

Lakshmi Builders Vs. Devinder Lakra

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Court : Delhi

Decided On : Mar-03-2016

Judge : Vipin Sanghi

Appeal No. : CS(OS).No. 1366 of 2015

Appellant : Lakshmi Builders

Respondent : Devinder Lakra

Judgement :

I.A. No. 16564/2015

1. This application has been moved by the defendant under Order XXXVII Rule 3 (5) CPC to seek leave to defend the present suit filed by the plaintiff as a summary suit under Order XXXVII CPC.

2. The case of the plaintiff, as made out in the plaint, is that the defendant used to seek short term financial assistance from the plaintiff to meet his business related requirements. In all, the defendant borrowed a sum of Rs. 2,50,00,000/- from the plaintiff from time to time in the following manner:

a) Rs. 33 Lacs in Cash on 31.12.2010

b) Rs. 15 Lacs by way of RTGS on 01.06.2012

c) Rs. 20 Lacs in Cash on 23.06.2012

- d) Rs. 10 Lacs by way of Cheque No.703784 on 28.08.2012
- e) Rs. 50 Lacs by way of Cheque No.703796 on 29.08.2012
- f) Rs. 50 Lacs by way of Cheque No.703797 on 29.08.2012
- g) Rs. 32 Lacs by way of Cheque No.703798 on 29.08.2012
- h) Rs. 40 Lacs in Cash on 30.08.2012.

3. On 03.09.2012, the defendant acknowledged/ admitted his liability and agreed to re-pay the said amount to the plaintiff. He executed a promissory note undertaking to pay the said amount on 03.09.2012. Apart from executing the promissory note, the defendant also issued two post-dated cheques dated 29.10.2012 drawn on Central Bank of India, Connaught Circus, New Delhi bearing Nos.074805 and 074806 for Rs. 1 Crore and Rs. 1.50 Crore respectively in favour of the plaintiff and also undertook that the said cheques shall be honoured upon presentation on the due date. This undertaking was recorded in the promissory note itself. The defendant had also stated in the promissory note dated 03.09.2012 that if the defendant fails to make payment of the amount on the due date, he shall personally handover the possession of his office bearing No.501-502 constructed on a plot admeasuring 400 sq. yards falling in Khasra No.339, Village Deedarpur, Delhi. In respect of the said property, the defendant also executed an agreement to sell dated 29.08.2012 in favour of the plaintiff s proprietor Mr. Vinod Sharma as a collateral security.

4. The further case of the plaintiff is that the loans were advanced by the plaintiff by himself incurring overdraft in his account with Vijaya Bank. The payments were made by the plaintiff either by cheque or through RTGS, except some payments which were made in cash, as noticed hereinabove.

5. The plaintiff further stated that when the aforesaid two cheques were presented for payment on 29.10.2012, the same were returned unpaid by the defendant s bank on 30.10.2012 on account of insufficient funds. On 07.11.2012, the plaintiff issued a legal notice to the defendant calling upon the defendant to make payment of Rs. 2,50,00,000/-, but to no avail.

6. Consequently, the plaintiff initiated a criminal complaint under Section 138 of the Negotiable Instruments Act in the Court of the learned CJM, Gurgaon. The defendant was summoned in those proceedings. On 05.03.2014, the learned JMIC, Gurgaon, inter alia, recorded the statement of the defendant/ accused under Section 313 Cr.P.C. After the statement of the accused/ defendant was recorded, the defendant undertook before the learned JMIC, Gurgaon to repay the amount of Rs. 2.5 Crores in five equated installments of Rs. 50 Lakhs each to the plaintiff. As per the said statement/ promise, the first installment of Rs. 50 Lakhs was due and payable on 15.04.2014. However, the defendant did not make payment of any of those installments.

7. The plaintiff further points out that the defendant/ accused did not appear before the learned Magistrate, and consequently, he was declared Proclaimed Offender vide order dated 17.07.2014. A First Information Report bearing FIR No.446/2014 under Section 174 A IPC was registered against him on 21.07.2014. Four properties of the defendant/ accused were also attached under Section 83 Cr.P.C. in order to secure his presence.

8. In this background, the plaintiff has filed the present suit for recovery under Order XXXVII CPC. The plaintiff has sought recovery of Rs. 2.5 Crores along with pendente lite and future interest @ 24% per annum from the date of filing of the suit till actual realisation. The plaintiff has also sought recovery of Rs. 1,12,50,000/- as interest for the pre-suit period along with pendente lite and future interest @ 24% per annum from the date of filing of the suit till realisation. The plaintiff also prays for costs in the suit.

9. The defendant has filed the aforesaid application to seek leave to defend. The defence disclosed by the defendant, firstly, is that the promissory note dated 03.09.2012 is not a promissory note in the eyes of law, as defined in the Negotiable Instruments Act, since it seeks to create mortgage of immovable properties of the defendant. Even the said mortgage does not stand created since the document is not registered.

10. The defendant further states that the so-called promissory note does not indicate any promise by the defendant to pay the amount on demand by the

lender. Thus, the suit is not maintainable on the basis of the said promissory note under Order XXXVII CPC.

11. The defendant also claims that the suit is barred by limitation inasmuch, as, the amounts of Rs. 33 Lakhs and Rs. 40 Lakhs were shown to have been borrowed on 31.12.2010 and 30.08.2012 respectively, whereas the present suit has been filed only on 01.05.2015.

12. The further submission of the defendant is that the amount of Rs. 40 Lakhs was not received by the defendant/ applicant and no proof in respect thereof has been produced by the plaintiff. It is also pleaded that the promissory note relied upon by the plaintiff is typed on a blank signed paper, which was obtained by the plaintiff from the defendant and his father who has been shown as a witness.

13. The defendant also states that the suit is barred under Section 3 of the Punjab Registration of Money Lenders Act, 1938 as applicable to Delhi and Haryana State. The plaintiff has not disclosed that he has registration as a money lender, and has been issued a license as a money lender under the said Act.

14. Learned counsel for the plaintiff has countered the submissions of the defendant/ applicant. It is, firstly, pointed out that the suit is not merely based on the promissory note dated 03.09.2012, which, in any event, is an acknowledgement of debt and liability by the defendant. Learned counsel points out that even if the said promissory note were not to be considered as a promissory note, the plaintiff has also placed reliance on the fact that the defendant had issued two cheques, as aforesaid for Rs. 1 Crore and Rs. 1.5 Crores, which have been dishonoured upon presentation by the defendant's bank. The plaintiff has placed on record the copies of the said cheques, as well as the dishonour memo of the Vijaya Bank.

15. Moreover, the promise to pay is also contained in the solemn statement made by the defendant before the learned Magistrate under Section 138 of the Negotiable Instruments Act. The said solemn statement is signed by the defendant. Learned counsel for the plaintiff referred to the following statement of the defendant made on solemn affirmation before the JMFC, Gurgaon:

Jointly stated that the matter has been mutually settled between complainant and accused. In pursuance of the settlement, accused shall pay sum of Rs. 50 lakhs to the complainant on or before 15.04.2014, If accused fails to pay the above amount by above date then he shall transfer his plot situated at Village Didarpur on 16.04.2014 as per mutually agreeable valuation of the said plot which will be decided mutually by both the parties later on.

Remaining payment will be paid later on in monthly installment of Rs. 50 Lakhs per month. If the first or the installment of any monthly payment is defaulted then this settlement shall fail and the amount if any earlier deposited shall be forfeited by complainant. Accused shall be liable for conviction thereafter.

ROAC

Sd/-

Vinod Sharma

Identified by

Sd/- Naresh Panwar, Advocate

16. Learned counsel points out that the defendant/ accused had made the statement before the learned Magistrate in the presence of his counsel. In this regard, he places reliance on the order passed by the learned Magistrate on 05.03.2014, which reads as follows:

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Present: Complainant in person with Sh. Naresh Panwar, Advocate.

Accused on bail with Ms. H.S. Gugaral, Advocate.

Today case is fixed for cross-examination of complainant. CW-1 present and examined. Vide separately recording the statement, complainant has closed his evidence. Statement of accused under section 313 is recorded.

Today complainant as well as accused has made a joint statement regarding settlement. Statement to that effect recorded. Now to come up on 16.04.2014 failing which DWs and arguments

Sd/-

(Amit Kumar Grover)

JMIC/GGN, 05.03.2014

17. It is also submitted that the plea premised on the Punjab Registration of Money Lenders Act, 1938 is misconceived inasmuch, as, the plaintiff is not a moneylender within the definition of the said expression contained in the said Act. The said Act defines loan to mean an advance whether secured or unsecured of money or in kind at interest (emphasis supplied). Learned counsel submits that the transaction between the parties was a friendly loan transaction, as no interest was stipulated to be payable by the defendant. Moreover, the plaintiff is not the Money-lender as defined in Section 2(8) of the said Act, which is defined to mean a person, or a firm carrying on the business of advancing loans as defined in this Act, Learned counsel submits that the plaintiff is not engaged in the business of advancing loans, i.e. advancing monies on interest. It is pointed out that there is no averment made in the defendant s application that the plaintiff is engaged in the business of advancing loans, i.e. on interest.

18. Having heard learned counsel, I am of the view that the defence of the defendant does not raise any triable issue, requiring grant of leave to defend the present suit and the defence set up by the defendant is completely frivolous and moonshine.

19. The promissory note relied upon by the plaintiff, no doubt, may not meet the requirement of a promissory note as defined in Section 4 of the Negotiable Instruments Act, which is defined as follows:

A promissory note is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer

of the instrument .

20. This is so, because the said document does not contain a promise to pay a certain sum of money only to the plaintiff by the defendant. It also contains an obligation undertaken by the defendant in respect of the agreement to sell dated 29.08.2012. Nonetheless the same is undoubtedly an acknowledgement of debt and liability by the defendant. However, as noticed herein above, the present suit is not filed by the plaintiff by placing reliance only on the so-called promissory note, and the plaintiff has also made specific averment with regard to issuance; deposit, and; dishonour of the two cheques aforesaid for Rs. 1 crore and Rs. 1.5 crore respectively by the defendants bank on account of insufficient funds. Moreover, the defendant on solemn affirmation undertook before the learned JMIC, Gurgaon that he shall refund the amount and make payment of Rs. 50 lacs to the plaintiff on or before 15.04.2014, and that he shall make the remaining payment in monthly instalments of Rs. 50 lacs. The said statement contains the defendants promise to make payment of the principal amount claimed by the plaintiff in the suit. Thus, there is no merit in the submission of the defendant that the present suit is not maintainable under Order 37 CPC.

21. The further submission of the defendant that the suit is barred by limitation inasmuch, as, the payments are claimed to have been made on 31.12.2010 and thereafter upto 30.08.2012, whereas the present suit was instituted only on 01.05.2015, also has no merit. Firstly, it is only the first payment of Rs. 33 lacs in cash made on 31.12.2010, which exceeds the period of three years from the date of filing of the suit. Even in respect of the said payment, the suit cannot be said to be barred by limitation for the reason that the plaintiff executed the document styled as promissory note on 03.09.2012 acknowledging his liability in respect of the payment received, inter alia, on 31.12.2010. The cause of action once again arose in respect of, inter alia, the said payment of Rs. 33 lacs on 03.09.2012 when the document styled as a promissory note was executed. In respect of the said payment, and the other payments made by the plaintiff to the defendant, the cause of action arose when the cheques dated 29.10.2012 were dishonoured upon presentation and returned unpaid on 30.10.2012. It further arose when the defendant made his solemn statement before the learned JMIC, Gurgaon

undertaking to make payment of the entire amount of Rs. 2.50 crores in monthly instalments beginning 15.04.2014. Thus, no part of the plaintiffs claim can be said to be barred by limitation.

22. The further submission of the defendant that there is no proof of receipt of Rs. 40 lacs by the defendant, in cash, also has no merit. The document styled as promissory note dated 03.09.2012 executed by the defendant is proof enough of his having received the said amount. Similarly, the issuance of the cheque for Rs. 2.50 crores which includes the said amount of Rs. 40 lacs, is again proof of the receipt of the said instalment. The solemn statement made by the defendant before the learned JMJC, Gurgaon undertaking to make payment of Rs. 2.50 crores in monthly instalments, is yet another proof of the defendant having received the entire payment of Rs. 2.50 crores, including the said instalment of Rs. 40 lacs.

23. The submission of the defendant that the suit is barred by Section 3 of the Punjab Registration of Money Lenders Act, 1938 also has no merit. Firstly, the defendant has not claimed that the money was lent by the plaintiff to the defendant on interest. Secondly, the defendant does not even claim that the plaintiff is engaged in the business of money lending on interest. Thus, the said act has no application to the transaction in question between the parties. Section 3 of the said Act provides that a suit by a money lender for recovery of a loan shall, after the commencement of the said Act, be dismissed unless the money lender is registered under the Act. Since the plaintiff is not a money lender, and the amount advanced does not qualify as a loan, the said Act has no applicability to the present case.

24. The defence that the defendant and his father had signed the document styled as promissory note in blank also has no merit and does not raise any triable issue. Apart from making the said bald assertion, the defendant has not explained under what circumstance he and his father allegedly executed the said document in blank. Moreover, this claim of the defendant is belied by the fact that he himself issued two post dated cheques dated 29.10.2012 in favour of the plaintiff, and also went on to make a statement on solemn affirmation before the learned JMJC

Gurgaon that he shall repay the amount of Rs. 2.50 crores in monthly instalments of Rs. 50 lacs each beginning 15.04.2014. Thus, I am of the view that the defence set up by the defendant is completely frivolous and moonshine, and the same does not raise any triable issue. Accordingly, the application is dismissed.

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25. The relevant facts and circumstances have already been noticed by the Court while dealing with the defendant's application seeking leave to defend, which has been dismissed. For the sake of brevity, they are not repeated once again.

26. The principal liability of the defendant is Rs. 2,50,00,000/-. The defendant had issued post-dated cheques dated 29.10.2012, which have been dishonoured on 30.10.2012. Thus, the plaintiff is entitled to interest on the aforesaid amount from 30.10.2012 onwards. Under the Negotiable Instruments Act, Section 80 provides that when no rate of interest is specified in the instrument, interest on the amount due on the negotiable instrument shall be calculated at the rate of 18% p.a., from the date on which the same ought to have been paid by the party charged, until tender or realization of the amount due, or until such date after the institution of a suit to recover such amount, as the court directs. Thus, the plaintiff would be entitled to interest on the amount of Rs. 2.50 crores from 30.10.2012 onwards till realization. However, the plaintiff cannot claim interest on interest, as claimed in prayer B. Thus, prayer B made by the plaintiff in the plaint is rejected.

27. The suit is, accordingly, decreed for the amount of Rs. 2,50,00,000/- along with interest from 30.10.2012 onwards @ 18% per annum till the passing of the decree and thereafter till realisation. The plaintiff shall also be entitled to costs.

I.A. No.10236/2015 (u/o 38 r 5)

28. This application has been moved by the plaintiff to seek attachment before judgment of the defendant's properties enlisted in para 8 of the application. The suit of the plaintiff has been decreed as defendant's application seeking leave to defend has been dismissed. As the liability of the defendant stands established, there is every likelihood that the defendant may evade the execution of the decree

passed by this Court. The previous conduct of the defendant shows that even earlier he promised to pay the amount of Rs. 2.50 crores, and issued post dated cheques, which were dishonoured upon presentation. He also made solemn statement before the learned JMIC, Gurgaon undertaking to make payment in monthly instalments of Rs. 50 lacs each beginning 15.04.2014, but did not make the payment. The plaintiffs assertion that the defendant failed to appear before the learned Magistrate and was, therefore, declared a proclaimed offender has also not been controverted. Thus, I am satisfied that the present is a fit case for attachment of the defendants properties enlisted in para 8 of the application. It is, accordingly, directed that the said properties shall remain attached till the realization of the plaintiffs dues under the decree.

29. The application stands disposed of.

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