

(2018) 09 RAJ CK 0007
In the Rajasthan High Court
Case No : Civil First Appeal No. 652 of 2011

LRs of Late Shri Khangar Mal @APPELLANT@Hash Sampat Raj

Date of Decision : 05-09-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 96, Order 3 Rule 1, Order 3 Rule 2, Order 41 Rule 11(1)

Citation : (2018) 09 RAJ CK 0007

Hon'ble Judges : P.K. LOHRA, J

Bench : Single Bench

Advocate : C.S. Kotwani, Surendra Singh, Sharad Kothari

Final Decision : Dismissed

Judgement

Appellants, the legal representatives of original plaintiff Late Shri Khangarmal, have preferred this first appeal under Section 96 of the Code of Civil

Procedure, 1908 (for short, "CPC") to assail impugned judgment dated 24th April, 2009 passed by Addl. District Judge, Barmer (for short,

"learned trial Court") dismissing their suit against respondent for recovery of a sum of Rs.1,40,000.

The facts, in brief, are that a civil suit was filed by appellants against respondent for recovery of the aforesaid amount. It was, inter-alia, averred in

the plaint that original plaintiff Khangarmal was proprietor of M/s. Sohanlal Govindram, a shop situated at Laxmi Bazar, Barmer and from whom

respondent-defendant borrowed money from time to time. It is also pleaded in the plaint that respondent-defendant agreed to pay requisite interest

on the borrowed amount and necessary entries were made by the original plaintiff in account books. Lastly, it was pleaded that by the end of

March, 2000, total amount due against defendantrespondent came to Rs.73,084.49. Plaint further envisage averment that amount was demanded

from defendant-respondent and he acknowledged the debt by executing document to this effect.Â In substance, the principal amount and the interest accrued thereon cumulatively was shown as Rs.1,40,000 in the plaint and the plaintiff prayed for granting him decree.

On behalf of respondent-defendant, written statement was filed and all the facts mentioned in the plaint are refuted.Â It is also averred by the respondent-defendant that suit is filed by the plaintiff as counter-blast to a suit for eviction filed by him, therefore, same is liable to be dismissed with costs.Â Â

The learned trial Court, on the basis of pleadings of rival parties, settled four issues for determination.Â For substantiating the claim on behalf of

appellant-plaintiffs, one Devanand appeared as PW1 and on behalf of respondent-defendant he himself appeared in the witness box.Â Upon

conclusion of the evidence of rival parties, learned trial Court heard final arguments and dismissed the suit precisely for the reason that original plaintiff

Khangarmal had not appeared in the witness box instead his power of attorney has appeared.Â The learned trial Court also observed that a power of

attorney cannot depose on behalf of principal and he can depose only in respect of acts done by him in exercise of power granted by the

instrument.Â The Court further recorded a definite finding that a power of attorney holder cannot depose for principal in respect of matters in which

only principal can have personal knowledge and in respect of which principal is liable to be cross-examined.Â For drawing this conclusion, learned

trial Court has placed reliance on Order 3 Rule 1 & 2 CPC and accordingly decided issue Nos.1 & 2 against the appellantplaintiffs.Â The other

issues i.e. issue Nos.3 & 4 were decided by the learned trial Court in favour of appellants. However, in absence of requisite evidence to prove the

claim eventually learned trial Court dismissed the suit of the appellants.

I have heard learned counsel for the appellants as well as learned counsel for the respondent and perused the impugned judgment.

While it is true that normally a first appellate court is required to requisition record of the trial Court but after CPC (Amendment) Act, 1999 and

insertion of new sub rule (1) it is empowered to dismiss an appeal at the admission stage.Â Â The only rider is that court has to record its reasons

that the appeal lacks merit.Â Reliance in this behalf can be placed on a judgment

of Apex Court in the matter of UP Avas Evam Vikas Parishad Vs.

Sheo Narain Kushwaha & Ors [(2011) 6 SCC 456] wherein the Court, while examining Rule 11(1) of Order 41 CPC, made following observations:

It is evident from sub-rule (1) that an appellate court can dismiss an appeal after a preliminary hearing without calling for the records of the trial

court and without issuing notice to the respondent, if it is satisfied that the appeal has no merit. Sub-rule (1) does not however state that such dismissal can be without assigning any reasons.

Sub-rule (4) provides that where the appellate court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment

recording in brief, its grounds for doing so. Sub-rule (4) by implication therefore provides that if the appellate court is the High Court, and it chooses to

dismiss a first appeal at the stage of preliminary hearing, without issuing notice to the respondent and without calling for records, it need not deliver a

formal brief judgment as is required by other appellate fora. A 'judgment', even a brief one, which is required to be rendered by appellate courts other

than High Courts, should necessarily refer to the pleadings, nature of relief, the points for consideration and the decision thereon. But sub-rule (4) does

not say that if the appellate court which dismisses the appeal is the High Court, no reasons be assigned for dismissing the appeal. Sub-Rule (4) of Rule

11 does not enable the High Court to dismiss first appeals by one line orders to the effect that 'appeal is dismissed' or by non-speaking orders. The

order of the High Court dismissing the first appeal should be sufficiently reasoned to disclose the application of mind to the grounds of appeal and

make out that the High Court was resorting to dismissal in limine as it found the appeal either to be vexatious or wholly without merit. Order 41 Rule

11 of the Code, while relieving the High Court from the obligation to write a 'judgment', does not dispense with the obligation to assign reasons in brief,

when summarily dismissing the appeal.

Unless the order is reasoned, there will be no way of knowing whether the appellate court has examined the appeal before deciding that it did not

deserve admission. As a limited right to appeal to Supreme Court is available against the appellate judgments of the High Court, unless there are

reasons in the order of dismissal, it will not be possible for the Supreme Court to examine whether the High Court has rightly rejected the appeal. The

appellant who has filed the first appeal in pursuance of a statutory right to file such appeal, paying necessary court fee, can legitimately expect

reappreciation of the evidence and redetermination of the questions raised, unless the statute providing for the appeal provides otherwise.â??

Now advertent to the findings of learned trial Court on issue Nos.1 & 2, suffice it to observe that findings are in consonance and conformity with

Order 3 Rule 1 & 2 CPC.

Supreme Court in the matter of Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank Ltd. & Ors. [(2005) 2 SCC 217], while interpreting Order 3

Rule 1 & 2 CPC, has held.

Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed

in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the

instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has

rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the

principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the

principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.â??

In a later judgment in case of Man Kaur (Dead) by Lrs Vs. Hartar Singh Sangha [(2010) 10 SCC 512], Supreme Court emphasized that party to the

suit is required to appear in the witness box for stating his own case and further to offer himself for cross-examination. The Court further observed

that if the plaintiff fails to appear then a presumption can be drawn that the case set up by him is not correct and finally the Court reiterated the

principles laid down in Janki Vashdeo Bhojwani & Anr. (supra).

Upon overall analysis of the impugned judgment, in my view, in the backdrop of facts and circumstances of the case, nonappearance of the plaintiff

himself in witness box has rightly persuaded learned trial Court to draw a presumption that his case is not proved.

In this view of the matter, I fully concur with the findings and conclusions of the learned trial Court and while recording my satisfaction that appeal is

bereft of any merit, dismiss the same at admission stage.