
(2014) 07 CAL CK 0024
In the Calcutta High Court
Case No : F.A. No. 91 of 2007

S.P. Ghosh

APPELLANT

Vs

Tarapada Bhowmick

RESPONDENT

Date of Decision : 16-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 151 — Contract Act, 1872 - Section 25(3)

Citation : (2015) 1 CHN 117

Hon'ble Judges : Ashim Kumar Banerjee, Acting. C.J.;Arijit Banerjee, J.

Bench : Division Bench

Advocate : Ashis Sanyal, for the Appellant; Bidyut Kumar Banerjee and Koushik Dey, for the Respondent

Final Decision : Disposed off

Judgement

Arijit Banerjee, J.?This is an appeal arising out of the judgment and decree dated November 30, 2006 passed by the Learned Civil Judge (Senior Division), 2nd Court, Howrah, in Money Suit No. 16 of 2004 whereby the Learned Judge dismissed the suit filed by the appellant/plaintiff. The case of the plaintiff is that he used to visit Roychak in Diamond Harbour very often for leisure purpose. He used to put up in hotel Roychak which was run by the defendant Nos. 1 and 2 who are husband and wife. In course of frequent visit a good relationship grew up between the plaintiff and his wife and the defendants. The defendants in order to develop their hotel business approached the plaintiff for financial accommodation/loan without interest. Out of good faith the plaintiff granted loan to the defendants from time to time between 18th February, 1997 and 23rd April, 1999 aggregating Rs. 6,71,782/-. Out of this amount the defendants have repaid only a sum of Rs. 8,000/- leaving Rs. 6,63,782/- outstanding. However, a sum of Rs. 25,000/- was paid by the defendants on account of interest. From time to time the plaintiff requested the defendants to repay the said amount and the defendants meted out an assurance that the same would be paid soon. By letters dated 10th July, 2001, 26th July, 2001, 1st September, 2001, 2nd

September, 2001 and 9th September, 2001 the defendants acknowledged receipt of the loan from the plaintiff and promised to repay the same. However, in fact, the defendants failed, neglected and refused to repay the loan amount. After waiting for long the plaintiff served a lawyer's notice on the defendants dated 2nd July, 2004 and, thereafter, filed the suit for recovery of the loan amount.

2. In the written statement the defendants admit having received the loan amount from the plaintiff but contend that the same was thrust upon the defendants by the plaintiff. The defendants contend that they had apprised the plaintiff that they had already taken a loan from West Bengal Financial Corporation (hereinafter referred to as the WBFC) and any further loan from any other source will have to be subject to the rules and regulations of the WBFC and that without the permission of the WBFC such loan could not be repaid.

3. The Trial Judge held that WBFC is a necessary party to the suit and in its absence no decree can be passed. It was further held that plaintiff's claim was barred by limitation. The learned Judge dismissed the suit.

4. Before us, two points were urged on behalf of the appellant. Firstly, it was contended that WBFC is neither a proper party nor a necessary party to the suit. The plaintiff has no cause of action against WBFC. There was no reason for the plaintiff to implead WBFC as a defendant in the suit. The learned Judge erred in holding that no effective decree can be passed in the absence of WBFC. Secondly, in view of the clear admission/acknowledgement by the defendants of receipt of loan amount in the documents dated 1st September, 2001, 2nd September, 2001 and 9th September, 2001 (Exhibits 4 and 5) along with the assurance to repay the loan amount, the suit cannot be said to be barred by limitation. Such assurance amounts to promise to pay within the meaning of section 25(3) of the Indian Contract Act. The suit was filed in August 2004 i.e. within three years of execution of the documents being Exhibits 4 and 5.

5. Per contra, it has been argued on behalf of the respondents that WBFC is a necessary party to the suit and as such not impleading WBFC as a defendant is fatal to the suit. In support of his contention learned Counsel for the respondents has placed reliance on the decisions of the Hon'ble Apex Court in the case of Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, and in the case of Mumbai International Airport Pvt. Ltd. Vs. Regency Convention Centre and Hotels Pvt. Ltd. and Others, . Reliance has also been placed on a Full Bench decision of the Allahabad High Court in the case of The Benares Bank Ltd., Benares Vs. Bhagwan Das and others and Ratanlal and another--> . Relying on the aforesaid decisions learned Counsel for the respondents contended that the Learned Judge rightly held that the suit should be dismissed for non-joinder of necessary party.

6. On the issue of limitation, it was contended that execution of documents being Exhibits 4 and 5 were procured by coercion and as such the same are not binding on the defendants. The learned Judge has rightly held that the plaintiff's claim is barred by limitation.

7. We have considered the rival contentions of the parties. We do not see how WBFC is a necessary party to the suit. A necessary party is one in whose absence no effective decree can be passed in the suit and/or whose presence before the Court may be necessary for proper and effective adjudication of the disputes involved in the suit. There was no transaction between the appellant and WBFC. It also does not appear from the documents and evidence on record that the appellant advanced money to the respondent on condition that the same would be repayable only subject to permission of WBFC. Indeed, that would be an absurd situation and no prudent man in his right senses would agree to such a condition. We are of the view that WBFC's presence before the Court was in no way necessary for the Court to be able to properly adjudicate the issues involved. Since we hold that WBFC is not a necessary party, the decisions cited on behalf of the respondent would have no manner of application to the facts of the instant case.

8. Coming to the issue of the plaintiff's claim being barred by limitation, we are unable to agree with the finding of the Learned Trial Judge. Exhibits 4 and 5 are documents dated 02/09/2001 and 09/09/2001 whereby the defendant No. 1 has unequivocally acknowledged receipt of the amounts of Rs. 1.55 lakhs and Rs. 5.33 lakhs respectively from the plaintiff coupled with promise to repay the said amount. The suit was filed on or about 23/08/2004 i.e. within three years of such clear acknowledgement. In his evidence, the defendant No. 1 has tried to run a feeble case that such documents of acknowledgement were extracted from him by the plaintiff under coercion. However, no such case has been made out in the written statement, nor the defendant No. 1 has challenged the validity of such documents of acknowledgement nor asked for the delivery up and/or cancellation thereof. The contention of the defendant No. 1 is that the said documents of acknowledgement were procured by the plaintiff under coercion is not credible.

9. In any event, there is clear admission in the written statement filed by the defendants that moneys are due and payable by them to the plaintiff. The last sentence of paragraph 12 of the written statement is as follows:-

"As a matter of fact, the defendants paid a sum of Rs. 50,000/- Rs. 8,000/- and Rs. 25,000/- on diverse occasions leaving a sum of Rs. 5,70,782/- as due".

10. In their written statement, the defendants have sought to run a case that there was an understanding between the plaintiff and the defendant No. 1 that if the defendant No. 1 could secure a works contract for the plaintiff from the Arunachal Pradesh Government, the plaintiff would pay to the defendant No. 1 Rs. 10 lakhs and odd by way of commission. The defendants sought to contend that the defendant No. 1 was instrumentally in securing the works contract for the plaintiff from the Arunachal Pradesh Government, but the plaintiff has not paid the agreed commission and the plaintiff's claim should be set off against such unpaid commission. However, in his written statement, the defendant No. 1 has stated, inter alia, as follows:-

"I admit that the amount lent by Mr. S.P. Ghosh, the plaintiff in this case, is not co-related to my claim of Rs. 10 lakhs and odd amount towards commission".

11. Hence, the defendant No. 1 has himself destroyed the case of set off that he sought to run in his written statement.

12. Another point that was very tentatively urged on behalf of the respondents is that the respondents received the loan from the plaintiff and his wife jointly and in the absence of the plaintiff's wife as a party to the suit, no decree could be passed. Having considered the evidence adduced in the suit, both documentary and oral, we are constrained to hold that this is an argument in despair. In any event, to dispel any doubt, the plaintiff's wife had filed an application before the Learned Trial Judge under Order 1 Rule 10 of the CPC read with section 151 thereof for being impleaded as a co-plaintiff, wherein she has unequivocally stated that she is a housewife and the money lent to the defendants belonged to the plaintiff. This argument of the defendants is completely merit less and is rejected.

13. In view of the aforesaid discussion this appeal succeeds. The impugned judgment and decree dated 30th November, 2006 passed by the Court of Civil Judge (Senior Division), Second Court at Howrah is set aside. We proceed on the basis of the admission of the defendants in their written statement and pass a decree for Rs. 5,70,782/- in favour of the plaintiff. There appears to be some doubt as to whether or not the loan that was advanced by the plaintiff was agreed to be interest free. However, in view of the fact that the plaintiff has been deprived of his legitimate dues for a long period of time, we feel that for the ends of justice some interest should be granted to the plaintiff. Accordingly, the decretal amount shall carry interest at the rate of 8 per cent per annum from the date of institution of the suit i.e. 23.08.2004 till the repayment of the decretal amount by the defendants to the plaintiff. This appeal, thus, stands disposed of, without however any order as to costs.

Ashim Kumar Banerjee, Actg. C.J.

I agree.