

Vikram Kumar vs.rakesh Saraf

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Court : Delhi

Decided On : Nov-24-2017

Appellant : Vikram Kumar

Respondent : Rakesh Saraf

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + % VIKRAM KUMAR RFA No.979/2017 24th November, 2017 Mr. T.P.S. Kang, Adv. Appellant Through: versus RAKESH SARAF CORAM: HONBLE MR. JUSTICE VALMIKI J.MEHTA Respondent To be referred to the Reporter or not?. VALMIKI J.

MEHTA, J (ORAL) C.M. No.42588/2017 (exemption) 1. Exemption allowed subject to just exceptions. C.M. stands disposed of. RFA No.979/2017 and C.M. No.42589/2017 (stay) 2. This Regular First Appeal under Section 96 of the Code of Civil Procedure (CPC) is filed by the defendant in the suit impugning the judgment of the trial court dated 24.8.2017 by which the trial court has decreed the suit filed by the respondent/plaintiff for a sum of Rs. 7,16,000/- along with interest at 12% per annum. Suit was filed for recovery of Rs. 19,77,000/- with interest. RFA No.979/2017 Page 1 of 7 3. At the outset it may be noted that appellant/defendant did file the written statement, did not cross examine the witnesses of the respondent/plaintiff and also did not lead evidence. In fact the appellant/defendant was given repeated opportunities to file the written statement, but not only those opportunities were not utilized, even opportunities granted by allowing two petitions by this Court were not utilized, and no written statement was filed by the

appellant/defendant.

4. The subject suit was filed by the respondent/plaintiff for recovery of Rs. 19,77,000/- along with interest pleading that the appellant/defendant approached the respondent/plaintiff with an investment proposal with respect to the property bearing No.F-2, Kailash Colony, New Delhi. Respondent/plaintiff was persuaded by the appellant/defendant to invest Rs. 40 lakhs in the said property. An agreement to sell dated 8.3.2007 was entered into between the parties recording this fact. The profit on sale of the property was to be divided in the ratio of 40:60 to the respondent/plaintiff and appellant/defendant respectively. It is further pleaded in the plaint that appellant/defendant however did not pay any money to the RFA No.979/2017 Page 2 of 7 respondent/plaintiff. In the month of January 2009 when the respondent/plaintiff again approached the appellant/defendant for his monies then the appellant/defendant told the respondent/plaintiff that either the respondent/plaintiff must forget about his monies or he should stand as a guarantor for the appellant/defendant so that the appellant/defendant would raise loan from the market and pay back the amount to the respondent/plaintiff. The respondent/plaintiff having no other option entered into a Memorandum of Understanding (MoU) dated 9.1.2009/Ex.PW

under which the respondent/plaintiff received Rs. 47 lakhs from the appellant/defendant by virtue of raising money on a chit from a Chit Fund Committee and the appellant/defendant had to pay remaining installments of the chits at Rs.2,15,000/- per month from 10.1.2009 till 10.4.2010 totaling to Rs.34,40,000/-. Respondent/plaintiff was agreed to be paid Rs.7,16,000/- by the appellant/defendant as backlog of the installments. Since the balance amount of Rs. 19,77,000/- became due and payable to the respondent/plaintiff on account of appellant/defendant not paying the installments, hence the subject suit was filed for recovery of this amount along with interest. RFA No.979/2017 Page 3 of 7 5. As already stated above, there is no evidence on record of the appellant/defendant who did not file written statement, and who did not even cross-examine the witnesses of the respondent/plaintiff.

6. Respondent/plaintiff proved his case and exhibited documents which has been recorded in para 4 of the impugned judgment, and this para 4 of the impugned

judgment read as under:-

"4. In order to prove his case, the plaintiff examined himself as PW-1 and his affidavit for evidence Ex.PW-1/A. The plaintiff relied upon following documents: (i) Copy of Memorandum of Understanding Ex.PW- dated 09.01.2009 (OSR) (ii) Receipts issued by Nanak Chits & Finance Ex.PW- Company, (six pages) (colly.) (iii) Copy of statement of account Ex.PW- (iv) Copy of Agreement to Sell/ Collaboration Mark A Agreement dated 09.10.2006 (v) Copy of Agreement to Sell dated 08.03.2007 Mark B (vi) Copy of complaint dated 23.08.2011 Mark C 7. Trial court, in my opinion, has rightly held that documents which were proved by the respondent/plaintiff, and more particularly the MoU which showed that a sum of Rs. 7,16,000/- was paid by the respondent/plaintiff to the appellant/defendant. Trial court however has dismissed the suit for the balance amount noting that the respondent/plaintiff failed to prove that there was an agreement in terms of Ex. PW

that if the appellant/defendant failed to make the RFA No.979/2017 Page 4 of 7 remaining 16 installments of the chits then when the respondent/plaintiff made payment on his behalf then this amount would be recovered from the appellant/defendant. Therefore, trial court decreed the suit only for a sum of Rs. 7,16,000/- along with interest being the liability acknowledged by the appellant/defendant towards respondent/plaintiff in terms of the MoU/Ex.PW1/1. The relevant paras of the judgment of the trial court are paras 11 to 13 and these paras read as under:-

"11. Now to come on the merit of the case. PW-1, Sh. Rakesh Saraf has supported his case. The deposition of PW-1 and the documents relied upon by the plaintiff have gone unrebutted and unchallenged. From Agreement to Sell Mark B, it is established that an Agreement to Sell was entered into between plaintiff and defendant and the plaintiff had paid Rs. 40 lacs to the defendant in respect of 2nd and 3rd Floor rear portion of property No.F-2 Kailash Colony, New Delhi. The defendant failed to put his defence on record, therefore, he failed to challenge Mark B. The fact of execution of Agreement to Sell Mark B entered into plaintiff and defendant can also be ascertained from Memorandum of Understanding dated 09.01.2009 Ex.PW-1/1. It is clearly stated in Ex.PW-

that the original Agreement to Sell entered between plaintiff and defendant for the second floor / third floor duplex at F-2, Kailash Colony, New Delhi was handed over to the defendant by the plaintiff. Thus the plaintiff proved that the original of Mark B is in power and possession of the defendant and thereby fulfilled the criteria to prove secondary evidence as laid down under section 65 of the Indian Evidence Act. From Memorandum of Understanding Ex.PW- 1/1, it is further established that the plaintiff has not only gave Rs. 40 lacs at the time of execution of Mark B but also that the plaintiff had paid the installments of chit on behalf of the defendant. It was further agreed between the plaintiff and defendant as per terms of Ex.PW-

that the defendant had to pay backlog of chit committee to the plaintiff amounting to Rs. 10.66 lacs out of which the defendant had paid Rs. 3.5 lacs only and balance of Rs. 7.16 lacs was to be paid by the defendant to the plaintiff alongwith an interest @ Rs. 1.25 per month from 10.01.2009 onwards. RFA No.979/2017 Page 5 of 7 Thus, the liability of the defendant to pay Rs. 7,16,000/- to the plaintiff is established from the Memorandum of Understanding Ex.PW-1/1.

12. Now the question arises, whether the plaintiff is entitled for the money which he claimed that he had paid for 16 balance installments of chit on behalf of the defendant being guarantor of the defendant. Though, the plaintiff has filed original of 16 chit receipts Ex.PW-

(colly.) on record. But it is not established that the plaintiff is entitled to recover the payment of said chits from the defendant. It was nowhere agreed as per the terms of Ex.PW-

that in case the defendant failed to make the payment of remaining 16 installments of the chit, the plaintiff would make the payment on his behalf and later on recover the said amount from the defendant. The statement of account Ex.PW-

has not been proved as no certificate under section 65 (B) of Indian Evidence Act was filed on behalf of the plaintiff. Just filing statement of account in the form of computer printout is not sufficient to prove statement of account in the absence of certificate under section 65 (B) of Indian Evidence Act. The statement of account Ex.PW-

neither bears the signature of the plaintiff nor of the defendant. Thus, the plaintiff failed to prove that he is entitled for Rs. 12.16 lacs i.e. balance of Rs. 34.40 lacs

which he claimed that he had paid as 16 balance installment of the chit on behalf of the defendant.

13. In view of the above discussions, I am of the considered view that the plaintiff has succeeded to partly prove his case that the defendant is liable to pay Rs. 7,16,000/- to him under Memorandum of Understanding Ex.PW-1/1. The interest @ 1.25% per month agreed between the parties as per Ex.PW-

but the plaintiff has claimed interest @ 12% per annum in the instant suit. The interest @ 12 % per annum is less than the interest @ 1.25% per month, therefore, pendentlite and future interest @ 12% per annum on Rs. 7,16,000/- is awarded to the plaintiff. The Memorandum of Understanding Ex.PW-

was executed on 09.01.2009 and the instant suit was filed on 07.01.2012. Thus, the suit was filed within the period of limitation of three years. Hence, a decree for a sum of Rs. 7,16,000/- alongwith pendentlite and future interest @ 12% per annum till recovery of the decretal amount is passed in favour of the plaintiff and against the defendant. (underlining added) 8. I completely agree with the aforesaid reasoning and conclusion of the trial court because the MoU/Ex.PW1/1, stood proved and which showed the liability of the appellant/defendant to the respondent/plaintiff for a sum of Rs. 7,16,000/-. RFA No.979/2017 Page 6 of 7 9. Counsel for the appellant/defendant argues that MoU/Ex. PW1/1, is not proved however this Court fails to understand this argument because admittedly there is no cross-examination of the respondent/plaintiff who proved Ex. PW1/1. Once there is no cross- examination, then it does not lie in the mouth of the appellant/defendant to canvass the fact that the MoU dated 9.1.2009, Ex. PW was not validly proved.

10. There is no merit in the appeal. Dismissed. VALMIKI J.

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