

(2016) 01 DEL CK 0305
In the Delhi High Court
Case No : RFA No. 107/2009

State Bank of India

APPELLANT

Vs

Rajesh Chandra

RESPONDENT

Date of Decision : 07-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Limitation Act, 1963 — Section 17
Partnership Act, 1932 — Section 69, Section 69(3) (a)

Citation : (2016) 160 AIC 659 : (2016) 2 CivCC 203 : (2016) 227 DLT 110

Hon'ble Judges : Rajiv Sahai Endlaw, J.

Bench : Single Bench

Advocate : R.P. Vats, Advocate, for the Appellant; Mridula Ray, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—1. This appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment dated 21st October, 2008 of the Court of Sh. Rajiv Mehra, Additional District Judge (ADJ), Delhi decreeing Suit No. 51/2004 filed by the respondent/plaintiff against the appellant/defendant State Bank of India (SBI) in the sum of Rs.17,19,796/- along with interest pendente lite and future till realisation of the amount at the rate of 12% per annum along with cost of the suit.

2. Notice of the appeal was issued and vide ex-parte ad-interim order dated 30th March, 2009, subject to the appellant/defendant SBI depositing the principal amount in the form of Fixed Deposit Receipt (FDR), execution of the impugned judgment and decree was stayed.

3. Thereafter, vide order dated 11th May, 2009 the appeal was admitted for hearing and Trial Court record requisitioned. On the application of the respondent/plaintiff for early hearing, vide order dated 23rd September, 2015, the appeal was taken out of the category of "Regulars" and ordered to be listed today for

hearing.

4. The counsel for the appellant/defendant SBI has been heard. Need to call upon the counsel for the respondent/plaintiff to address arguments has not arisen.

5. The claim of the respondent/plaintiff against the appellant/defendant SBI in the suit from which appeal arises was on the basis of the amounts wrongfully debited by the appellant/defendant SBI from the current account of the respondent/plaintiff on the basis of cheques, though drawn out of the cheque books issued by the appellant/defendant SBI to the respondent/plaintiff but not bearing the signatures of the respondent/plaintiff.

6. It is no longer *res integra* that in such a situation the Bank is liable to refund the amounts debited to the customer's account on the basis of cheques not bearing the signatures of the customer. Reference in this regard can be made to *Canara Bank Vs. Canara Sales Corporation*, (1987) 2 SCC 666.

7. In the present case, the appellant/defendant SBI did not contest the fact that the cheques, amount debited whereof was sought to be recovered in the suit, were not bearing the signatures of the account holder. The appellant/defendant SBI contested the suit averring the claim in the suit to be barred by time and further averring that the respondent/plaintiff had no cause of action for the suit. Accordingly, vide order dated 28th May, 2004, only the following issues were struck in the suit:

"1. Whether the claim of the plaintiff is barred by limitation?

2. Whether there was cause of action for the plaintiff to institute the present suit against the defendant?

3. To what amount if any, the plaintiff is entitled to recover from the defendant?

4. Relief."

8. Needless to state, the learned ADJ has decided all the issues aforesaid in favour of the respondent/plaintiff and hence decreed the suit.

9. The counsel for the appellant/defendant SBI has today raised only two arguments. Firstly, it is contended that since the respondent/plaintiff is a partnership firm and the account was in the name of the partnership firm, the suit was not compliant with Section 69 of the Indian Partnership Act, 1932 and the plaint was liable to be rejected on this ground alone. The only other contention is that the learned ADJ has wrongly held the suit claim to be within time.

10. As far as the first of the aforesaid contentions is concerned, not finding any issue thereon, it has at the outset been enquired from the counsel for the appellant/defendant SBI, whether any such plea of the suit being barred by Section 69 *supra* was taken in the written statement and / or at any other time

during the pendency of the suit.

11. The counsel for the appellant/defendant SBI has fairly replied in the negative. He has however contended that such a plea can be taken in the appeal for the first time and has placed reliance in this regard on the judgment of the Division Bench of the High Court of Madras in Goverdhandoss Takersey Vs. M. Abdul Rahiman 55 Law Weekly 446. On enquiry, whether any such ground has been taken in the memorandum of appeal, attention is drawn to ground (n) of the memorandum of appeal.

12. Section 69 of the Partnership Act provides that no suit arising from a contract shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against third party, unless the firm is registered and the person suing is or has been shown in the Register of Firms as partner in the firm.

13. It has been enquired from the counsel for the respondent/plaintiff, whether the respondent/plaintiff is a registered firm.

14. In spite of the said ground having been taken in the memorandum of appeal, the counsel for the respondent/plaintiff states that she will have to obtain instructions in this regard.

15. As far as the reliance placed by the counsel for the appellant/defendant SBI on the judgment in Goverdhandoss Takersey supra of the Division Bench of the Madras High Court is concerned, all that the same says is that a point of law of the nature of Section 69 of the Partnership Act can be raised for the first time in an appeal but subject to the condition "if all the facts necessary for its determination are on the record". Admittedly in the present case, what to talk of facts even a plea to this effect is not on record of the suit against decree wherein the appeal has been preferred. Only if the appellant/defendant SBI had taken such a plea in its written statement could the said facts have come on record.

16. That is however only to meet the judgment aforesaid. Else, the said plea in the appeal is found to be totally misconceived and on an erroneous assumption that the suit from which this appeal arises was instituted by or on behalf of a partnership firm. A bare perusal of the Memorandum of Parties to the suit, record whereof has been requisitioned, shows that the same was filed by the respondent Sh. Rajesh Chandra as sole proprietor of M/s. Chandra Sons and it was the averment in the plaint that M/s. Chandra Sons though earlier a partnership firm of the said Sh. Rajesh Chandra and Sh. Chandra Prakash but the said Sh. Chandra Prakash died on 27th January, 2001 and after his death, the partnership firm stood dissolved and all the debts, liabilities and assets were taken over by the respondent/plaintiff i.e. Sh. Rajesh Chandra and who was carrying on business as sole proprietor of M/s. Chandra Sons.

17. The appellant/defendant SBI in its written submission to the suit, though admitted M/s. Chandra Sons being earlier a partnership firm but denied for knowledge of the death of Sh. Chandra Prakash or the fact that Sh. Rajesh

Chandra was carrying on business as sole proprietor of M/s. Chandra Sons and pleaded that the appellant/defendant SBI had never been informed of the same or of the change in constitution of M/s. Chandra Sons.

18. It is perhaps on this aspect that the issue as to whether the plaintiff had cause of action for the suit was framed and which has been answered in favour of the respondent/plaintiff and finding on which issue has not been challenged by the counsel for the appellant/defendant SBI today who has confined the hearing to the aforesaid two aspects only.

19. On the aforesaid facts, the suit even otherwise would fall within the exceptions provide in Section 69(3) (a) of the Partnership Act, being for enforcement of a right to realise the property of a dissolved firm. Reference in this regard can be made to Appaya Nijlingappa Hattargi Vs. Subrao Babaji Teli , AIR 1938 Bom. 108, Bhagwanji Morarji Goculdas Vs. The Alembic Chemicals Works Co. Ltd. , AIR 1943 Bom. 385, Bharat Prasad Vs. Paras Singh , AIR 1964 All. 15, Sri Baba Commercial Syndicate Vs. Channamasetti Dasu , AIR 1968 AP 378, Basantlal Jalan Vs. Chiranjilal Sarawgi , AIR 1968 Pat. 96 and Gujarat Water Supply and Severage Board Vs. Sundardas Hukumatram Shivanani , AIR 1991 Guj. 170. Even otherwise, the scope of Section 69 has been considerably diluted, as noticed by this Court in Vesco Product Company Vs. Sh. Rajinder Nath Pathak and Sai Nath Enterprises Vs. North Delhi Municipal Corporation . It has been held that the bar of Section 69 does not apply to enforcement of statutory and common law rights.

20. Thus, the contention that the plea of Section 69 is available is misconceived, inasmuch as the suit was not by a partnership firm.

21. On the aspect of limitation, the contention of the counsel for the appellant/defendant SBI is that since the cheques which were debited were for the period between 14th June, 1995 and 22nd July, 1998 and the suit was instituted on 16th August, 2001, the same had been instituted beyond the period of three years from even the last of the cheques wrongfully debited and was thus barred by time.

22. I have at the outset enquired from the counsel for the appellant/defendant SBI as to which Article of the Schedule to the Limitation Act, 1963 would apply to claim in such a suit.

23. The counsel for the appellant/defendant SBI though does not refer to any Article but refers to Section 17 of the Limitation Act which provides for the effect of fraud or mistake on the period of limitation.

24. In my view, before the need to consider whether the period of limitation is required to be extended for the reason of fraud or mistake, it needs to be first determined what is the period of limitation for such a suit and which Article of the Schedule to the Limitation Act is attracted.

25. I find Article 22 of the Schedule to be providing as under:

26. It is thus clear that for recovery of monies deposited by a customer with his banker and which monies are payable on demand, the limitation provided is of three years commencing from the date when the demand is made. It has been so held in *The Bharat Overseas Bank Ltd. Vs. Shri Prasert Sirikuruwan Alias Avtar Singh Gorowara* and in *State Bank of India Vs. National Open School Society* as well as in *The Jammu and Kashmir Bank Vs. Nirmala Devi* , AIR 1959 J&K 85 (DB).

27. I have enquired from the counsel for the appellant/defendant SBI, whether it was/is the plea of the appellant/defendant SBI that the demand of the monies claimed in the suit had been made for the first time prior to three years of the institution of the suit.

28. No answer is forthcoming.

29. The suit having been filed within three years of the date when the respondent/plaintiff first demanded the monies wrongfully debited by appellant/defendant SBI from the account, cannot this be said to be barred by time.

30. I may however record that the learned ADJ has answered the issue of limitation in favour of the respondent/plaintiff invoking Section 17 of the Limitation Act but need wherefore as aforesaid is not felt.

31. There is thus no merit in the argument of limitation as well.

32. Neither of the contentions raised by the counsel for the appellant/defendant SBI having found favour, the appeal is liable to be dismissed.

33. I have otherwise gone through the Trial Court record, perused the documents on record and also perused the oral evidence addressed and am satisfied that there is no error otherwise in the impugned judgment and decree.

34. Accordingly, the appeal is dismissed.

No costs.

Decree sheet be drawn.

35. The monies deposited by the appellant/defendant SBI in this Court together with interest accrued thereon be now released in favour of the respondent/plaintiff by encashing the FDR in which the monies are kept. The respondent/plaintiff shall be entitled to recover the balance decretal amount, if any by executing the decree.