(2011) 05 DEL CK 0295

In the Delhi High Court

Case No : Regular Second Appeal No. 90 of 2011

Khemka Capital Services (P) Ltd. and Others APPELLANT

Vs

I.S. Gupta (Since Deceased) thru L.Rs. and Others RESPONDENT

Date of Decision : 31-05-2011

Acts Referred:
Evidence Act, 1872 — Section 34

Citation : (2011) 05 DEL CK 0295

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Manish Kohli, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 08.11.2010 which has endorsed the finding of the trial judge dated 15.03.2010 whereby the suit filed by the Plaintiff seeking recovery of money had been decreed; suit of the Plaintiff had been decreed for a sum of Rs. 95,000/- and also another sum of Rs. 12,500/- alongwith interest @6% per annum.

2. Plaintiff had dealings with the Defendants who were share brokers; Defendant No. 2 and 3, being the directors of Defendant No. 1. Initial transaction of the Defendant was with Plaintiff No. 1; since the relations between the parties were amicable, Plaintiff No. 1 asked his other family members i.e. Plaintiff No. 2 to 5 to also purchase shares through the Defendants. In October, 1999 Plaintiffs No. 2 to 5 instructed Defendant to purchase shares of HDFC company worth Rs. 95,000/-; further instructions were to transfer these shares in the name of Plaintiff No. 1 to whom they wanted to give a gift. Plaintiff No. 2 and 3 had also handed over 50 shares of the State Bank of India(SBI) worth Rs. 12,500/- to the Defendants on 07.11.1999 for sale in the stock market with instructions to give the sale consideration to Plaintiff No. 1. However the HDFC shares have since not been transferred to Plaintiff No. 1; the sale consideration qua the SBI shares have also not been received; the present suit was filed accordingly.

3. In the written statement the defence was that Plaintiff No. 1 alone had transactions with the Defendants; it was denied that any amount was received from Plaintiff No. 2 to 5; it was however admitted that sum of Rs. 95,000/- has been received from Plaintiff No. 1 but the said amount had been adjusted against the earlier transactions made between Plaintiff No. 1 and the Defendants, no amount is due.

4. On the pleadings of the parties following issues are framed:

1) Whether the suit of the Plaintiff is liable to be dismissed for want of common cause of action? OPD.

2) Whether the suit of the Plaintiff is bad for misjoinder of Defendant No. 3 as party to the suit? OPD.

3) Whether the Plaintiff is entitled to decree for recovery of Rs. 95,000/- against Defendants as prayed for? OPP.

4) Whether the Plaintiff is entitled to decree in sum of Rs. 12,500/- against Defendants towards minimum sale consideration amount of 50 SBI shares as prayed for? OPP.

5) Whether the Plaintiff is entitled to interest, if so, at what rate and for which period? OPP.

6) Relief.

5. Oral documentary evidence was led which included four witnesses on behalf of Plaintiff and one witness of the Defendant.

6. While disposing of issue No. 3, the court noted that the Plaintiffs have proved on record through oral and documentary evidence that a sum of Rs. 95,000/- has been paid by the Plaintiff to Defendant for the purchase of HDFC shares and 50 shares of SBI worth Rs. 12,500/- have been given to the Defendant. Court had proceeded on the admission made by the Defendants in the written statement. It would be necessary to advert to this admission. In para 4 of the written statement, Defendants have admitted:

Plaintiff No. 1 had paid Rs. 95,000/- to Defendant No. 1 firm through cheque as well as cash on different dates only as an account payment in respect of the previous transactions.

This admission of the Defendants weighed in the mind of both the courts below. There are concurrent findings of fact that this amount of Rs. 95,000/- had been received by the Defendant; his submission with this amount stands adjusted against earlier transactions of the Plaintiff had however not been proved.

7. Court had noted that Ex.DW1/2 was a certified copy of the computerized statement of account maintained by the Defendant qua the Plaintiff for the period 01.04.1999 to 31.03.2000.

8. Section 34 of the Indian Evidence Act had been adverted to as also the deposition of DW1. DW1 had admitted that the computerized copy of the statement of account is from the ledger books maintained by him; Defendant had however not produced these ledger books; court had also noted that there is no entry in Ex. DW1/2 to show as to whom this money was paid as also the purpose for which the money was paid; there was also no evidence of the adjustments purported to have been made by the Defendants; ledger books were not produced and the person who had prepared the statement of account had also not come into the witness box.

9. The two courts below had rightly noted that the Plaintiff is entitled to the decretal amount; Defendant having admitted the receipt of Rs. 95,000/- and his only defence being that he had adjusted this amount against earlier transactions which had not been substantiated by Ex.DW1/2. Moreover, Ex.PW3/2, PW3/3, PW3/4 were receipts issued by the Defendant to the Plaintiff admitting the receipt of the aforenoted amounts; it is also not the case of the Defendant that he had not received the 50 shares of SBI. His contention that the amounts stood adjusted was based on no evidence.

10. The impugned judgment had returned the following finding in this context. It reads as follows:

The Appellants have placed on record the computer generated copy of the statement of account to substantiate their case and justify their claim but have failed to prove the same in terms of Section 34 of Evidence Act which is relevant law to be looked into. The amendment carried out in the Evidence Act after introduction of the Information Technology Act, 2000 which has recognized the electronic data etc. which has found reference in Section 34 of Evidence Act itself. However, it does not dispense with the production of original books of ledger. It is not the case of the Appellant that they are not maintaining the ledger account or that they are maintaining only computer records. Therefore, in these circumstances, it was mandatory for the Appellant to prove the statement of account as per law in order to show that the amount adjusted was in fact due from late Shri I.S. Gupta; Failure on the part of the Appellant on this context further gets compounded in view of the fact that Respondent has specifically raised objections in its replication towards the so called claim of the Appellant and still the Appellant chose not to bring sufficient and cogent evidence to justify its action against late Shri I.S. Gupta. Thus adverse inference drawn against the Appellant was justified. In this context reference can be made to the judgment in Bharat Aluminium Co. Ltd. Vs. Maharashtra Aluminium Corporation, where it was observed in the following words:

Since the Plaintiff has failed to prove its statement of account by leading any evidence much less cogent evidence in regard to the same, it cannot be said that the Plaintiff has proved its claim against the Defendant. However, the learned Senior Counsel appearing on behalf of the Plaintiff has relied upon the admission of the Defendant contained in letter Ex.P6 dated 15.04.1986 and Ex.P7 dated

18.03.1986. The alleged admission by the Defendant in these letters Ex.P6 and Ex.P7 is of no legal consequence because the present suit was filed by the Plaintiff on 28.11.1988 after more than 2.1/2 years of the alleged admission and it is not the case of the Plaintiff that no dealings at all had taken place between the parties after these alleged admission. In fact, the Plaintiff was required to prove its statement of account before the Defendant could be burdened with the liability for payment in this suit.

The claim of the Appellant is not foolproof and above board in view of the fact that on account payment in itself does not reflect as to which account the Appellant is talking about. It may be in the context of shares applied for or shares sold by the Appellant on the instructions of the Respondent. The only plausible way through which the Appellant could have shown that on account payment meant with regard to the earlier transactions between the Appellant and Mr. I.S. Gupta was by production of ledger books where the outstanding amount could have been shown by the Appellant. It gives a drubbing to the Appellant''s case, which ultimately proved fatal.

In view of foregoing discussions, it is apparent that there is no cogent ground available with the Appellant which may warrant interference in the impugned judgment. Accordingly, the appeal stands dismissed.

11. The Apex court in Chandradhar Goswami and Others Vs. The Gauhati Bank Ltd., in the context of Section 34 of the Evidence Act had noted:

That a bare perusal of the section that no person can be charged with liability merely on the basis of entries in books of account, even where such books of account are kept in the regular course of business. There has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with liability thereunder, except where the person to be charged accepts the correctness of the books of account and does not challenge them.

12. This finding in no manner calls for any interference. There is no perversity in findings of the two fact finding courts below. Substantial questions of law have been embodied on the page 11 of the body. No such substantial question of law has arisen. Appeal is dismissed in limine.