

Ashoke Industries Ltd. and Ors. Vs. Kajal Sengupta and Ors.

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Court : Kolkata

Decided On : Feb-23-2015

Judge : Debangsu Basak

Appellant : Ashoke Industries Ltd. and Ors.

Respondent : Kajal Sengupta and Ors.

Judgement :

CS No.73 of 1998 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE ASHOKE INDUSTRIES LTD.& ORS.Versus KAJAL SENGUPTA & ORS.Appearance Mr.Dhruba Ghosh, Adv.Ms.Ahana Sikdar, Adv.Mr.Chayan Gupta, Adv.Mr.N.Sengupta, Adv.BEFORE: The Hon'ble JUSTICE DEBANGSU BASAK Date : 23rd February, 2015.

The Court : In the second call none appears for the plaintiff when the suit is taken up for hearing.

The cross-examination of the fiRs.witness of the defendant is closed.

The defendant has another witness.

The defendant is permitted to produce the second witness.

The examination-in-chief of the second witness of the defendant nos.1,2 and 3 is closed.

None appears for the plaintiff to cross-examine such witness.

Learned Counsel for the defendant nos.1, 2 and 3 is called upon to commence his submission.

In couRs.of the submissions of the learned Counsel for the defendant nos.1 to 3, the learned Advocate for the plaintiffs appears and seeks adjournment of hearing without specifying any ground.

Such prayer would not be accepted.

Later : The plaintiff seeks declaration, mandatory injunction and refund of loans allegedly given by the plaintiffs to the defendant Nos.1, 2 and 3 in respect of dealing relating to the plaintiff No.1.

According to the plaintiffs, the plaintiff Nos.2 to 11 were the shareholders of the plaintiff No.1.

The plaintiff No.1 had a hotel in Bhubaneswar.

The business of the plaintiff No.1 was facing financial difficulties.

The financial institutions had taken possession of the hotel run by the plaintiff No.1.

The plaintiffs had approached the defendant No.1 for the purpose of taking over of the hotel upon payment of certain considerations.

The plaintiffs had allegedly pledged shares of the plaintiff No.1 with the defendant Nos.1, 2 and 3.

According to the plaintiffs, since the defendants were not running the hotel, they had sold such shares to the defendant Nos.7 and 8 series.

In the couRs.of such pledging of shares, according to the plaintiffs, they had signed various documents, such as, blank share transfer deeds, money receipts, resignation letteRs.on which they seek relief.

They also claim that, the plaintiffs had given a loan of Rs.80 lakhs to the defendant Nos.1, 2 and 3.

After adjusting a sum of Rs.11 lakhs as interest payable by the plaintiffs to the defendants, they should be refunded a sum of Rs.69 lakhs along with interest.

The defendant Nos.1, 2 and 3 are contesting the instant suit.

They have filed a written statement with a counter-claim.

According to them, the plaintiffs had agreed to sell 100% shares of the plaintiff No.1 to the defendant No.1 and his nominees at a consideration of Rs.75 lakhs.

The plaintiffs had agreed to make over possession of the hotel to defendant no.1 and / or his nominees for them to run the same.

In the event of delay in making over possession the plaintiffs would suitably compensate the defendants.

The plaintiff No.2 could make over 57% of the shares of the plaintiff No.1 to the defendant No.1 and his nominees.

The defendant No.1 and his nominees paid the consideration on such 57% of the shares of the plaintiff No.1 to the other plaintiffs.

The plaintiffs, however, did not put the defendant No.1 and his nominees in possession of the hotel of the plaintiff No.2.

The defendant No.1 and his nominees paid the dues of the plaintiff No.1 to the various financial institutions.

In spite of such payment, the defendant No.1 and his nominees were not put in possession of the hotel of the plaintiff No.1 by the plaintiff.

In such circumstances, the plaintiffs caused refund of a sum of Rs.152 lakhs.

According to the contesting defendants, the plaintiffs agreed to pay a compensation of Rs.170 lakhs to the defendant no.1 and his nominees.

Out of the compensation of Rs.170 lakhs, the plaintiffs through the plaintiff no.2 had paid a sum of Rs.80 lakhs leaving a sum of Rs.90 lakhs payable to the defendant Nos.1, 2 and 3.

The plaintiffs have not paid interest on the sum of Rs.152 lakhs for the period from July, 1994 to December 6, 1994 and the defendant nos.1 to 3 claim the same from the plaintiffs.

Three issues have been framed on February 26, 2014.

The same are as follows:1) Whether the sum of Rs.80 lac paid by the plaintiff no.2 to the defendant no.4 was as and by way of compensation as alleged by the defendants?.

2) What damages, if any, are the plaintiffs entitled to?.

3) What reliefs are the parties entitled to?.

The plaintiffs produced one witness who was examined in chief and cross-examined on behalf of the defendant nos.1, 2 and 3.

The contesting defendants produced the defendant no.1 as their fiRs.witness.

He was examined in chief and was cross-examined on behalf of the plaintiffs upto a considerable extent.

Subsequently, the plaintiffs chose not to appear today at the time when the suit was taken up for hearing in the second call for cross-examining the fiRs.witness of the contesting defendants.

In such circumstances, the crossexamination of the fiRs.witness of the contesting defendants was closed.

The contesting defendants produced their second witness chief.

who was examined in Again, none appeared on behalf of the plaintiffs to cross-examine the second witness of the defendants.

In such circumstances, learned Counsel for the defendants was requested to advance his submissions on the merits of the suit.

After the learned Counsel for the contesting defendants commenced his submission, learned Advocate for the plaintiffs appeared and sought an adjournment for the day.

Such prayer was considered and refused in view of the fact that, no accommodation was sought for in the fiRs.call or even in the second call when the suit was taken up for hearing.

The learned advocate for the plaintiffs had appeared approximately after 45 minutes of the suit being taken up for hearing in the second call.

No ground had been made out for seeking such adjournment.

Immediately upon the prayer for adjournment being refused, the learned Advocate for the plaintiffs left the Court without rejoining the proceedings at any point later.

The learned Advocate for the contesting defendants continued his submissions on the merits of the suit thereafter.

On the fiRs.issue, it is submitted on behalf of the contesting defendants that, there is no question of the contesting defendants obtaining any loan from the plaintiffs.

Learned Counsel for the contesting defendants refers to the evidence of the witness of the plaintiffs that the plaintiff no.1 was not doing any business at the relevant point of time.

He, therefore, highlights the fact that the plaintiff no.1 did not have any business and that the other plaintiffs had approached on the defendants for the purpose of obtaining loan.

It is inconceivable in the facts of the case that, a lender would turn into a borrower and that too from a person who did not have any business.

According to the learned Counsel for the defendants, the claim of Rs.80 lakhs made by the plaintiffs is without any basis.

There is no documents with regard to such claim.

The plaintiffs did not demand refund of such sum prior to the suit.

The plaintiffs did not produce their accounts to establish such claim of Rs.80 lakhs.

In such circumstances, learned Counsel for the contesting defendants submits such claim of the plaintiff is unbelievable.

The plaintiffs admit that 57% of the shares of the plaintiff no.1 were made over to the defendant no.1 and his nominees.

The plaint case is that, the plaintiffs have pledged such shares in favour of the defendant no.1 and his nominees by making over blank transfer deeds, blank money receipts and giving letters of resignation.

The claim of pledge is not borne out from any material on record.

The plaintiffs did not produce the plaintiff no.2 who had acted on behalf of the plaintiffs in the transactions.

The son of the plaintiff no.2 comes as the witness although the plaintiff no.2 is available.

The explanation of not producing the plaintiff no.2 is that, due to his old age, the plaintiff no.2 would forget the transactions.

Such explanation cannot be accepted in view of the fact that the suit is pending since 1998.

The plaintiffs did not make any attempt to have the evidence of the plaintiff no.2 recorded on commission.

I am not in a position to accept the explanation given by the witness of the plaintiffs that the plaintiff no.2 was not produced since he may forget the transactions.

The best witness of the plaintiffs was not produced in support of the case of the plaintiffs.

The plaintiffs and the contesting defendants entered into a memorandum of understanding dated June 18, 1994 being Exhibit-11.

The witness of the plaintiff has identified the signatures appearing in Exhibit - 11.

The signature of the plaintiff no.2 as well as the defendant no.2 have been identified by the witness of the plaintiffs.

The plaintiffs, however, has set up another memorandum of understanding which is Exhibit-F as the memorandum of understanding between the parties.

Both the memorandum of understanding contain the same terms and conditions.

The memorandum of understanding being Exhibit -11 is signed by the other shareholders of the plaintiff no.1.

Such signatures of the other shareholders of the plaintiff no.1 have been identified by the witness of the plaintiffs and have been marked as Exhibit -3.

Signatures of other shareholders of the plaintiff no.1 does not appear in Exhibit -F.

Exhibit - 11 the plaintiffs By had agreed, inter alia, to sell their shares in the plaintiff no.1 to the defendant no.1 and/or his nominees.

57% shares of the plaintiff no.1 was sold to the defendant no.1 and his nominees subsequent to Exhibit-11.

The parties had acted on the basis of Exhibit-11.

Exhibit -11 contains various terms and conditions.

The first term and condition of the Exhibit -11 is that, the defendant no.1 and his nominee or nominees would purchase 50 lakhs equity shares of the plaintiff no.1 of the nominal value of Rs.50 lakhs at a premium of Rs.25 lakhs.

It also records the resignation of the existing directors of the plaintiff no.1 as well as making over of necessary documents of share transfer and other documents to effect a change in the management and transfer of shares of the plaintiff no.1.

The third term and condition of Exhibit -11 requires the plaintiff no.2 to negotiate settlement with the lenders. The sixth clause of Exhibit -11 allows the defendant no.1 and / or his nominees to claim compensation for delay in receiving possession of Konark Hotel from the plaintiffs.

The parties thereafter entered into loan agreements.

These loan agreements are exhibits G to K.

Four of these loan agreements were executed on July 25, 1994 and the last one on July 28, 1994.

The contesting defendants claim that the defendant no.1 through his nominee or nominees had caused a loan of Rs.162 lakhs to be given to the plaintiffs.

The contesting defendants have failed to establish the loan to be of Rs.162 lakhs.

The documents, however, speak of Rs.152 lakhs.

The plaintiffs refunded the sum of Rs.152 lakhs to the persons who had given such loan.

This is an accepted position between the contesting parties in the suit.

It appears from the evidence on record that, the parties had held negotiations between them in February, 1998.

Till this time, the defendant No.1 and/or his nominees were not put in possession of the hotel concerned.

The defendants demanding the refund of the loans and compensation for the hotel not being made available to the defendants for them to exploit it commercially.

It appears from the evidence on record that, the plaintiffs agreed with the defendant No.1 and his nominees that the shares held by the defendants in the plaintiff No.1 should be transferred to the defendant Nos.7 and 8 series for a consideration of Rs.225 lakhs.

This appears from the letter written by the plaintiff No.2 in the letterhead of the plaintiff No.1 to the Managing Director of New Kenilworth Hotel Limited being Exhibit-10.

The defendant No.1 and his nominees transferred their 57% shares in the plaintiff No.1 to New Kenilworth Hotel Limited.

During the pendency of the suit, the plaintiffs entered into a terms of settlement with the Managing Director of New Kenilworth Hotel Limited and had recorded 100% share transfer of the plaintiff No.1 in favour of the defendant Nos.7 and 8 series.

This terms of settlement was entered into on October 5, 2010 and is Exhibit-N in the suit.

Exhibit-N was tendered in evidence by the plaintiffs.

All the pages of the terms of settlement have not been produced in evidence.

Page 3 of the terms of settlement is not on record.

In evidence, therefore, it has been established that, shares of the plaintiff No.1 were ultimately transferred to the Managing Director of New Kenilworth Hotel Limited and/or his nominees.

In such circumstances, reliefs sought for by the plaintiffs with regard to blank share transfer deeds, letters of resignation and other matters relating to the plaintiff no.1 do not survive.

Coming back to the claim of Rs.69 lakhs made by the plaintiffs against the contesting defendants, I find from the evidence on record that, the plaintiff No.2 had made over a cheque for Rs.80 lakhs to the contesting defendants.

According to the contesting defendants, the plaintiffs agreed to pay the compensation of Rs.170 lakhs for not making available the hotel to the contesting defendants as also for not transferring the balance 43% shares of the plaintiff No.1 to them.

Exhibit-11 contemplates that the plaintiffs would provide compensation to the contesting defendants in the event the hotel was not made over to the contesting defendants for commercial exploitation.

The evidence also establishes that the value of the hotel had increased manifold.

There is no evidence on record to suggest why the plaintiffs paid a sum of Rs.80 lakhs to the contesting defendants as a loan.

The plaintiffs admit that they had two cheques - one of Rs.80 lakhs and the other of Rs.90 lakhs - to be payable by the plaintiffs to the contesting defendants.

The claim of the plaintiffs that they had granted a loan of Rs.80 lakhs, therefore, cannot be believed.

The plaintiffs did not produce the plaintiff no.2 who had conducted the negotiations on behalf of all the plaintiffs as a witness.

The plaintiffs have failed to establish the source of Rs.80 lakhs when the plaintiff no.1 was admittedly without any business.

As rightly pointed out by the learned Counsel for the contesting defendants, there is no loan agreement on record.

The terms of the alleged loan has not been established in evidence.

The parties did not execute any documents for the so-called loan.

This fact is highlighted against the prior set of documentation for the loan given by the contesting defendants to the plaintiffs.

Again, as rightly pointed by the learned Counsel for the contesting defendants, the plaintiffs did not make any demand for payment prior to the filing of the suit.

The plaintiffs did not produce their accounts or their income-tax returns to arrive that they had granted a loan to the contesting defendants.

In the given facts, the only conclusion is that the plaintiffs had issued the cheque of Rs.80 lakhs and the other cheque for Rs.90 lakhs aggregating to Rs.170 lakhs as compensation to the contesting defendants.

Out of the sum of Rs.170 lakhs, as the agreed compensation, the plaintiffs have paid a sum of Rs.80 lakhs.

The contesting defendants are, therefore, entitled to a sum of Rs.90 lakhs from the plaintiffs.

In such circumstances, the fiRs.issue is answered in the negative, and in favour of the contesting defendants.

So far as the second issue is concerned, in view of the discussions of the fiRs.issue, the same is required to be answered in the negative and against the plaintiffs.

The plaintiffs did not suffer any damages.

It is the plaintiffs who did not act in terms of Exhibit-11 and had agreed to compensate the contesting defendants with the sum of Rs.170 lakhs for their failure and had paid a part thereof being Rs.80 lakhs.

On the third issue, the learned Counsel for the contesting defendants submits that the counter-claim of the defendants is required to be considered by the Court.

The contesting defendants have two heads of claim against the plaintiffs.

The first head of claim is for the interest on the sum lent and advanced by the defendant nos.1, 2 and 3 in terms of the loan agreements being Exhibits G to K for the period from July 7, 1994 to December 6, 1994.

The second head of claim is the balance of the amount of compensation agreed to be paid by the plaintiffs to the contesting defendants being a sum of Rs.90 lakhs and any interest that the Court may award thereon.

On the first head of claim, only three defendants are making the counter-claim, namely, the defendant nos.1, 2 and 3.

They have established that, they had lent and advanced a sum of Rs.95 lakhs on account of the plaintiffs.

The rate of interest in the loan agreement was agreed to be 18%.

The period of loan claimed by the defendant nos.1, 2 and 3 varies in respect of the three defendants.

Annexure -D to the written statement shows that, the defendant nos.1, 2 and 3 are entitled to an aggregating sum of Rs.12,92,467.24 on account of interest.

The defendant nos.1, 2 and 3 will, therefore, be entitled to a decree for the sum of Rs.12,92,467.24 against the plaintiffs jointly and severally.

The defendant Nos.1 to 3 had jointly lent a sum of Rs.95 lakhs to the plaintiffs.

The contesting defendants are entitled to interest on Rs.95 lakhs from October 26, 1998 when they had verified the counter-claim.

There will be a decree for interest at the rate of 10% per annum on and from October 26, 1998 until realisation on the sum of Rs.95 lakhs in favour of the defendant Nos.1, 2 and 3 and against the plaintiffs.

On the second claim of Rs.90 lakhs, I am of the view that, the plaintiffs did agree to compensate the contesting defendants with the sum of Rs.170 lakhs.

The plaintiffs did pay a sum of Rs.80 lakhs which now the plaintiffs are claiming to be loan allegedly granted by them to the contesting defendants.

The contesting defendants are, therefore, entitled to a sum of Rs.90 lakhs from the plaintiffs jointly and severally.

In such circumstances, there will be a decree for a sum of Rs.90 lakhs against the plaintiffs jointly and severally and in favour of the defendant nos.1,2 and 3.

The defendant nos.1,2 and 3 will also be entitled to a decree for interest at the rate of 10% per annum on and from February 12, 1998 on the sum of Rs.90 lakhs until realisation.

I find that the contesting defendants have put in Court fees of Rs.10,000/-.

The contesting defendants will be entitled to costs assessed at Rs.20,000/- against the plaintiffs.

There will be a decree in favour of the contesting defendants and against the plaintiffs jointly and severally for such costs.

The third issue is answered accordingly.

The claims made by the plaintiffs in CS No.73 of 1998 are dismissed.

The department will draw up and complete the decree as expeditious as possible.

(DEBANGSU BASAK, J.) TR/sg.

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