

Chhotulal Vs. Manak Devi

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Court : Rajasthan

Decided On : Feb-01-2005

Reported in : III(2005)BC440; 2006(1)CTLJ377(Raj); RLW2005(2)Raj808; 2005(2)WLC337

Judge : N.P. Gupta, J.

Acts : Stamp Act - Sections 33; Income Tax Act - Sections 40A, 40A(3), 154, 154(7), 269SS and 269T; Indian Contract Act - Sections 23 and 23A; Provincial Act; [Companies Act, 1956](#) - Sections 617; Direct Tax Laws (Amendment) Act, 1987; [Finance Act, 1971](#); [Finance Act, 1992](#); [Societies Registration Act, 1860](#) - Sections 28, 36(1) and 36(9); Money Lender's Act

Appeal No. : Civil Second Appeal No. 36 of 2005

Appellant : Chhotulal

Respondent : Manak Devi

Advocate for Pet/Ap. : Vikas Balia, Adv.

Disposition : Appeal dismissed

Judgement :

N.P. Gupta, J.

1. Heard learned counsel for the appellant at length.
2. By the impugned judgments and decrees, the two learned courts below have decreed the suit of the plaintiff for repayment of the principal sum of Rs. 40,000/-, alleged by the plaintiff to have advanced to the defendant by way of loan, and Rs. 8800/- by way of interest, along with pendente lite, and future interest.
3. The suit is based on Rukka Ex. 1, which according to the plaintiff is signed by the appellant, and is on the letter head of the appellant. As found by the learned courts below, the plaintiff has led evidence about the actual advancement of cash loan, and execution of the document Ex. 1, while the defendant came forward with the story of his signatures having been appended on a blank letter head, and the courts below have found, that the defendant has failed to prove this story, nor has the defendant been able to effectively rebut the evidence led by the plaintiff about the execution of the document, and advancement of the loan.
4. Assailing the impugned judgments, and decrees, it is contended by the learned counsel, that the document is not a promissory note but is only a receipt, and does not contain promise to repay, therefore, it could not be summed, either that the consideration passed merely by execution of the document, or that there was any agreement to make repayment of the amount.
5. I have considered the submissions, and find, that both the learned courts below have not proceeded on the basis of any presumption about passing of consideration, and the existence of any agreement to repay, merely on the basis of the document Ex. 1, but have relied upon the evidence of the plaintiff, and his witness P. W. 2, who have independently proved passing of consideration, and the agreement to repay the amount, as it was advanced by way of loan, along with interest.
6. The next submission made is, that the document is insufficiently stamped, it was contended, that when the document was tendered in evidence, at the time of recording of statement of P. W. 1, an objection about the document being insufficiently stamped was raised, but that was deferred to be decided later on. Taking advantage of that deferment of objection, it is contended, that the

document is inadmissible in evidence. Suffice it to say, that learned counsel has not been able to show as to how the document was deficiently stamped, or what was the stamp duly required to be paid. Be that as it may. Exercising the powers under Section 33 of the Stamp Act, the document is hereby Ordered to be impounded, and be forwarded to the authorities concerned competent to determine the sufficiency of stamp duty, with a direction to determine the leviable stamp duty and penalty thereon, and recover the same from the plaintiff according to law.

7. The next objection raised is, that even according to the plaintiff, the amount was advanced in cash. The amount of loan was Rs. 40,000/-, while according to Section 269SS of the Income Tax Act, hereafter to be referred to as 'the Act', such advancement of loan of an amount aggregating Rs. 20,000/-, or more, could not be made in cash, but was required to be made only by an account payee cheque, and/or account payee bank draft. That having not been done, it is a case of violation of Section 269SS of the Act, and in view of the provisions of Section 23 of the Indian Contract Act, it renders the transaction illegal, rather void, with the result, that the plaintiff is not entitled to maintain the suit for recovery of the amount.

8. I have considered this submission also. For convenience, the provisions of Section 269SS of the Act, so also Section 40A of the Act, and Section 23A of the Contract Act are reproduced, which read as under: -

'269SS. No person shall, after the 30th day of June, 1984, take or accept from any other person (hereafter in this Section referred to as the depositor), any loan or deposit otherwise than by an account payee cheque or account payee bank draft if,-

(a) the amount of such loan or deposit or the aggregate amount of such loan and deposit; or

(b) on the date of taking or accepting such loan or deposit, any loan or deposit taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount

remaining unpaid; or

(c) the amount or the aggregate amount referred to in Clause (a) together with the amount or the aggregate amount referred to in Clause (b),

is twenty thousand rupees or more :

Provided that the provisions of this Section shall not apply to any loan or deposit taken or accepted from, or any loan or deposit taken or accepted by,-

(a) Government;

(b) any banking company, post office savings bank or co- operative Bank;

(c) any corporation established by a Central, State or Provincial Act;

(d) any Government company as defined in Section 617 of the [Companies Act, 1956](#) (1 of 1956);

(e) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette :

(Provided further that the provisions of this Section shall not apply to any loan or deposit where the person from whom the loan or deposit is taken or accepted and the person by whom the loan or deposit is taken or accepted are both having agricultural income and neither of them has any income chargeable to tax under this Act.] '40A. (1) The provisions of this Section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to the computation of income under the head 'Profits and gains of business or profession'.

(2) (a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in Clause (b) of this Sub-Section, and the [Assessing] Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the

business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction.

b) The persons referred to in Clause (a) are the following, namely:-(i) where the assessee is an individual any relative of the assessee;(ii) where the assessee is a company, any director of the company, partner of firm, association of persons or Hindu undivided family, or any relative of such director, partner or member;(iii) any individual who has a substantial interest in the business or profession of the assessee, or any relative of such individual;

(iv) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member;

(v) a company, firm, association of persons or Hindu undivided family of which a director, partner or member, as the case may be, has a substantial interest in the business or profession of the assessee; or any director, partner or member of such company, firm, association or family or any relative of such director, partner or member;

(vi) any person who carries on a business or profession-

(A) where the assessee being an individual, or any relative of such assessee, has a substantial interest in the business or profession of that person; or

(B) where the assessee being a company, firm, association of persons or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person.

Explanation.-For the purposes of this sub-Section, a person shall be deemed to have a substantial interest in a business or profession, if,-

(a) in a case where the business or profession is carried on by a company, such person is, at any time during the previous year, the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power, and

(b) in any other case, such person is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the profits of such business or profession.

(3) Where the assessee incurs any expenditure in respect of which payment is made, after such date (not being later than the 31st day of March, 1969) as may be specified in this behalf by the Central Government by notification in the Official Gazette, in a sum exceeding [twenty thousand] rupees otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, [twenty per cent of such expenditure shall not be allowed as a deduction):

Provided that where an allowance has been made in the assessment for any year not being an assessment year commencing prior to the 1st day of April, 1969, in respect of any liability incurred by the assessee for any expenditure and subsequently during any previous year the assessee makes any payment in respect thereof in a sum exceeding [twenty thousand] rupees otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, the allowance originally made shall be deemed to have been wrongly made and the [Assessing] Officer may recompute the total income of the assessee for the previous year in which such liability was incurred and make the necessary amendment, and the provisions of Section 154 shall, so far as may be, apply thereto, the period of four years specified in Sub- section (7) of that Section being reckoned from the end of the assessment year next following the previous year in which the payment was so made:

Provided further that no disallowance under this sub- Section shall be made where any payment in a sum exceeding [twenty thousand] rupees is made otherwise than by a crossed cheque drawn on a bank or by a crossed bank draft, in such cases and under such circumstances as may be prescribed, having regard to the

nature and extent of banking facilities available, considerations of business expediency and other relevant factors.] (4) Notwithstanding anything contained in any other law for the time being in force or in any contract, where any payment in respect of any expenditure has to be made by a crossed cheque drawn on a bank or by a crossed bank draft in Order that such expenditure may not be disallowed as a deduction under Sub-section (3), then the payment may be made by such cheque or draft; and where the payment is so made or tendered, no person shall be allowed to raise, in any suit or other proceedings, a plea based on the ground that the payment was not made or tendered in cash or in any other manner.]

(5) [Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1.4.1989. Original Sub-section (5) was inserted by the Finance (No. 2) Act, 1971, w.e.f. 1.4.1972]

(6) [Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1.4.1989. Original Sub-section (6) was inserted by the Finance (No. 2) Act, 1971, w.e.f. 1.4.1972.

7(a) Subject to the provisions of Clause (b), no deduction shall be allowed in respect of any provision (whether called as such or by any other name) made by the assessee for the payment of gratuity to his employees on their retirement or on termination of their employment for any reason.

(b) Nothing in Clause (a) shall apply in relation to any provision made by the assessee for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund, or for the purpose of payment of any gratuity, that has become payable during the previous year.

Explanation-For the removal of doubts, it is hereby declared that where any provision made by the assessee for the payment of gratuity to his employees on their retirement or termination of their employment for any reason has been allowed as a deduction in computing the income of the assessee for any assessment year, any sum paid out of such provision by way of contribution towards an approved gratuity fund or by way of gratuity to any employee shall not be allowed as a deduction in computing the income of the assessee of the

previous year in which the sum is so paid.]

8. ...

9. No deduction shall be allowed in respect of any sum paid by the assessee as an employer towards the setting up or formation of, or as contribution to, any fund, trust, company, association of persons, body of individuals, society registered under the [Societies Registration Act, 1860](#) (21 of 1860), or other institution for any purpose, except where such sum is so paid, for the purposes and to the extent provided by or under Clause (iv) or Clause (v) of Sub-section (1) of Section 36, or as required by or under any other law for the time being in force.

(10) Notwithstanding anything contained in Sub-section (9), where the (Assessing) Officer is satisfied that the fund, trust, company, association of persons, body of individuals, society or other institution referred to in that Sub-section has, before the 1st day of March, 1984, bona fide laid out or expended any expenditure (not being in the nature of capital expenditure) wholly and exclusively for the welfare of the employees of the assessee referred to in Sub-section (9) out of the sum referred to in that Sub-section, the amount of such expenditure shall, in case no deduction has been allowed to the assessee in respect of such sum and subject to the other provisions of this Act, be deducted in computing the income referred to in Section 28 of the assessee of the previous year in which such expenditure is so laid out or expended, as if such expenditure had been laid out or expended by the assessee.]

(11) Where the assessee has, before the 1st day of March, 1984, paid any sum to any fund, trust, company, association of persons, body of individuals, society or other institution referred to in Sub-section (9), then, notwithstanding anything contained in any other law or in any instrument, he shall be entitled-

(i) to claim that no much of the amount paid by him as has not been laid out or expended by such fund, trust, company, association of persons, body of individuals, society or other institution (such amount being hereinafter referred to as the unutilised amount) be repaid to him, and where any claim is so made, the unutilised amount shall be repaid, as soon as may be, to him;

(ii) to claim that any asset, being land, building, machinery, plant or furniture acquired or constructed by the fund, trust, company, association of persons, body of individuals, society or other institution out of the sum paid by the assessee, be transferred to him, and where any claim is so made, such asset shall be transferred, as soon as may be, to him).

(12) [Omitted by the [Finance Act, 1992](#), w.e.f. 1-4-1993.1

'Section 23. What consideration and objects are lawful, and what not. The consideration or object of an agreement is lawful, unless-

It is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent; or

involves or implies injury to the person or property of another; or

the court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.'

9. A look at Section 23 of the Contract Act shows, that what it provides is, that the consideration or object of the agreement should be forbidden by law, or should be of the nature, that if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the court regards it as immoral, or opposed to public policy. In each of such events, the consideration or object of an agreement is said to be unlawful rendering the object or consideration to be void.

10. In the present case, the consideration of the transaction between the parties was, advancement of loan in the form of Indian currency, to be repayable by the loanee, to the loaner, along with interest. The transaction comprises of repayable consideration, being advancement of loan, and agreement to repay the amount in Indian currency, along with interest. Suffice it to say, that such advancement of loan, or agreement to make repayment thereof, does not fall within any of the

mischief contemplated by Section 23. All that is sought to be argued is that, the mode of passing of consideration is not permissible by law, inasmuch as, instead of passing consideration in cash Indian currency, it should have been by account payee cross cheque, or account payee bank draft. For that purpose, a look at the provisions of Section 269SS, quoted above, coupled with the provisions of Section 40A, shows that under Sub-section (3) of Section 40A all that has been provided is, that where the assessee incurs any expenditure in respect of which payment is made, after cut off date, of an amount exceeding limit, 'other than by a crossed cheque, such expenditure shall not be allowed as a deduction, and that if it has been allowed wrongly, then the assessing officer may re-compute the total income of the assessee for the previous year in which such liability was incurred, and make the necessary amendment. However, under the second proviso, it has been provided, that such disallowance shall not be made, where it is made in such cases, and under such circumstances, as may be prescribed, having regard to the nature and extent of banking facilities available, considerations of business expediency, and other relevant factors. Then under the second proviso appended to Section 269SS, it is contemplated, that the provisions of this Section shall not apply to any loan, where the person from whom the loan or deposit is taken or accepted, and the person by whom the loan or deposit is taken or accepted, are both having agricultural income and neither of them has any income chargeable to tax under this Act. Thus, a collective reading of the provisions of Section 269SS as a whole, and Section 40A does make it clear, that they are not intended to invalidate the making of the payment, as such, or to invalidate the transaction entered into by making such payment, rather it only contemplates, that deduction on that amount shall not be admissible, and may be, that in certain circumstances, there may be some provisions which may permit computing such amount to be the income of the person handing over such money. In any case, even on the face of language of Section 269SS, read with Section 40A of the Act, if the loan is advanced in cash, in my view, it does not attract the mischief of Section 23 of the Contract Act, so as to render the contract void. If the argument is carried to logical conclusion, it may be raised, even in cases where the loan is advanced by way of cheque, or demand draft, and the repayment is made by the loanee in cash, then the leaner may come forward with the story, that such repayment, even if

admittedly made, violate Section 269SS, or Section 269T, for that matter, and therefore, the transaction of repayment of loan is hit by Section 23, and may lay a claim second time for repayment of loan in view of the provisions of Section 269T. That would be an utter travesty of law. Thus, taking an overall view of the matter, I am not inclined to accept the submission, that the transaction is hit by the mischief of Section 23 of the Contract Act.

11. The next submission made is, that the plaintiff is a money lender, and since she has no license under the Money Lender's Act, the suit was not maintainable. Learned courts below have decided the issue relying upon the two judgments of this Court, passed in identical circumstances. I do not find any error in that finding either.

12. In my view, the appeal thus does not involve any substantial question of law. The same is, therefore, dismissed summarily.

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