

(2018) 12 DEL CK 0347

In the Delhi High Court

Case No : Civil Suits (Original Side) No. 378 Of 2018, Interlocutory Application
16982 Of 2018

Sanjeev Jain

APPELLANT

Vs

Rajni Dhingra & Ors

RESPONDENT

Date of Decision : 19-12-2018

Acts Referred:

Negotiable Instruments Act, 1881 — Section 138
Code of Civil Procedure, 1908 — Section 52

Citation : (2018) 12 DEL CK 0347

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Dinesh Garg, Rachna Agrawal, Shrishti Gupta, Mohit Chaudhary

Judgement

Prathiba M. Singh, J

I.A. 16982/2018 (u/O XXXVII Rule 3(5) CPC)

1. The present suit under Order XXXVII has been filed by the Plaintiff - Mr. Sanjeev Jain (hereinafter, "Plaintiff"), seeking recovery of principal amount of Rs.3 crores and Rs.84 lakhs as the interest component, levied from 1st April, 2016, till date of filing of the suit. The background is that the Plaintiff claims to have issued a loan to one Late Mr. Virendra Dhingra for a sum of Rs.3 crores in May, 2015. The amounts were paid through banking channels in the following manner:

1)

Rs.1,00,00,000/-

Vide RTGS No. SBINR52015051915121123

dated 19.05.2015 drawn on State Bank of

India, Green Park, New Delhi

2)

Rs.50,00,000/-

Vide

RTGS

NO.SBINR52015062216609545

dated 22.06.2015 drawn on State Bank of
India, Green Park, New Delhi

3)

Rs.50,00,000/-

Vide

RTGS

NO.SBINR5201506241669643

dated 24.06.2015 drawn on State Bank of
India, Green Park, New Delhi

4)

Rs.50,00,000/-

Vide RTGS NO.SBINR5201506261679 dated
26.06.2015 drawn on State Bank of India,
Green Park, New Delhi

5)

Rs.50,00,000/-

Vide RTGS NO.SBINR52015062916885929
dated 29.06.2015 drawn on State Bank of
India, Green Park, New Delhi

2. It is the case of the Plaintiff that Mr. Virendra Dhingra started paying simple interest @ 12% per annum to the Plaintiff and towards the said interest, had made payments. Since the details of the payments, were not filed, on a query from the Court, counsel for the plaintiff has handed over a chart showing four payments towards interest, on 21st August, 2015, 14th October, 2015, 2nd January, 2016 and 31st March, 2016 in the following manner:

S.no.

Cheque no.

Date

Amount

1.

001456

21/08/2015

Rs.4,43,836/-

2.

000680

14/10/2015

Rs.6,00,000/-

3.

001520

2/01/2016

Rs.9,00,000/-

3. According to the Plaintiff, Mr. Dhingra had defaulted in the payment of interest and principal, despite repeated requests, the payments were not made. It is claimed that the Plaintiff then approached Mr. Dhingra and demanded the loan amount. Mr. Dhingra then issued a cheque for Rs.3 crores dated 26th December, 2017. Copy of the cheque has been placed on record. The cheque when presented was not honoured on three occasions as is evident from the bank memos dated 5th January, 2018, 18th January, 2018 and 27th February, 2018.

4. The Plaintiff thereafter got issued a legal notice dated 21st March, 2018 calling upon the Defendant to pay the outstanding amount. Since, the same was not replied to, a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter, "NI Act") was filed on 20th April, 2018. Before the said complaint could be registered and statement of the Plaintiff could be recorded, Mr. Dhingra passed away on 30th April, 2018. The complaint under Section 138 of the NI Act, was thus dismissed as the Respondent had passed away.

5. Thereafter, the Plaintiff has filed the present suit on 30th July, 2018 under Order XXXVII CPC, seeking recovery of the principal sum of Rs.3 crores along with interest thereon.

6. The suit, was instituted against the legal heirs of Mr. Dhingra as he had already passed away by that time. Defendant No.1 - Ms. Rajni Dhingra - the wife of Mr. Virendra Dhingra, Defendant No.2 - Mr. Sanjeev Dhingra - his son and

Defendant No.-3 - Ms. Shivani Bhushan Bansal, his daughter are the Defendants in the suit. The Defendants have filed a leave to defend application under Order XXXVII which has been placed before this Court as the Plaintiff took an objection on the ground that the application was belated.

7. It is further submitted by Ld. counsel for the Plaintiff that he does not wish to file a reply to this application and is willing to make the submissions straight away. Submissions have been heard on behalf of Plaintiff by Mr. Dinesh Garg, and on behalf of the Defendants by Ms. Shrishti Gupta and thereafter by Mr. Mohit Chaudhary.

8. The main submission raised by the Defendants is that they are only the LRs of Late Mr. Dhingra, and are not aware of any transactions that have been pleaded in the plaint, and cannot be held liable for the same. They are relying on two judgments in support of their claim. One of Bombay High Court and one of this Court. The Bombay High Court's judgment relied upon by Defendant is *Rajesh Steel Centre v. Smt. Rashmi K. Agarwal* 1986 Mah L.J. 993 (hereinafter, "*Rajesh Steel Centre*") and judgment of a Single Judge of this Court in *Sarla Devi & Ors. v. Daya Ram & Ors.* [IA 9565/1994 in Suit no.1518/1994 decision dated 22nd November, 1994]

9. The Ld. Counsel for the Plaintiff on the other hand submits that both the judgments relied upon by the Ld. counsel for the Defendant have been either over ruled or set aside. He places reliance on *Bank of India v. Industrial Polymer* (1991) 93 BOMLR 218 (hereinafter, "*Bank of India*") and the Division Bench's judgment in *Sarla Devi & Ors. v. Daya Ram & Ors.* 60 (1995) DLT 3 (DB) (hereinafter, "*Sarla Devi DB*").

10. It is further submitted by counsel that there is a difference between a decree being passed against the LRs and decree being executed. Insofar as the passing of a decree under Order XXXVII is concerned, the two judgments relied upon by him, support the case of the Plaintiff that there is no bar against claiming a remedy against the LRs of a person who may have availed a loan. He further submitted that the Defendants have not challenged the signatures of Mr. Virendra Dhingra but have specifically argued that they are not aware of the transaction itself.

11. The Court has heard the counsel for the parties. The first and foremost fact is that the LRs of Late Mr. Virendra Dhingra have been impleaded as he passed away prior to the filing of the suit. Thus, for all intents and purposes, the LRs have been made parties here in respect of the loan availed by Mr. Dhingra. The Defendants do not dispute that they are the LRs of Mr. Virendra Dhingra. Their submission is one in law i.e. that a summary suit is not maintainable against LRs, in view of the two judgments relied upon by them.

12. However, a perusal of the Division Bench's judgment of in *Bank of India* (supra) and *Sarla Devi DB* (supra) leave no matter of doubt that Order XXXVII suit is maintainable against the LRs and the right to sue survives.

13. The relevant paras of Bank of India (supra) are set out herein below:

"7. Order XXXVII does not exclude from its purview a suit where the heirs and legal representatives of a deceased are party defendants. Nor is there any protection under the Civil Procedure Code to the heirs and legal representatives of a deceased defendant from a decree being passed against them, provided of course, that the right to sue them survives. The protection which Section 52 of the Civil Procedure Code gives to the heirs and legal representatives of a defendant is a protection against the enforcement of a decree against them in execution. Under Section 52, where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of such property. The decree can be executed to the extent of the property of the deceased in his hands. This is a protection which is granted at the stage of execution. Hence even in a case where a decree is passed against such an heir or legal representative under Order XXXVII of the Civil Procedure Code, the decree can be executed only to the extent of the estate of the deceased coming to his hands. The apprehension of the learned judge in the case of Rajesh Steel Centre (supra) is, therefore, unfounded.

8. In the case of Lallu Bhagvan v. Tribjuvan Motiram (1889) I.L.R. 13 Bom. 633 (D.B.), a Division Bench of this Court held that the decree against the legal representatives of a deceased debtor can be passed even if they have not inherited any property. If they have not inherited any property, the only result is that the decree can not be executed against them. This is a matter to be decided at the stage of execution. It does not affect the right of a court to pass a decree. This decision has been followed in the case of Ranjitsingh v. Narmadi (1931) A.I.R. Nagpur 173 where it is held that where an heir of a debtor is sued it is not open to him to raise the plea in course of the suit that he does not hold the assets of the deceased debtor. The plea is confined to execution only.

9. In our view, therefore, the difficulty expressed by the learned single Judge in the case of Rajesh Steel Centre v. Rashmi K. Agarwal (supra) is misconceived. A summary Suit can be filed against an heir and legal representative of a deceased defendant and the provisions of Order XXXVII apply in full to such a suit also. The decree however, can be executed only to the extent of the estate of the deceased in the hands of the judgment debtor. We therefore agree with Variava J. that the summons for Judgment against the heirs of defendant No.3 is maintainable."

14. The relevant portion of Sarla Devi (supra) is extracted herein below:

"3....

Thereupon the appellants required the respondents to refund the sum of Rs.4 lakhs, which was paid by Brahm Prakash to the first two respondents and Tej Ram at the time of execution of the agreement to sell. Failing to receive any favorable response from the respondents, the appellants filed a suit under Order

37 CPC against them on the basis of the agreement to sell. On November 22, 1994 the learned Single Judge passed an order holding that the suit was not triable under Order 37 CPC as the third and fourth respondents, were not parties to the agreement to sell.

In reaching this conclusion the learned single Judge relied upon a decision of the Bombay High Court in *Rajesh Steel Centre vs. Smt. Rashmi K. Agarwal & Ors.*, 1986 Mah. L.J. 993. It is this order of the learned Single Judge which has been impugned before us.

4. We have heard learned Counsel for the parties and we are of the opinion that the learned Single Judge was not right in holding that the suit under Order 37 CPC would not lie. In an identical matter where the present appellants had instituted a suit, being Suit No.1507/94 under Order 37 against some other parties, the learned Single Judge has veered around to the view that such a suit would be maintainable against the heirs and legal representatives of the contracting party who have received his assets. The following are the observations of the learned Single Judge recorded in his order dated May 3,1995 with which we respectfully concur."

15. Thus, the above judgments are conclusive as to the maintainability of the present suit against the LRs of Late Mr. Virendra Dhingra. This Court however, is not going into the issue as to whether the said LRs in fact came into possession of any assets of Mr. Dhingra, or if the decree which may be passed in the present suit is executable against Mr. Dhingra's assets and if so, against which of the assets. This is not an issue that has been raised in the present suit.

16. The maintainability of the suit being not an issue any more, the facts of the present case show that Mr. Dhingra had given a cheque dated 26th December, 2017 for a sum of Rs.3 crores. The notice dated 21st March, 2018 is also placed on record. The payment of the interest also having been made on various dates, the availing of the loan in itself is not in dispute.

17. The same being not in dispute and the cheque of Rs.3 crores having been issued in 2017 towards the principal amount, the suit is clearly maintainable under Order XXXVII CPC. The same is in respect of a liquidated sum based on a financial instrument and hence the question of maintainability is also decided in favour of the Plaintiff.

18. The next submission of the learned counsel for the Defendants is that since the suit prays for a decree for a sum of Rs.3,84,00,000/- and not the exact amount of Rs.3 crores which is the amount of the cheque, the suit under Order XXXVII CPC is not maintainable. This is based on a reading of judgment of this Court in *IFCI Factors v. Vasudev Rao & Anr.* in FAO (OS) 2014/2014. This judgment does not help the case of the Defendant as the ratio in the said judgment reads as under:

"8. Pleadings in a summary suit have to be construed strictly for the reason an

otherwise valuable right recognized by law that every person has a right to defend a proceedings initiated against him is curtailed by a summary suit because of business efficacy requiring that in commercial transactions of the kind envisaged by Order XXXVII a defendant must obtain leave to defend by prima facie pleading facts which if proved would non-suit the plaintiff."

19. The pleadings in the present suits are clear to the effect that Rs.3 crores is claimed as the principal amount and Rs.84 lacs is claimed towards the interest from 1st April, 2016 till the date of filing of the suit @12% per annum. The pleading is clear and categorical. It brooks no ambiguity. A reading of the said pleading shows that it is in accordance with the instrument issued by Late Mr. Dhingra i.e. a cheque of Rs.3 crores. This, objection is also not tenable.

20. The leave to defend, therefore, does not raise any triable or valid defence. The question of limitation is not being gone into as the summons for judgments were served on the Defendants on 6th November, 2018 and first filing of the leave to defend was on 12th November, 2018. Though, there was a refiling of the said application, the date of filing of the said application would have to be construed as 12th November, 2018. The objection of limitation is, thus, rejected.

21. Under these circumstances, the suit is decreed for a principal sum of Rs.3 crores. In the facts and circumstances of the present case, since the actual individual i.e. Late Mr. Dhingra, who availed of the loan has passed away and it is only his wife and children who are the Defendants in the present suit, interest is awarded @6% per annum from the date when the cheque was given i.e. 26th December, 2017. It is clarified that this Court has not gone into the issue as to whether the LRs or any of their assets can be attached or sold. The defences available to the LRs under Section 52 shall continue to be available in any execution of the present decree.

22. The suit is, accordingly, decreed in the above terms. There shall be no orders as to costs. All pending applications also stand disposed of.