

(2009) 05 DEL CK 0039

In the Delhi High Court

Case No : Regular First Appeal App. No. 460 of 2007 and CM No. 11691 of 2007

Punjab and Sind Bank

APPELLANT

Vs

Kunshiv Profiles Co. Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 08-05-2009

Acts Referred:

Bankers Books Evidence Act, 1891 — Section 4
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 47 Rule 1
Evidence Act, 1872 — Section 65

Citation : (2009) 05 DEL CK 0039

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Pallav Saxena, for the Appellant; Maldeep Sidhu, for the Respondent

Final Decision : Allowed

Judgement

V.B. Gupta, J.—Appellant has filed the present appeal against the judgment and decree dated 28th July, 2006 passed by Sh. Rakesh Kumar, Addl. District Judge, vide which the suit filed by the appellant was dismissed.

2. The brief facts of this case are, the appellant filed a suit for recovery of Rs. 8,29,842.09p. along with interest thereon @ 18.5% p.m. compounded quarterly on the allegations that respondent No. 1 is a private limited company of which respondents 2 to 5 are directors. Credit facilities were initially granted to respondent No. 1 on 21st August, 1990 in the form of Cash Credit (hypothecation) facility with a limit of Rs. 75,000.00, Cash Credit (pledge) facility with a limit of Rs. 1 lac and Bill Purchase (clean) facility with a limit of Rs. 25,000.00 respectively. Limit of Cash Credit (hypothecation) facility, was enhanced on 12th December, 1990 from Rs. 75,000.00 to Rs. 2.5 lacs. The credit facilities were primarily secured by virtue of loaning and security documents executed by respondent No. 1, inter alia, on 21st September, 1990, 8th October, 1990, 3rd April, 1992, 20th February, 1995 and 13th January, 1998 and collaterally secured by virtue of personal guarantees of respondents 2 to 5,

equitable mortgage of Immovable property of respondent No. 1, being property No. 349/1/1, Village Bandia, Tehsil Kichha, District Nainital, U.P. and creation of second charge on the immovable property of respondent No. 1 being Industrial Plot No. G-1-680, Bhiwadi Industrial Area, Bhiwadi. The respondents failed to liquidate their respective liabilities necessitating the filing of suit.

3. Respondents 1 to 3, were duly served but did not appear. Vide order dated 19th April, 2002, they were precluded from filing the written statement, while respondents 4 to 5, were served by publication as well as affixation, but they also failed to appear and vide order dated 13th February, 2003, they were proceeded ex parte.

4. In support of its case, appellant examined Sh. B.S. Shokhi, Senior Manager of the appellant-bank, who tendered his evidence by way of affidavit. Though appellant had also filed the affidavits of Sh. A.S. Jaggi and Sh. Kamlesh Kumar, Managers Punjab and Sind Bank, Chawri Bazar, but these witnesses did not appear in the witness box and as such their affidavits remained untendered. The appellant did not opt to examine any other witness, though opportunities were given.

5. Trial court in its impugned judgment held that, during the statement of above witnesses only photocopies of documents were produced and as regards the original documents, it was claimed that those were misplaced by the counsel for the appellant, although the documents were duly handed over to him and in this respect, the counsel for the appellant expressed his desire to file additional affidavit in evidence to prove the loss of original documents. Appellant was permitted to do so, but instead of bringing additional and collateral evidence in the form of secondary evidence, the counsel for the appellant submitted his own affidavit, inter alia, making deposition that the original documents were lost by him.

6. After dismissal of the suit, appellant filed an application for review of the impugned judgment under Order 47 Rule 1 CPC, before the trial court. That application was dismissed by the trial court, vide its order dated 12th March, 2007.

7. Now in the present appeal, appellant has also filed an application under Order 41 Rule 27 CPC seeking permission to lead additional evidence.

8. It is contended by learned Counsel that the appellant had clearly succeeded in discharging the onus of proving its claim against the respondents by leading secondary evidence in the form of photocopies of original loaning and security documents. The original loaning and security documents were handed over to the then counsel for the appellant against receipt vide letter dated 16.2.1999. The application for leading secondary evidence in the form of photocopies of loaning and security documents was duly supported by the affidavit of the then counsel for the appellant, who deposed to the fact that the original loaning and security documents had been lost/misplaced. Since the originals had been misplaced by

the then counsel for the appellant, he was the most competent person to depose about the same, which he did by way of his affidavit in support of the application for leading secondary evidence. Thus, the best evidence qua loss and misplacement of original documents had already been filed in the form of affidavit of the counsel for the appellant.

9. The trial court erroneously concluded that the appellant was obligated to lead collateral and corroborating evidence to establish misplacement and loss of original documents. It is contended that after the loss of the original documents, neither a police report was lodged nor any public notice was issued. In such circumstances, there was no collateral or corroborative evidence to prove the loss of original documents. As a matter of fact, there cannot be any direct evidence of such facts. Therefore, the conditions precedent to leading secondary evidence stood duly established and proved. The trial court committed an error of law by not treating the case of the appellant as proved by secondary evidence.

10. It is further contended that the Statement of Account quantifying the dues of the appellant, had been duly placed on records. As per the settled proposition of law, every entry contained in a statement of account, which is a true extract of ledger maintained by a bank in ordinary and normal course of its banking business, is presumed to be correct unless proved to the contrary. In the instant case, each entry in the Statement of Account remained uncontroverted and unchallenged. Further, the Statement of Account duly certified is admissible in evidence by virtue of Section 4 of Bankers Books Evidence Act, 1891. Thus, the trial court erroneously observed that the appellant was obligated to produce books and ledgers, which are immune from production under the provisions of Bankers Books Evidence Act, 1891.

11. In support of its contention, learned Counsel for appellant cited, Central Bank of India Vs. Ravindra and Others, in which Supreme Court held;

A statement of account shall be filed in the court showing details and giving particulars of debit entries, and if debit entry relates to interest then setting out also the rate of, and the period for which the interest has been charged. On the court being prima facie satisfied, if a dispute is raised in that regard, of the permissibility of debits, the onus would be on the borrower to show why the amount of debit balance appearing at the foot of the account and claimed as principal sum cannot be so accepted and adjudged. This practice would narrow down the scope of controversy in suits filed by banking institutions and enable an expeditious disposal of the suits, the issues wherein are by and large capable of being determined by documentary evidence.

12. On the other hand, learned Counsel for the respondents has contended that there is no infirmity in the judgment passed by the trial court. Since the appellant, did not produce even the secondary evidence, the court had no option, but to dismiss the suit.

13. It is well settled that in every suit the onus is upon the plaintiff to prove the

averments made in his plaint, unless the same are admitted by the defendant. The appellant filed the present suit entirely based on documents but did not file any original documents. Only photocopies of documents were filed. Due to non-filing of the original documents, the trial court dismissed the suit of the appellant.

14. In this regard, it will be fruitful to reproduce certain findings of the trial court which reads as under;

In support of the case of the plaintiff, Sh. B.S. Shokhi, Sr. Manager appeared in the witness box and tendered his evidence by way of affidavit. Although the plaintiff has also filed the affidavits of Sh. A.S. Jaggi and Sh. Kamlesh Kumar, Managers, Punjab and Sind Bank, Chawri Bazar, but these witnesses did not appear in the witness box and as such their affidavits remained untendered. While tending the affidavit, PW-1, (recorded as PW-2) has brought the following photocopies of documents on record.

15. So, it is clear that only photocopies of the documents were produced before the trial court. The court further held;

The plaintiff did not opt to examine any other witness, though opportunities were given. During the statement of above mentioned witness only photocopies of documents were produced and as regard to original documents it was claimed that those were misplaced by the counsel for the plaintiff, although the documents were duly handed over to him and in this respect the counsel for the plaintiff expressed his desire to file additional affidavit in evidence to prove the loss of the original documents. He was permitted to do so but instead of bringing additional and collateral evidence in the form of secondary evidence, the counsel for plaintiff submitted his own affidavit inter alia making deposition that the original documents were lost by him.

I have given my anxious thoughts to the submissions of Ld. Counsel for the plaintiff. I have also carefully perused the entire relevant material placed in the file and in my considered opinion the plaintiff has been failed to discharge its onus of proving its case in its favour and against the defendants despite of the fact that the evidence produced by the plaintiff remained un-rebutted and un-controverted. In this case, the original documents have been withheld by the plaintiff on the ground that the same have been lost by Ld. Counsel for plaintiff to whom they were given but it has failed to establish that it has exhausted all the sources & means in search of the same. There is no police report. No public notice was issued regarding loss of documents in the Newspaper etc. It has only produced the photocopies of the documents instead of bringing the additional and collateral evidence in the form of secondary evidence and it has merely placed the affidavit of Ld. Counsel to the effect that the same has been misplaced by him but the same is not sufficient. In order to raise presumption in favour of the plaintiff regarding transactions held between the parties during the ordinary course of business, it should have brought the additional evidence like records of relevant entries in the Books & Ledgers while advancing money,

extracts of registers where documents were registered/recorded at the time of issuance, records of the acknowledgements of the loan amount by the defendants, records of issuance of DD/ Pay Order etc., material correspondence and exchange of communications etc. and so on. It should have also bring evidence to the effect that the documents were actually given to the counsel by producing acknowledgment receipts etc. and utmost efforts were made for tracing them out.

Sections 61 & 62 read together show that the contents of a document must, primarily be proved by the production of the document itself for the inspection of the court. Original document is the best and primary evidence. Section 63(3) prescribes two alternatives for admissibility of a document as a secondary evidence first it may be a copy made from original and secondary it must be a copy compared with the originals. If either of these two requirements had been satisfied then the documents would be a proper and valid secondary evidence. Secondary evidence of the contents of the documents cannot be admitted without the non production of the original being first accounted for in such manner as to bring it within one or the other cases provided for in Section 65 of Evidence Act. In *Rasdhari Lal and Others Vs. Nand Lal Mahton*, , it was held that, "Secondary evidence should not be allowed unless the circumstances are a sufficient justifications under the Evidence Act for reception of secondary in lieu of primary evidence." In AIR 1954 SC 506, it was observed that, "A foundation must first be laid for the reception of secondary evidence. Merely stating that a document could not be found is not sufficient to permit the admission of secondary evidence." It was held in AIR 1958 AP 415 "DB" that, "Section 65 permits that leading of secondary evidence only where the original has been lost. It must be established that the party has exhausted all the sources and means in the search of the documents, which were available to him. Where no reason for it or loss thereof proved, secondary evidence cannot be allowed.

16. Primary evidence is the best evidence obtainable, that is, the statement of an eye witness or an original document. Section 63 of the Indian Evidence Act, 1872 (in short as "Act") defines as to what is secondary evidence. "Secondary evidence", as the name implies, assumes the existence of better evidence, viz, the original. As a rule, secondary evidence is not admissible until the non-production of primary evidence is satisfactorily accounted for.

17. The present suit was filed on 23rd February, 1999 and at that time appellant filed only the photocopies of the documents.

18. On 13th August, 2004, statement of PW-2 was recorded, who in his statement stated that;

The original documents have been lost/misplaced by our counsel of the Bank after filing of the suit, so I have exhibited the photocopies of the original documents which are on record and the same are the true copies of the originals.

19. In this statement PW-2 nowhere stated as to on which date, the original

documents were handed over to their counsel and when the same were lost by their counsel. In this respect, it may be pertinent to mention here that counsel for the appellant filed an application u/s 63 of the Act on 13th August, 2004 in the trial court, along with his affidavit, stating that during the pendency of the present suit, the original documents, the basis of the suit have been lost/misplaced and are not traceable with the plaintiff's counsel.

20. It was nowhere stated in this application that these documents were lost by the counsel after the same were handed over to him, nor it was mentioned, as to on which date and by whom these documents, were handed over to him and when and where, and in what manner he had lost/misplaced, these documents.

21. The counsel for the appellant in his affidavit dated 17th November, 2005 has stated that original documents were with him and during the pendency of the suit, the same has been lost/misplaced by him.

22. Appellant has also filed an application under Order 41 Rule 27 CPC for permission to lead additional evidence. In this application, it is stated that after dismissal of the suit, appellant made frantic efforts to locate the proof of handing over of original documents to its counsel and such primary documentary evidence as would be sufficient to corroborate its claim against the respondents. With great difficulty the appellant, succeeded in locating original receipted copy of letter dated 16th February, 1999, Form No. 182 dated 30th September, 1995, Form No. 182 dated 12th June, 1996, Balance Confirmation Slip as on 30th September, 1997 and Balance Confirmation Slip as on 30th March, 1998 respectively. These documents were filed along with review application to substantiate that the appellant did possess certain additional evidence.

23. Interestingly, in this application it is nowhere stated as to from where these documents were located or found. According to the averments made in this application, it appears that the documents have been located by the appellant and they were not in possession of their counsel. The case of the appellant, right from day one, is that the original documents were handed over by appellant to its counsel and counsel has lost/misplaced the documents. If the counsel has misplaced/lost the documents, then how these documents have now come into possession of the appellant.

24. The averments made in the application for additional evidence are contrary to the pleas taken by the counsel for the appellant, in his affidavit filed in this case. It would also be pertinent to note that the appellant has nowhere stated in this application for additional evidence as to on which date after judgment, these documents were located/traced and in whose custody these documents were found to be traceable. No name of any official of the appellant's bank has been mentioned. If averments in the application for additional evidence are assumed to be correct, then the stand of appellant is entirely contradictory, in view of the statement of PW-2 and the affidavit of counsel Raja Harpal Singh, filed in this case.

25. Thus the judgment cited by learned Counsel for the appellant is not applicable to the facts of the present case at all.

26. Since the appellant has neither filed nor proved the original documents on record, I do not find any infirmity with the judgment of the trial court and I fully concur with the findings of the trial court.

27. There is no merit in this appeal. Consequently, the appeal as well as application for additional evidence, are dismissed.

28. Parties are left to bear their own costs.