
(1984) 08 DEL CK 0017
In the Delhi High Court
Case No : Suit No. 637 of 1984

J.S. Sood

APPELLANT

Vs

Prem Lata Mehta and Another

RESPONDENT

Date of Decision : 28-08-1984

Acts Referred:

Citation : (1984) ILR Delhi 716

Hon'ble Judges : D.P Wadhwa, J

Bench : Single Bench

Judgement

D.P. Wadhwa, J.

(1) The plaintiff, as sole proprietor of M/s. Globe Films, has filed the preset suit for recovery of Rs. 2,36,000 against the defendants, who are stated to be the partners of a firm which was producing a motion picture "NADANIYAN". The suit has been filed under Order xxxvii of the Code of Civil Procedure.

(2) The plaintiff has alleged that there was a verbal agreement under which he agreed to finance the production of the aforesaid film. He has further alleged that in pursuance thereto he made various payments to the defendants from time to time for this purpose. It is specifically averred that though the whole finance for the production of this picture was given by the plaintiff there existed no writing between the parties to that effect. It is further stated that sometime in July, 1983, the plaintiff requested the defendants to go into the accounts and confirm the payments received by them so that the plaintiff could have an exact idea of his investments. This plea appears to be rather strange when the money was advanced by the plaintiff and there could be no question of defendants going into the accounts and confirming the payments received by them from the plaintiff. It is then stated that after great persuasion the defendants agreed to acknowledge only receipt of Rs. 2,00,000 though the plaintiff could trace out payment of Rs. 2,08,000 "from whatever little bank accounts he was having". The plaintiff has also stated that in fact the payments made by him were more than this amount of Rs. 2,08,000 as he also made payments by means of bearer cheques and cash

as well. On the basis of the following writing of the defendants, the plaintiff has filed the present suit under Order xxxvii of the Code of Civil Procedure: "J. S. Sood Globe Film Delhi Regarding: Nadaniyan This is to certify that you have paid a sum of Rs. 2 Lakh in completion of picture Nadaniyan till date which will be repaid to you before release of the picture "NANDANIYAN".

(3) This writing is stated to be in the handwriting of defendant No. 2. It is, however, on the letterhead of the plaintiff. From the signatures appended to this writing it can hardly be said that it is signed by defendant No. 2, although the plaintiff contends that it is so signed. There is no rate of interest mentioned in this writing but the plaintiff is claiming interest @ 24 per cent per annum which is stated to be the minimum in the film trade. The total interest as worked out comes to Rs. 36,000. Hence the suit for recovery of Rs. 2,36,000.

(4) Summons were issued to the defendants. They were served on 28th April 1984. They did not enter appearance within the time prescribed. The plaintiff would thus be entitled to judgment but it has to be seen whether the present suit under Order xxxvii is maintainable.

(5) The suit under Order xxxvii of the CPC after the amending Act of 1976 can now be filed to recover a debt or liquidated demand in money payable with or without interest and if it arises on a written contract. The question which now engages attention is whether the writing referred to above constituted a written contract between the parties. Mr. Mehra contends that it does so. According to him, it records the fact of receipt of payment of Rs. 2.00,000 by the defendants for the completion of the film "NADANIYAN" and also the fact of repayment of this amount before the release of the film. But then at the same time it can also be said that this writing acknowledges the receipt of a particular amount and promise for repayment, arising out of an oral contract which would be the basis for this writing. As noticed above it is the case of the plaintiff himself that there was no written contract between the parties. The amount thus due to the plaintiff is under an oral contract though the acknowledgement of receipt of some of the payments may be in writing. There is no date of this writing though according to the plaintiff he had requested the defendants to go into the account? and confirm the payments received by them".

(6) An agreement which is enforceable by law is a contract. An agreement requires a promisor, a promisee and consideration. Normally a written contract would be signed by both the parties. Though in some cases written contract might be spelt out from exchange of letters. A contract which is to be inferred or implied from certain documents may not be a written contract to which the provisions of Order Xxvii would apply. The reason being that earlier Order xxxvii was confined to negotiable instruments but by the amending Act of 1976 this Order became applicable to written contract as well. Needless to say that Order xxxvii prescribes a summary procedure. In the summary procedure the Court cannot possibly infer contract from various documents though exchanged between the parties and treat that as a written contract and then adopt the

summary procedure under Order xxxvII.

(7) Reference may be made to a decision of the Bombay High Court in *Manekchand Mohanlal Poonawala Vs. Shah Bhimji Kundanmal and Company*, . This was a case under old Order xxxvii Rule 2 as amended by the Bombay High Court. Relevant part of this Rule 2 was as follows:

".... and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money... "arising on a written contract."

The question that arose in the case was whether a supremacy suit can be filed on the basis of Khata Pete receipt. The plaintiff filed the suit against the defendant on the basis of the following writing made by the defendant in the book of the plaintiff :-----

"RS.13,000 Shah Bhimaji Kundanmal and Company. (sd/-) Manekchand Mohanlal Poonawala. Rs. 13,000 cash-full Khata Pete Jama (received on Sarafi account and so credited) Interest 14 annas (fourteen annas). S. Y. 2023 Posh Vad. 12. Monday 6-2-67. (Sdl-) Mota Visraj."

(8) It was contended by the defendant that suit did not lie under Order xxxvii on the basis of the aforesaid writing, it was held that the writing relied upon by the plaintiff was what was ordinarily known as a "Khata Pete receipt" and this kind of writing had been known and understood to constitute not only an acknowledgement for receipt of the money but to contain an implied promise that the money having been received "Khata Pete" i.e. "on account" would be repaid by the debtor signing the writing. Thus the question was whether the Khata Pete receipt was a written contract within the meaning of Rule 2 referred to above. It was observed that though the writing did not contain express promise to repay but even so it was apparent that the writing did contain an implied promise to repay. This was so because the writing was made in lender's book by the debtor and the debtor stated that the amount was received on Sarafi account and was credited to the account of creditor in the ledger of the debtor and that the rate of interest was also mentioned. It was held that the writing related to a fresh loan and had no reference to adjustment or otherwise of accounts of previous dealings and that it bore a 4-anna revenue stamp. It was further held that it was quite clear that the parties did not intend "the writing to be and it is not merely a receipt" and that the writing was executed to create an obligation and promise to repay the amount mentioned therein. The main point in the above case is, Therefore, quite clear and it is that the writing related to a fresh loan and had no reference to adjustment or otherwise of accounts of previous dealings. In the present case the writing in question acknowledges the receipt of certain amount under an oral contract which had been entered into between the parties earlier. The judgment of the Bombay High Court is quite distinguishable.

(9) Another decision of the Bombay High Court may also be referred to which related to an earlier amendment of Order xxxvii Rule 2 as amended by the

Bombay High Court and was as follows:

"ALL suits upon bills of exchange, hundis or promissory notes and all 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 on contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money."

(10) The question in the case *Gokulprasad Poddar Vs. Ramrikhdas Parasrampuriah and Co.*, with which the Court was concerned was whether a summary suit would lie when the plaintiff's claim was not based upon any written agreement but was based upon an agreement in order to prove which evidence had to be given by the plaintiff. The suit was based upon Hundis honoured by the plaintiff under an agreement with the defendant. It was held that this case fell in the category of a debt or liquidated demand in money payable by the defendant with or without interest arising on the contract express or implied. Therefore, the Court held the rule itself assumed that the contract on which the plaintiff is suing need not be a contract in writing. It may be even be an implied contract. But so long as there is a debt or liquidated demand which becomes payable under such a contract the plaintiff is entitled to sue for the amount due under the contract. Thus the Court held that the summary suit would be maintainable, although it was based on an oral agreement or contract when a specific sum is demanded by the plaintiff which was the amount of the Hundis honoured by the plaintiffs under an agreement with the defendant and, Therefore, there could be no doubt of this interpretation of the Rule. The plaintiff was suing on a debt or liquidated demand which arose on an express contract although the contract was oral and not in writing. As will be seen this Rule 2 was again amended by the Bombay High Court which fell for consideration in the case of *M/s. Manekchand Mohanlal Poonawala* (supra).

(11) In *Milkharam (India) Private Ltd. and Others Vs. Chamanlal Bros.*, which was an appeal from judgment of the Bombay High Court granting to the appellants-defendants leave to defend the suit based on promissory notes executed by the appellants, on the appellants depositing security. The suit was filed under the provisions of Order xxxvii of the CPC as amended by the Bombay High Court. One of the contentions raised was that promissory notes on which the suit was based was only a collateral security for the performance of the agreement between the parties relating to the export of pulses and, Therefore, the suit was not of a nature which fell within the ambit of Order xxxvii of the code. The suit was based upon promissory notes executed by the defendants in favor of the plaintiffs for advances made from time to time under an agreement between the parties which was held to be independent of the agreement and fell under Order xxxvii Rule 2 of the Code. It was contended by the defendants that the only claim which the plaintiffs had or could have against them was on the basis of the agreement that that claim would be for an unliquidated amount and that, Therefore, the suit could not be brought under Order xxxvii Rules 2 and 3 of the

Code. The Supreme Court negated this contention holding that it seemed clear from the perusal of the plaint as well as the affidavits of the appellants that the cause of action for the plaintiff's claim as laid in the suit was prima facie independent of the agreement between the parties. In the instant case it cannot be said so.

(12) As to whether the written contract may be signed by both the parties does not call for decision in the present case though it appears that the words "written contract" envisage some sort of a formal document between the contracting parties. I would rather think that it would be a condition, precedent that there should be a formal agreement executed by (ha parties and signed by them. plaintiff's own version is that it was a verbal contract and the document on the basis of which the suit has been filed merely acknowledges the money due under the aforesaid verbal contract. Such a writing may at best be a written acknowledgement which extends the period of limitation u/s 18 of the Limitation Act, 1963, but no more. Thus I do not think that such a document would fall within the definition of written contract and the provisions of Order xxxvii would not apply. It must, Therefore be held that the present suit is not maintainable under the summary procedure prescribed under Order xxxvII.

(13) Moreover the plaintiff has claimed interest @ 24 per cent per annum stating this to be the normal rate of interest in the film line. Provisions of the Usurious Loan Act, 1918 as amended by the Punjab Relief of Indebtness Act, 1934 in its application to Delhi appear to restrict the rate of interest to 12-112 per cent per annum only.

(14) After having held that the suit under Order xxxvii is not maintainable; the question arises as to what should be next course ? Should I proceed to record ex-parte evidence of the plaintiff or should I issue fresh summons to the defendants? In the circumstances of the case, however, I think the best course would be to try this suit as an ordinary suit and issue fresh summons to the defendants for 8th October, 1984. Suit not maintainable under order