

Hari Kishan Vs. Fortune Traders and ors.

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Court : Delhi

Decided On : Jul-08-2003

Reported in : 2003VIAD(Delhi)89; 105(2003)DLT802; 2003(70)DRJ75

Judge : Manmohan Sarin, J.

Acts : Code of Civil Procedure (CPC) - Order 1, Rule 10 - Order 6, Rule 17 - Order 37

Appeal No. : IA 4397/2001 in S. No. 4/2000

Appellant : Hari Kishan

Respondent : Fortune Traders and ors.

Advocate for Def. : Pankaj Bala Verma, Adv.

Advocate for Pet/Ap. : Manish Gandhi, Adv

Judgement :

Manmohan Sarin, J.

1. By this judgment, IA. No. 4397/2001, being an application moved under Order xxxv II (3)(5) of the Code of Civil Procedure for grant of leave to contest the suit, is being decided.

2. The facts culminating in filing of the present application for leave to contest may be briefly noted:-

(i) Plaintiff, Hari Kishan, sole proprietor of M/s. New Bengal Vastra Bhandar, has filed this suit under Order xxxv II CPC for recovery of Rs. 9,26,514.55, being the amount of cheque bearing No. 823163, dated 2.8.1999 together with interest at 18% per annum, on the outstanding amount from 2.8.1999, till the date of filing of the suit. Pendente lite and future interest is also claimed at 18% per annum.

(ii) Plaintiff's case is that defendant No. 2, Sh. Deepak Shirodkar is the sole proprietor of defendant No. 1, M/s. Fortune Traders. Defendant No. 1 had approached the plaintiff for purchase of fabric etc., on short term credit. Plaintiff raised number of bills for the supplies made during April, 1997 to November, 1997. Defendant Nos. 1 and 2 used to make the payments and part payment against invoices, though irregularly. The net liability of defendant Nos. 1 and 2, as per the plaintiff was Rs. 13,62,014.55 (Rs. thirteen lacs sixty two thousand fourteen and fifty five paise) as on 31.3.1998. This included the debit balance of Rs. 5,42,205.35, carried over from the previous year. Plaintiff, it is stated, was induced by defendant Nos. 1 and 2, including defendant No. 3 to enter into the agreement dated 21.4.1999 and compelled to accept a lesser amount of Rs. 12,86,514.50 for the liability. The agreement dated 21.4.1999, records the accord and satisfaction. It is stated that under the agreement dated 21.4.1999, defendant Nos. 1 and 2 made a payment only of Rs. 2,70,000/-, though in fact it is shown as Rs. 3,00,000/- in the agreement. Additionally, car No. DL-6C-7574 was given to the plaintiff. The value of this car was assured as Rs. 2,53,000/- while it could fetch only Rs. 1,58,000/-. In the premise, the plaintiff claims that defendant Nos. 1 and 2 are entitled to an adjustment only of Rs. 4,28,000/- (Rs. 2,70,000/- being the amount paid instead Rs. 3,00,000/- plus 1,58,000/- on account of the car). It is further the plaintiff's case that as per the spirit of the agreement dated 21.4.1999, the liability was to be joint and several. Plaintiff claims that once the defendant was notified about the intention to take legal action, defendant No. 2 issued the cheque bearing No. 823163 dated 2.8.1999 for Rs. 9,26,514.55, towards the full and final settlement of the outstanding amount. Plaintiff has filed the suit under Order xxxv II CPC on account of the payment of the aforesaid cheque being stopped.

3. Before advertizing to the application for leave to contest and considering the merits thereof, the proceedings in the present suit, may be noted.

(i) Plaintiff had initially imp leaded Sh. Anil Khurana as defendant No. 3. It was brought to the attention of the plaintiff that impleadment of defendant No. 3, was neither on the basis of a partner of defendant No. 1 nor was he signatory to the cheque on the basis of which suit had been filed under Order xxxv II CPC. Plaintiff sought leave to amend the plaint. IA. No. 781/2000 under Order I Rule 10 CPC and VI Rule 17 CPC was moved. The application was allowed vide order dated 25.1.2000. Plaintiff moved IA. No. 9211/2000 for issuance of summons of judgment, which were duly issued. Defendant entered appearance. Plaintiff claimed that appearance was not entered within time and moved IA. No. 575/2001, which was dismissed vide order dated 18.4.2001. Upon summons for judgment being issued, defendant filed IA. No. 4397/2001, seeking leave to contest. Counsel for the parties were heard on 15.5.2003 and the judgment was reserved.

4. The main plank of the submission of defendant No. 2 is that the said defendant neither himself nor as a sole proprietor of defendant No. 1, issued cheque bearing No. 823163, drawn on Punjab National Bank in the sum of Rs. 9,26,514.55. It is claimed that Sh. Anil Khurana, who had earlier been imp leaded as defendant No. 3, had left the association of the answering defendant in April, 1998. He had taken away blank signed cheques including the cheque in question. He committed several acts prejudicial to the business of the defendants. Defendant No. 2 even took out a public notice in the Statesmen on 19.1.1999, informing the public at large that Sh. Anil Khurana was no longer having business dealings with them. It is averred that defendant No. 2 used to travel very frequently to foreign countries to secure export orders. For the execution of orders, defendant No. 2 used to rely on Sh. Anil Khurana. Sh. Anil Khurana had started its own sole proprietorship concern by the name of 'Fortune One'. Sh. Anil Khurana used to utilise the name of defendant No. 1 to place purchase orders, as it was not enjoying quota facility and such orders were procured by him from buyers through defendant No. 1. The orders were also executed through defendant No. 1. As noted earlier, defendant claims that the said Sh. Anil Khurana had taken away the cheque book with signed

cheques. The cheque book was of the year 1997 and defendant No. 2 had duly written to the bank on 20.7.1998, for stopping payment of the cheques and the aforesaid cheque bearing No. 823163 dated 2.8.1999 was also included in the said list.

5. Defendant No. 2 claims that he has never in his entire career issued a cheque of Rs. 9,26,514.55 and the Bank account never had this kind of money. Defendant Nos. 1 and 2 suffered lot of business losses and are currently facing financial crisis and a number of suits. Defendant No. 2 claims that the agreement dated 21.4.1999 was entered into between the parties, in terms of which the liabilities inter se between the parties were settled. Defendant relies on the said agreement, execution of which is admitted by the plaintiff himself. The said agreement duly records that defendant No. 2, Sh.Deepak Shirodkar together with Sh.Anil Khurana, who is described as the erstwhile partner, were debtors of the plaintiff to the extent of Rs. 12,86,214.50. The agreement also records that it has been agreed between the plaintiff, defendant and Sh.Anil Khurana that defendant would pay the debt to the extent of Rs. 6,43,107.25 being 50 per cent of the total amount and the remaining 50 per cent of the total amount would be paid by Sh.Anil Khurana. The agreement goes on to record a payment of Rs. 3,90,000/-, which is corrected to read as Rs. 3 lacs in the numericals with initials thereon. The amount when mentioned in words, 'Rs. Three lacs ninety thousand' also has a line drawn over 'ninety thousand'. In other words, parties are at variance whether Rs. 3 lacs was paid or Rs. 3,90,000/- was paid. Defendant claimed that the value of the car was given as Rs. 2,53,107.25. According to the defendant, upon payment of Rs. 3,90,000/- and the amount of Rs. 2,53,107.25, by delivery of car, the entire liability of Rs. 6,43,107.25 by the defendant stood discharged and nothing more was due. Accordingly, it is urged that the suit now filed in the sum of Rs. 9,26,514.55 is on the basis of a fabricated cheque.

6. The execution of the agreement is not denied by the plaintiff. What is sought to be urged is that the plaintiff was induced and coerced in entering into this agreement. There is no escape from the fact that the agreement records that out of the total sum of Rs. 12,86,214.50, defendant had accepted the liability to the extent of Rs. 6,43,107.25, the balance being to the account of Sh. Anil Khurana.

Sh. Anil Khurana was not a party to this agreement and has not signed the same. However, the wife of defendant No. 2 and one Sh. Gulshan Kumar, relation of the plaintiff, are witnesses to the agreement. Even if Sh. Anil Khurana has not signed the agreement, it makes no material difference as far as the inter se liability between the plaintiff and defendant No. 2 is concerned. Both are signatory to the agreement. Plaintiff has accepted the liability of defendant No. 2 to be Rs. 6,43,107.25. It is the defendant No. 2's case that upon payment of the sum of Rs. 3,90,000/- and handing over of possession of the car with right to sell, there was accord and satisfaction and the defendant stands discharged from liability. There is also, as noted earlier, a controversy, as to whether a sum of Rs. 3,90,000/- was paid or Rs. 3 lacs were paid. Though the sum of Rs. 3,90,000/- has been corrected and initialled as Rs. 3,00,000/- and there is deletion of Rs. 3,90,000/- to Rs. 3,00,000/- but the balance mentioned in the following para of the agreement has not been corrected and is computed on the basis of Rs. 3,90,000/- only.

7. I find merit in the submission of the defendant No. 2 that the agreement between the parties confined the liability of the defendant No. 2 to Rs. 6,53,107.25 and as per the agreement itself the plaintiff accepted the sum of Rs. 3,90,000/- and the car in satisfaction thereof. Even if the sum paid was Rs. 3,00,000/- and not Rs. 3,90,000/-, plaintiff could have a claim only to that extent. Plaintiff has, however, chosen to proceed on the basis of a cheque bearing No. 823163 for the sum of Rs. 9,26,514.55, stated to have been issued on 2.8.1999. There is merit in the contention of defendant No. 2 that once the agreement dated 21.4.1999, was executed and acted upon, there would have been no occasion for the defendant No. 2 to have issued the cheque bearing No. 823163 dated 2.8.1999. The contention of the defendant that this cheque formed part of the cheques, which had been taken away by Sh. Anil Khurana and whose payment was stopped is a highly plausible defense. It is also stated that a criminal complaint has also been lodged by defendant No. 2 against the plaintiff and Sh. Anil Khurana, who, it is claimed acted in collusion and in conspiracy for the fabrication of the cheque.

8. Learned counsel for the plaintiff feebly tried to urge that the role of Sh. Anil Khurana even as per defendant No. 2 was not clear. At times, in the agreement, he was referred to as the erstwhile partner, sometimes as friend/associate and

even as employee. Learned counsel for the plaintiff also relied on a reply to a notice at page 43 of the documents, wherein defendant is mentioned as carrying on business with Sh.Anil Khurana. He submits that the cheque had been issued by the proprietorship concern and was signed by defendant No. 2. I am not impressed by this submission. The description of Sh.Anil Khurana, who was associated with defendant No. 2 and had gained their confidence as an erstwhile partner or an associate or an employee, cannot in any manner undermine the factum of the admitted execution of the agreement dated 21.4.1999, between the plaintiff and defendant No. 2. The issuance of the cheque on a date subsequent to 21.4.1999 i.e. on 2.8.1999 remains unexplained. Defendant No. 2, in my view, has raised several triable issues and highly plausible defenses. This is a fit case, where keeping in view the judgments of the Supreme Court in M/s. Mechalec Engineers and Manufacturers Vs . M/s. Basic Equipment Corporation 0043/1976 : [1977]1SCR1060 and Mrs. Raj Duggal Vs . Ramesh Kumar Bansal : AIR 1990 SC2218 , the defendants are entitled to unconditional leave to contest. Accordingly, IA. 4397/2001 is allowed. Defendants are granted unconditional leave to contest.