(2011) 04 DEL CK 0295

In the Delhi High Court

Case No : Regular Second Appeal No. 357 of 2006

Gangour Investment Limited APPELLANT

Vs

Shri Pitamber Lal Gupta RESPONDENT

Date of Decision : 01-04-2011

Acts Referred:

Evidence Act, 1872 — Section 34

Citation : (2011) 04 DEL CK 0295

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Shilpi Jain Sharma, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 17.7.2006 which has endorsed the finding of the trial judge dated 06.8.2005 whereby the suit filed by the Plaintiff M/s Gangaur Investment Ltd. seeking recovery of Rs. 1,44,702.90 along with interest @ 18% per annum had been dismissed.

2. The case of the Plaintiff as is evident from the averments in the plaint is that the parties were dealing with one another in the sale purchase of the securities and shares. Amounts were duly debited and credited in the account of the Defendant which was being maintained by the Plaintiff as per the normal business transactions. As and when the Defendant purchased shares through Plaintiff the same had to be cleared within the settlement period; if the Defendant sold shares within the settlement period the profit/loss would be debited/credited to the account of the Defendant in the books of account maintained by the Plaintiff. Contention of the Plaintiff is that on 31.3.2001 a sum of Rs. 1,32,048.65 was due and outstanding against the Defendant.

3. Defendant contested the suit. His objection was that no transaction relating to the aforenoted amount ever took place between the parties. The claim is false

and frivolous.

4. From the pleadings of the parties five issues were framed. Oral and documentary evidence was led. Issue No. 2 is relevant for the controversy in dispute. It reads as follows:

Whether debiting of the account of the Defendant by the Plaintiff was a wrong debit? OPD

5. The finding of the trial judge has returned as follows:

Issue No. 2

7. An objection is raised by the Defendant that the statement of account filed by the Plaintiff in the suit does not reflect the true entries and the same is showing incorrect entries hence, they are not reliable at all. It is claim of the Defendant that an amount of Rs. 30,000/- was paid by him in cash against a receipt on 23.12.2000 and the same has not been correctly shown in the Statement of Account. The said receipt is filed by the Defendant and is marked Ex.DW-1/1. It is also admitted by the witness appeared on behalf of Plaintiff in his cross-examination that the Defendant paid Rs. 30,000/- in cash to the Plaintiff on 23.12.2000. The Statement of Account marked Ex.PW-1/5 does not have any entry of amount paid by the Defendant. During the cross-examination of the Defendant it is put to the Defendant on behalf of Plaintiff that the entries shown against 06.01.2011 amounting to Rs. 15,000/- each one by cash and other by cheque are in respect of the payment made by him on 23.12.2000. thus in the facts where it is admitted case of parties that the Defendant paid an amount of Rs. 30,000/- on 23.12.2000 and the same is not reflected in the Statement of Account filed by the Plaintiff and it is not the case of the parties that the Defendant made any payment either in cash or cheque on 06.01.2001 to the Plaintiff, I am of the opinion that the statement of Account does not reflect the true position of the account of the Defendant with the Plaintiff. Issue decided accordingly.

This was affirmed by the first appellate Court. The finding returned is as follows:

11. I have perused the evidence on record and considered the rival submissions made at bar. While deciding issue No. 2 against the Plaintiff, the Ld. Trial Court held that "the statement of account does not reflect the true position of the account of the Defendant with the Plaintiff." Admittedly, the Plaintiff could not explain as to why the entry of Rs. 30,000/- paid on 23-12-00 against the receipt Ex. DW1/1 by the Defendant was missing in the statement of account Ex. PW1/5. The stress of the Ld. Counsel for Plaintiff during the written arguments on the basis of the law referred "supra" on behalf of the Appellant is that the statement of account is produced from the books of accounts maintained in the ordinary course of business. It was further argued that the receiving of the amount of Rs. 30,000/- is shown by two entries of Rs. 15,000/- each dated 6-01-01 and it was admitted in the cross examination that one entry of Rs. 15,000/- is shown by

cheque wrongly. Section 34 of the Indian Evidence Act is very clear which lays down that "Entries in books of accounts, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but such statement shall not alone be sufficient evidence to charge such person with liability."

12. The Ld. Counsel for Plaintiff submitted that in support of statement of account, the Plaintiff has proved the transaction by placing on record document Ex. PW1/9 stating that the said document is a certified report by the chartered accountant of the Plaintiff confirming the transaction between the Plaintiff and the Defendant on the basis of which statement of account Ex. PW1/5 has been prepared and has shown the balance amount against the Defendant/Respondent.

13. The argument of Ld. Counsel for Respondent in that regard is that the statement of account admittedly does not reflect the true position because of the missing and the wrong entries therein. With regard to the report of transaction Ex. PW1/9, it is stated that the same is false and fabricated because the Plaintiff has never supplied the contract note with regard to the said transaction as the Defendant/Respondent has never given any instructions after 20-02-01 to carry out sale or purchase of shares on his behalf. It was deposed by DW-1 in his affidavit Ex. DX that the Plaintiff also did not issue any contract note to the Defendant for any transaction after 20.02.01, thereafter, any transaction of sale or purchase of shares carried out by the Plaintiff after 20.02.01 was invalid and not binding on the Defendant. In his cross examination, the DW-1 categorically stated that he has not received any contract note regarding the transaction after 20.2.01. The Plaintiff has not led any evidence to prove that the contract note of the transaction after 20.02.01 as shown in document Ex. PW 1/9 were duly sent to the Defendant and were received by him. In the absence of any such evidence, the Ld. Trial Court has rightly held that the Plaintiff has failed to produce the documentary evidence in that regard and Plaintiff cannot be allowed to lead oral evidence to prove the sending of the contract note to the Plaintiff qua transaction shown in Ex. PW 1/9.

14. In order to prove the claim against the Defendant on the basis of the statement Ex. PW 1/5 and the report of the chartered accountant Ex. PW 1/9, it was incumbent upon the Plaintiff to produce the witness who has prepared the statement of account in the ordinary course of the business. The Plaintiff has not even examined the chartered accountant who is stated to have prepared and certified the report of transaction Ex. PW 1/9. The Plaintiff/Appellant has, thus, failed to substantiate its claim in the suit as he has failed to lead necessary evidence in that regard. The finding recorded by the Ld. Trial Court on the issues framed in the suit is, therefore, found to be correct and legally sustainable. I do not find any infirmity in the judgment of the Ld. Trial Court which may need interference. For these reasons, I do not find any merit in the appeal and the same is accordingly dismissed. Copy of this order be sent to the Ld. Trial Court alongwith TCR.

6. The statement of account proved by the Plaintiff is Ex.PW-1/9 giving the details of the transaction. The contention of the Defendant was that a sum of Rs. 30,000/- had been paid by him to the Plaintiff on 23.12.2000 vide receipt Ex.DW-1/1; there is no dispute to this. However, Ex. PW-1/9 did not reflect this entry. Contention of the Plaintiff/Appellant is that there were two entries of Rs. 15000/- reflected in this statement of account which are dated 06.1.2001 and in fact they comprise of this amount of Rs. 30,000/-. This averment of the Plaintiff was dealt with by the two courts below; it was rejected.

7. This is a second appeal. It has been admitted and on 11.10.2007 the following substantial question of law was formulated:

Whether the Plaintiff would still require to prove each and every entry particularly when statement of account is not disputed by the opposite party.

8. This substantial question of law is bordered on factual submissions. A second appeal court cannot delve into fact finding. Be that as it may, the concurrent finding of fact do not in any manner calls for any interference. There is no perversity in the finding in the impugned judgment. It had rightly noted that Ex.PW-1/9 had not reflected the admitted entry of Rs. 30,000/-; this was the reason for the rejection of the statement of account of the Plaintiff; as a consequence of the same the suit of the Plaintiff was dismissed. Substantial question of law is answered accordingly. There is no merit in the appeal. Dismissed.