to the Bank to lead evidence and the only intention is to keep Defendant No.2 entangled in litigation. On this application, the Trial Court passed the following order:

“Arguments heard on the applications of the plaintiff pending on record.

In its application u/o 18 rule 17 CPC, the plaintiff is seeking opportunity to cross-examine DW2 Deepak Jain, the handwriting expert as the opportunity was

closed on 25.01.2017. Keeping in view the totality of the circumstances, one last opportunity is granted to the plaintiff to cross-examine DW2 Deepak Jain subject to costs of Rs.4,000/- payable to defendant No. 2 and the diet money shall also be paid by the plaintiff.

In the remaining application u/o 18 Rule 3 CPC, the plaintiff is seeking to produce its own handwriting expert in rebuttal to the examination of DW2 Deepak Jain, handwriting expert by the defendant No. 2. The way plaintiff is trying to examine its own handwriting expert is not rebuttal evidence but is an endeavor to fill the lacunae of the case. The defendant No. 2 had always been defending the case on the ground that his signatures on the alleged loan documents were forged by defendant No. 1. Meaning thereby, it was always within the knowledge of the plaintiff that the defendant No. 2 is disputing his signatures whereby the plaintiff ought to have examine its own handwriting expert at the very first instance instead of waiting for an opportunity to fill the lacunae of the case once the defendant No. 2 has examined his own handwriting expert favouring his contentions. This sort of liberty cannot be granted whereby the application is dismissed.

Issue fresh summons to the DW2 Deepak Jain as per the particulars on record on filing PF returnable for 25.07.2018.”

14. A perusal of the above order reveals that the Trial Court granted an opportunity to the Bank to cross-examine Mr. Deepak Jain, DW-3. However, on rebuttal evidence, the Court held that the Bank had an obligation to examine its own handwriting expert in the first instance instead of waiting to fill up lacunae in its evidence after Defendant No.2 had led his evidence. Thus, the permission to cross-examine was granted, however, the request for rebuttal evidence was rejected. Thereafter, DW-3 was cross-

examined by the Bank. However, the Bank then moved a second application under Order XVIII Rule 3 CPC for the same very relief which was earlier rejected. In the said application, the Bank sought a right to produce evidence in rebuttal. This has been allowed by the Trial Court by the impugned order which reads as under:

“An application U/O 18 Rule 3 CPC filed by the plaintiff for leading evidence in rebuttal filed on 10.01.2019 is subject matter of this order. The prayer in the application is that the plaintiff may be allowed to lead evidence in rebuttal by producing witnesses from plaintiff bank / Indian Overseas bank as well as expert witness in rebuttal.

The application is vehemently opposed by D2. D2 is the only contesting defendant. Very briefly stated, the plaintiff bank seeks recovery from the two defendants based on the case that D1 took certain vehicle loan from the plaintiff in which D2 stood as guarantor. D2 is contesting the suit on the ground that he never stood guarantor for D1 in the loan transaction involved in this case. D2 claims that infact D2 had taken another loan in February 2006 for Honda City Car and that loan had already been repaid to the plaintiff but he never stood guarantor for D1 in the loan transaction involved.

After conclusion of plaintiff evidence, the D2 examined one expert witness namely Deepak Jain who has been examined as DW3. The said witness has been examined by D2 to prove the point that the questioned signatures as guarantor on the loan documents does not belong to D2.

The application of the plaintiff is opposed by D2 on the ground that earlier also similar application was filed by the plaintiff which was dismissed on 28.03.2018 by the Court observing that the attempt by the plaintiff to examine its own hand writing expert is not infact rebuttal evidence but is an endeavor to fill

up the lacunae. Despite the fact that the plaintiff knew right from the stage of defence of D2 that D2 was disputing the signatures.

The evidence of DW3 namely Deepak Jain was concluded on 18.10.2018. The question of rebuttal evidence by the plaintiff would of course arise after the conclusion of evidence by the defendant which concluded on 18.10.2018. In the present matter the dispute between the plaintiff and D2 would be entirely based on the evidence whether D2 stood as guarantor and signed the loan documents/ guarantee documents as guarantor for D1. Once the D2 has examined an expert witness to disprove the signature the plaintiff must get a fair opportunity to disprove the said fact. Declining such an opportunity to the plaintiff at this stage would tantamount to throwing out the case of the plaintiff against D2 without giving the plaintiff a fair chance of proving its case. No prejudice shall be caused to D2 if the plaintiff is allowed to lead evidence to rebut the fact claimed by DW3. Merely because earlier such an application was dismissed does not come in the way of allowing this application for the reason that the plaintiff has a right to rebut the evidence of the defendant, which right would have approved only upon conclusion of the evidence of D2 which concluded subsequent to the dismissal of earlier application.

Accordingly, application U/O 18 Rule 3 CPC filed by the plaintiff is allowed. The plaintiff is given an opportunity to lead evidence in rebuttal and also lead evidence of an expert witness qua the signatures of D2. Let appropriate steps in this regard be taken by the plaintiff.

Put up for plaintiff evidence in rebuttal on 13.12.2019”

15. A perusal of the impugned order shows that the only reason given by the Trial Court is that the question of rebuttal evidence arises after the

Defendant's evidence is concluded and that the Bank must get a fair opportunity to disprove the facts.

16. The approach of the Trial Court is clearly erroneous. The Bank has been aware of the case of Defendant No.2 right from inception i.e. from the written statement as also the expert report of Mr. Deepak Jain which was placed on record. The Bank's witness clearly admitted that Defendant No.1 was guilty of forgery of documents with various other banks. With such knowledge at hand, the primary obligation to prove that the documents are genuine is that of the Bank and not of Defendant No.2. The onus of the main issue i.e. the issue to prove that the Bank is entitled for recovery, is on the Bank and not on Defendant No.2. Under Order XVIII Rule 3 CPC, the Plaintiff would only be entitled to rebuttal evidence if the onus is on the opposite side. The onus in respect of issue framed under Order VII Rule 11 CPC is on Defendant No.2, however, the said issue is a general issue - that there is no cause of action. The Bank has to first discharge the onus that the documents which form the basis of the suit are genuine and the signatures are not forged. For that purpose, the Bank always had the opportunity to, produce the documents relating to the first Honda City loan availed of by Defendant No.2 and compare the same with the signatures on the second application to see if the signatures on the second set of documents were forged or were genuine. Even when PW-1 appeared in the witness box, he had already perused the report of Mr. Deepak Jain. At that stage, the Bank knew that Defendant No.2 is leading the evidence of an expert. There was no reason as to why the Bank could not have adduced evidence of an expert at that stage. Clearly, the Bank waited for the expert of Defendant No.2 to be cross-examined and lead his evidence. In fact, even DW-3 – Deepak Jain

was initially not cross-examined, but vide order dated 28th March, 2018, upon costs being imposed, leave was granted. The first application seeking the same relief was already rejected on 28th March, 2018. A fair chance cannot mean that the Bank can have an indefinite chance to prove its case. There is no doubt that even without reserving right to lead rebuttal evidence, the Plaintiff could have been permitted to lead rebuttal evidence provided the basic onus was on Defendant No.2. However, in this case, the onus to prove that the loan was availed of and that recovery can be sought by the Bank was on the Bank and not on Defendant No.2. The question of granting permission to lead rebuttal evidence thus, does not arise. As held in ***Suman Kapoor (supra)***, rebuttal evidence can be permitted only if the onus is on the opposite side on a particular issue. The observation of the Court is as under:

“6. Perusal of the Rule 1, 2 and 3 of Order XVIII CPC would show that the plaintiff has a right to begin unless defendant admits the fact, hence state his case and produce his evidence in support of the issues he is bound to prove. Under Rule 3 out of the several issues if the burden to prove some issue lies on other party, then the party can begin at his option, either produce his evidence on these issues or reserve it by way of answer to the evidence produced by the other party and in the latter case, the party beginning may produce the evidence. However, there is no provision in the CPC which permits the party to lead evidence later on even on an issue onus of which lies on it.”

17. Under these circumstances, for the reason that the Bank has utterly failed in leading evidence in the first place and is only trying to fill up lacunae by seeking rebuttal evidence and also due to the fact that a similar relief was sought earlier and was rejected by the Trial Court on 28th March, 2018, the impugned order is not sustainable and is liable to be set aside. The

petition is allowed in the above terms.

18. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

DECEMBER 10, 2019

Rahul

