

(2009) 05 DEL CK 0115

In the Delhi High Court

Case No : IA. No. 3832 of 2008 in C.S. (OS) 2045 of 2007

Mrs. Shradha Wassan and Others

APPELLANT

Vs

Mr. Anil Goel and Another

RESPONDENT

Date of Decision : 05-05-2009

Acts Referred:

Contract Act, 1872 — Section 49
Limitation Act, 1963 — Section 19

Citation : (2009) 05 DEL CK 0115

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Vinod Tyagi, for the Appellant; Ratan K. Singh, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The application of the defendants for leave to defend the suit filed under Order 37 of the CPC for recovery of Rs 48,28,500/- inclusive of interest at 6% per annum till the date of institution of the suit in accordance with the agreement and with future interest at 15% from the date of institution of the suit till realization, is for consideration.

2. The plaintiff No. 1 as now proprietor and earlier partner of the plaintiff No. 3 M/s Om Prakash Satyapal has instituted this suit inter alia on the ground that she and her late husband Mr Naresh Wassan were carrying on business in partnership in the name and style of plaintiff No. 3; that the said Naresh Wassan died leaving the plaintiff No. 1 and his minor daughter plaintiff No. 2 as his only legal heirs and representatives; that the plaintiff No. 3 firm was carrying on business as civil engineers and steel stockists at Chhattisgarh ;that the defendant No. 2 of which the defendant No. 1 is the sole proprietor was having an account in the books of accounts of the plaintiff No. 3 regularly maintained in the normal course of business; that the defendant No. 2 through the defendant No. 1 had borrowed monies from the plaintiff No. 3 to the tune of Rs 12 lacs on 15th January, 2003, Rs 3 lacs on 18th January, 2003 and Rs 5 lacs on 27th January, 2003, repayable on demand with interest at 6% per annum; that the

defendant No. 2 had been acknowledging the said debt due to the plaintiff No. 3 together with interest due thereon from time to time; that the defendant No. 2 had its principal office at 28/42 Punjabi Bagh, New Delhi which property is stated to be owned by the defendant No. 1 upon the demise of his father; that the defendants are also stated to have branch office at Jabalpur and works at Chhattisgarh ;that the defendants had been delivering the confirmation of account in writing to the plaintiff No. 3 from time to time and had been seeking confirmation of account from the plaintiff also from time to time; that the defendant No. 2 was also deducting tax at source from the interest aforesaid payable to the plaintiff and the said tax was deducted at Delhi and TDS certificate dated 30th April, 2004 was issued by the defendants to the plaintiff from Delhi; that the defendants had thereafter been borrowing monies from the plaintiff from time to time and as on 31st March, 2005 a sum of Rs 42,04,385/- was shown due from the defendant No. 2 to the plaintiff No. 3 as per the statement of accounts of the defendant No. 2 which was sent to the plaintiffs for confirmation; that as, on the date of the institution of the suit, the aforesaid amount was due from the defendants to the plaintiff which the defendants had failed to pay inspite of demand of the plaintiff.

3. The defendants, on being served with the summons for appearance, entered appearance after the prescribed time. However, this Court vide order dated 11th March, 2008 condoned the delay in entering appearance by the defendants. The plaintiff thereafter served summons for judgment on the defendants and the defendants have sought leave to defend.

4. The counsel for the defendants has argued for leave to defend under the three heads. Firstly under the head of this Court not having territorial jurisdiction to entertain the suit and secondly under the head of the claim in suit being barred by time. Lastly it is argued that the claim in suit is barred by the Madhya Pradesh Money Lenders Act.

5. With respect to first of the aforesaid pleas, it is contended that upon the defendants satisfying this Court that this Court does not have jurisdiction either the plaint ought to be returned/rejected or at least the defendants are entitled to leave to defend on this ground. It is contended that both the parties are resident of erstwhile Madhya Pradesh and now Chattisgarh and were carrying on their business therein; that mere deduction of tax at source at Delhi would not form part of the cause of action for the suit available to the plaintiff so as to enable the plaintiff to invoke the territorial jurisdiction of this Court. It is further argued that since the defendants are the resident of outside the jurisdiction of this Court and are carrying on business outside the jurisdiction of this Court and further since admittedly the entire transaction of loan between the parties took place outside Delhi, mere deduction of tax at source, would not vest this Court with the territorial jurisdiction to entertain the present suit. Similarly, it is contended that merely because the defendant No. 1 had his ancestral house at Delhi and which too has since been sold would not give this Court jurisdiction. Reliance is placed

on Mannalal and Others Vs. Paneychand and Others, , Rashtriya Mahila Kosh Vs. The Dale View and Another, , M.S.M. Buhari Vs. S.M. Buhari, and Rattan Singh Associates (P). Ltd. v. Gill Power Generation Co. Pvt. Ltd 136 (2007) DLT 629.

6. Qua the aspect of limitation, it is urged that according to the plaint itself the monies were advanced by the plaintiffs to the defendants in January, 2003 and April, 2004, and the suit had been filed on 4th October, 2007; that the suit ought to have been filed within three years of advancing the monies and having not been so filed is barred by time. It is further urged that the reliance by the plaintiff on confirmation of accounts by the defendants is misconceived and in any case of 29th June, 2004 i.e., three years prior to the institution of the suit and thus of no avail.

7. Per contra, the counsel for the plaintiff has argued that the application for leave to defend of the defendants does not controvert or deal with the categorical averments in the plaint of the defendants having head office at Delhi and owing to non-contravention the same are to be deemed to have been admitted by the defendants. Qua limitation it is argued that the defendants themselves have filed the statements of accounts from its ledger and which match with those filed by the plaintiff and which are till 31st March, 2006 and on the basis whereof the suit instituted in October, 2007 is within time. It is further contended that the defendants have also acknowledged the debt by payment/credit of interest to the account of the plaintiffs and thus Section 19 of the Limitation Act is also applicable.

the plea of Money Lenders Act, the counsel for the plaintiff has relied upon Gajnan and Others Vs. Seth Brindaban, , Rajaram Baijnath and others Vs. Nandkishore Sheobux Rai and others, , Parmanand Jain Vs. Firm Babulal Rajendra Kumar Jain and Another, as well as the provisions of the Money Lenders Act itself to urge that the said Act is applicable only when the plaintiff is engaged in the business of money lending and which is not the case here; the loan transaction between the plaintiffs and the defendants was a friendly loan as is evident from the low rate of interest of 6% per annum.

8. The counsel for the defendant in rejoinder has drawn attention to the rejoinder filed by the defendants to the reply to the application for leave to defend and wherein it is denied that the principal office of the defendants is at Delhi. It is further argued that the passport and election card of the defendant No. 1 is at the address of Jabalpur only and the plaintiff has not filed any documents whatsoever showing that the defendants have any business at Delhi.

9. I had, during the course of hearing, asked the counsel for the defendants as to whether this Court would not have the territorial jurisdiction to entertain the suit on the principle of 'debtor must seek the creditor?', since the demands prior to the institution of the suit were issued on behalf of the plaintiff from Delhi. The counsel for the defendants has after the conclusion of hearing mentioned the matter and relied upon M. Ramalinga Iyer Vs. T.K. Jayalakshmi and Another, and

Escorts Limited v. G.K. Automobile 2006(1) RAJ 423 (Del) in this regard.

10. The submissions recorded as aforesaid would show that the defendants have not contested the money claim of the plaintiff and which, in view of the provisions of Order 37, shall be deemed to have been admitted by the defendants. The claim is sought to be defeated on technical pleas aforesaid.

11. However, a perusal of the leave to defend application shows that besides the grounds aforesaid it is also mentioned therein that the power of attorney holder of the defendants, namely, Shri Mulkraj Dua had borrowed money from plaintiff No. 3 through its partner Shri Naresh Wassan and his wife plaintiff No. 1; that Shri Mulkraj Dua was never authorized by the defendants to borrow money for and on their behalf by virtue of the power of attorney; thus the entire transaction made by Mulkraj Dua on behalf of the defendants is null and void; that the said Shri Mulkraj Dua had cheated the defendants in collusion with plaintiff No. 3 and for which reason the defendants have suffered huge losses in their business. Though the said plea has been taken in the application for leave to defend, the defendants alongwith the rejoinder and in support of their plea of the transaction between the parties having taken place outside the jurisdiction of this Court, filed as annexure thereto, the copies of its ledger containing the account of plaintiff No. 3 for the period 1st April, 2002 to 31st March, 2006. The said ledger shows the amount outstanding in the books of the defendants to the account of the plaintiff No. 3. It is perhaps by this reason that the counsel for the defendants did not during the course of hearing raise the said plea. The ledger filed by the defendants, negates the plea of the loan having been taken by the attorney of the defendants without the authority of the defendants. It now stands admitted from the documents of the defendants themselves that the amount is shown in the books of account of the defendants as due to the plaintiffs. Had no money been due, the question of showing the same as due to the plaintiffs would not have arisen.

12. In fact, the aforesaid ledger of the defendants also takes care of the plea raised by the defendant of limitation. From the documents on record it is now clearly borne out that as on 31st March, 2006 i.e., about one year prior to the institution of the suit, the defendants have acknowledged their liability to the plaintiff. Once the liability is so shown to have been acknowledged, the provisions of Section 19 of the Limitation Act shall come into play and the question of the claim in suit being barred by time does not arise.

13. As far as the defence of the Money Lenders Act is concerned, in view of the judgments aforesaid cited by the counsel for the plaintiff, no ground for leave to defend is made out. It is not the plea in the leave to defend application also that the plaintiff was engaged in the business on money lending.

14. That leaves the aspect of territorial jurisdiction only. Undoubtedly, the Madras High Court in M Ramalinga Iyer (supra) cited by the counsel for the defendant has held that the common law rule of 'Debtor must seek the Creditor' cannot

always be applied in India where there is no express stipulation with regard to the place of payment or no appointment of a place u/s 49 of the Contract Act. However, the judgment in that case also turned on the finding that the defendant therein was not a debtor of the plaintiff. As far as the judgment of this Court in Escorts Limited (supra) relied upon by the counsel for the defendant is concerned, that judgment was not concerned with the said principle. It was held therein relying upon A.B.C. Laminart Pvt. Ltd. and Another Vs. A.P. Agencies, Salem, that a part of cause of action arises where money is expressly or impliedly payable under a contract; it was, however held that acceptance of payment at a place other than that agreed does not constitute a waiver of the liability to make payment at the place agreed.

15. I find that this Court in Milkfood Limited Vs. Union Bank of India, has held that even if it is assumed that Delhi was not the expressly contracted place of payment, Delhi would still be a presumed place of payment because of the general rule that in the absence of a contract to the contrary, a debtor is bound to find the creditor for making the payment ? the place of payment is where the creditor resides.

16. In this regard it may be noticed that in this case the legal notice demanding the payment, preceding the suit was sent from Delhi and demanding the payment at Delhi. The principle of debtor must seek the creditor was held to be applicable.

17. Reference in this regard be also made to L.N. Gupta Vs. Tara Mani, where also after a review of the entire case law including the judgments of the other courts it was held that the principle of ?Debtor must seek creditor? is applicable to India. However, an exception was carved out with respect to the promissory notes. Another thing which is relevant is that the plea of territorial jurisdiction in this case is raised in an application for leave to defend. The criteria for determining the said plea in an application for leave to defend would be different from the criteria when such a plea is raised otherwise. While considering the leave to defend application, wherein the leave is sought merely on the ground by challenging the territorial jurisdiction of the court, unless a clear case of ouster of jurisdiction is made out, leave ought not to be granted on such a plea. In the present case on the applicability of the general doctrine aforesaid, no case for granting leave to defend is made out.

18. No ground is thus disclosed for granting leave to defend. The amounts claimed are not disputed. There is no dispute as to the contractual rate of interest. The plaintiff has claimed interest pendente lite and future interest @ 15% per annum. The transaction between the parties being admittedly a commercial transaction, the claim of interest at such rate is not found to be unreasonable specially when the defendant in spite of opportunity failed to pay the amounts in spite of the same being admitted and compelled the plaintiff to institute the present suit. The application is dismissed. Consequently, the suit is decreed as prayed. The plaintiff shall also be entitled to costs of the suit from the

defendant. Counsels fee assessed at Rs 35,000/-. The decree sheet be drawn up.