

Nizamuddin Vs. Jugal Kishore

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Court : Rajasthan

Decided On : Mar-27-1996

Reported in : AIR1996Raj207

Judge : Arun Madan, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 37, Rule 3(5); [Negotiable Instruments Act, 1881](#) - Sections 13; Rajasthan Money Lenders Act, 1964 - Sections 2(1)

Appeal No. : Civil Second Appeal No. 15 of 1994

Appellant : Nizamuddin

Respondent : Jugal Kishore

Advocate for Def. : B.L. Mandhana, Adv.

Advocate for Pet/Ap. : G.C. Garg, Adv.

Disposition : Appeal dismissed

Judgement :

Arun Madan, J.

1. This second appeal has been preferred to this court by the above-named defendant-appellant against the judgment and decree dated 29-10-93 passed by

Additional District Judge No. 2, Baran in Civil Regular Appeal No. 10/93 whereby the judgment and decree dated 16-8-93 passed by Munsiff and Judl. Magistrate, Baran in Civil Suit No. 140/93 has been upheld.

2. The facts giving rise to the filing of this appeal, briefly stated, are that the plaintiff-respondent had filed a suit under Order 37, C.P.C, against the defendant-appellant for recovery of Rs. 11,200/- in the Court of District Judge, Baran. In the said suit a sum of Rs. 10,000/- has been claimed towards principal amount and Rs. 1200/- on account of interest. The said suit was transferred to the Court of Addl. District Judge No. 2, Baran who thereafter again transferred the same to the Court of Munsiff and Judicial Magistrate, Baran for disposal in accordance with law.

3. In the plaint presented before the trial court the plaintiff-respondent alleged that the defendant had taken Rs. 10,000/- in cash for which he had executed a 'Shahjog Darshani Hundi' on Miti Baisakh Budi 2 samvat 2048 wherein it was alleged that after affixing the revenue stamp the signatures had been put thereon and the same was handed over to the plaintiff. It was further alleged in the plaint that the defendant-appellant when contacted by the plaintiff-respondent, had refused to acknowledge the same and he did not pay the amount due to the plaintiff on account of hundi and even thereafter the amount of hundi had not been paid and as a result thereof the plaintiff was constrained to file a suit against the defendant for the recovery of Rs. 11,200/- with interest @ 2% per month. After the registration of the suit the defendant-appellant was duly noticed by the trial court. On 2-11-1991 an application for leave to defend was filed on behalf of the appellant which was allowed by the trial court on 4-1-1992. Subsequently written statement was filed on behalf of the appellant in which he denied the averments made in the plaint by the respondent in totality and by way of additional pleas contended inter-alia that the defendant was in need of Rs. 1,00,000/- in lieu of which the defendant had agreed to mortgage his three shops situated in 'Gadi Adda Baran'. In this regard the defendant had contacted the agent, Kasim Dalal who in turn intimated that the plaintiff-respondent was ready to advance a sum of Rs. 1,00,000/- in lieu of mortgage of three shops in his favour. The transaction of mortgage was settled through Kasim Dalai who told the plaintiff that stamp papers

were required to be purchased for execution of mortgage deed which was to be typed thereon and for which expenses were to be incurred and for this purpose a hundi of Rs. 10,000/- was executed and both parties affixed their signatures in token of acknowledgement. But neither the stamps were affixed nor the date was mentioned on the hundi.

4. In the written statement filed on behalf of the appellant, it was contended that on 4-4-1991 two cheques of Rs. 50,000/- each were issued by the latter in his favour totalling Rs. 1,00,000/- and the plaintiff accompanied the defendant at his house where the plaintiff told the defendant that execution of mortgage deed will take some time and, therefore, he may take Rs. 80,000/- at first instance, while the balance of Rs. 20,000/- shall be paid before the sub-registrar at the time of registration of the mortgage deed and out of the sum of Rs. 80,000/- the plaintiff took Rs. 3,000/- for the purchase of court-fee stamps for registration and paid a sum of Rs. 77,000/- to the defendant as against a sum of Rs. 1,00,000/- and in lieu of the said advance a hundi of Rs. 10,000/- was executed by the defendant in favour of the plaintiff in which the defendant had agreed for re-payment of loan amount and the said document was signed through the agent Kasim Dalai. The plaintiff purchased stamp-papers in his name of the denomination of Rs. 3,000/- on 5-4-91 from the treasury, Baran for the purpose of execution of mortgage deed which was typed. Thereafter the plaintiff approached the defendant for obtaining his signatures thereon but the defendant refused to acknowledge his liability to pay any amount and instead told the plaintiff that he should get the three conditions duly typed on the mortgage deed in which it should be clearly mentioned, that in lieu of Rs. 1,00,000/- advanced to the defendant three shops should have been mentioned as mortgaged in lieu of the said amount. It was further agreed between the parties that the rent of the three shops shall be collected by the plaintiff and the possession over the said shops shall also remain with the plaintiff but the plaintiff did not get the above conditions duly incorporated in the mortgage deed. It was also contended by the defendant in the written statement that the plaintiff did not advance the loan amount as referred to above but had simply obtained his signatures on the mortgage deed without affixing the stamps and the date on the said document, as referred to above. It was further contended by the appellants that no proof of money lending had been produced and no notice with regard to

the hundi had been served prior to the institution of the suit on account of which the suit was not maintainable. It was further contended in the written statement that the hundi does not fall within the ambit of Bill of Exchange and hence not a negotiable instrument within the purview of Negotiable Instrument Act and since as only a money transaction had taken place between the parties, the suit was not maintainable under Order 37, CPC. It was further contended by the appellant that the respondent had filed a false suit notwithstanding the fact that no money was outstanding and the suit had been filed mala fide. It was further contended that no affidavit had been filed along with the suit and hence the suit was not maintainable.

5. On the pleadings of the parties the learned trial Court framed the following issues:-

1. Whether the defendant after receiving a sum of Rs. 10,000/- in cash from the plaintiff had executed a hundi on Baisakh Budi 2 Samvat 2048 P.
 2. Whether the defendant on presentation of hundi had refused to re-pay the amount advanced P.
 3. Whether the plaintiff is entitled to recover interest at the rate of 2% per month from the defendant P.
 4. Whether the defendant in token of acknowledgment of receipt of Rs. 10,000/- had signed the hundi as mentioned in para 5 of the written statement D.
 5. Whether the defendant had signed the hundi in lieu of Rs. 77,000/- as against the settled amount of Rs. 1,00,000/- as mentioned in para 6 of the written statement D.
 6. Whether the plaintiff did not get mortgage deed duly scribed as per agreement between the parties as Stated in para 7 of the written statement D.
 7. Relief ?
6. In support of his case the respondent examined himself as P. W. 1 and also tendered necessary documents on the record.

7. On behalf of the appellant, the defendant examined himself as DW. 1, Madanlal Bhartiya D.W. 2, Soorajmal Gupta D.W. 3 and Kasim Bhai Dalai DW. 4 and also led the necessary documentary evidence on the record which included notice Exs. A. 1 and A. 2, dated 13-4-91, Exs. A. 3 and A. 4 mortgage deed, Ex. A. 5 notices dated 9-5-91, Ex. A. 8 cheque dated 8-8-91 drawn on Sahkari Bank, Baran which was drawn by the respondent in favour of the appellant.

8. After hearing learned counsel for the parties and after examining the evidence on record, learned Munsif and Judicial Magistrate, Baran vide his judgment and decree dated 16-8-93 decreed the suit by deciding issue Nos. 1 to 5 in favour of the respondent while issue No. 6 in favour of the appellant. The trial Court decreed the suit for a sum of Rs. 10,000/- along with interest at the rate of 12% per annum from due date till its realisation. Aggrieved by the said judgment and decree of the trial Court, dated 16-8-93 an appeal was preferred by the appellant before the learned District Judge, Baran which came to be heard and finally decided by learned Addl. District Judge No. 2, Baran which is impugned in this appeal.

9. Learned first appellate Court has recorded a positive finding to the effect that when no issue was framed by trial Court as to whether the plaintiff was carrying on any money lending business on the basis of money lending licence and in absence of any objection having been raised in this regard before the trial Court, it was not open to the appellant to raise that objection before the first appellate Court of Addl. District Judge No. 2, Baran. It was further held by the appellate Court that the suit was based on a hundi and the money-lending licence is not an essential pre-requisite in respect of the suit for the recovery of money on the basis of hundi. In this regard it was brought to the notice of the appellate Court that the plaintiff is having money lending licence but the same could not be produced before the said court as it was lying with the concerned authority for its renewal. Thus, the first appellate Court came to the conclusion that the plaintiff's suit cannot be said to be not maintainable only for the reason that the plaintiff was not in possession of any money lending licence and it will not be proper to hold that the trial Court has committed any illegality by decreeing the plaintiffs's suit in violation of the law.

10. On the basis of evidence on record and after having examined the rival claims and contentions of the parties as well, as the legal position the learned first appellate Court arrived at the conclusion that the hundi was duly signed by the defendant and the defendant had also acknowledged his signatures in token of acceptance and hence the logical conclusion which emerges as a consequence thereof is that the hundi was duly executed between the parties. The appellate Court further held that a sum of Rs. 80,000/- was advanced to the defendant by the plaintiff besides a sum of Rs. 3,000/- for purchase of stamp papers as against the hundi of Rs. 1,00,000/- which was executed by the defendant in favour of the plaintiff. Consequently the appeal preferred by the defendant-appellant was dismissed and the judgment and decree passed by the trial court dated 16-8-93 was affirmed by the appellate Court.

11. As against the concurrent findings of the Courts below, i.e., trial Court and the first appellate Court this second appeal has been preferred before this Court wherein defendant-appellant has assailed the findings of first appellate court and contended inter alia that the judgment and decree of Courts below are against the facts and law and as such are liable to be set aside. It has been further contended in appeal that defendant-appellant in his written statement had clearly taken the objection that the plaintiff is a money-lender and re-joinder had been filed and an application had also been submitted before the trial Court seeking amendment in the written statement under Order 6, Rule 17, CPC but appellant's application for seeking amendment in the written statement was dismissed vide order, dated 6-3-1993 holding that the suit had been filed for the recovery of the money on the basis of Shahjog hundi for which Money-lending Act is not applicable. Shri G. C. Garg, learned counsel for the appellant has contended at the bar that Shahjog hundi is not a negotiable instrument falling within the ambit of Negotiable Instruments Act and hence the suit could not be decreed under Order 37 of the Code of Civil Procedure, 1908 in favour of the respondent and that the trial Court had committed a gross error in decreeing the suit. It was further contended by the learned counsel that Shahjog hundi cannot be considered a negotiable instrument in favour of a Mahajan. Reliance was placed on the decision of this Court in S. B. Civil Writ Petition No. 279 of 1984, Bhanwarlal v. Chheetarmal, (reported in 1990 (2) Raj LW 244). It was further contended by the learned counsel for the appellant

that the burden to prove that the plaintiff was not money-lender was on the plaintiff himself which he had failed to discharge. In this regard I am of the opinion that this contention of the learned counsel for the appellant is contrary to the evidence as well as the findings of the Courts below who have concurrently held that the plaintiff-respondent was a money-lender and was possessed of the money-lending licence and had remitted the same for its renewal with the concerned authorities and in view of this position it was not proper to hold that the plaintiff was not a money-lender.

12. It was further contended by learned counsel for the appellant that in the present case the trial Court has committed illegality while rejecting the appellant's application seeking amendment of the written statement on the ground that the plaint had been presented on the basis of Shahjog hundi to which Money-lending Act is not applicable. In this regard I am of the opinion that the courts below have not committed any illegality in rejecting the said application, since when the Rajasthan Money Lending Act, 1963 itself is not applicable in this case and no such plea was taken in the first, appeal, no objection can be raised or taken for the first time in second appeal before this Court. My observations are fortified from the well reasoned findings of learned first appellate Court in para 15 of its impugned judgment wherein it has been specifically observed that in his written statement filed before the trial Court on 20-1-92 no such plea or objection had been taken or advanced that plaintiff is not a money lender and suit is liable to be dismissed for the reason that the plaintiff is not having money lending licence under the Money-lending Act. In this regard I am further of the opinion that since no issue was framed to the effect that the plaintiff was not a money-lender by the learned trial Court on 22-2-92 when other issues were framed and in absence of which the appellant is not entitled to raise this objection in second appeal before this Court. Learned first appellate Court has very rightly observed in para 16 of its impugned judgment that when no issue had been framed by learned trial Court in respect of money-lending licence and in absence of this it was not open for the defendant-appellant to raise such objection before the first appellate Court. Consequently no such objection can be raised before this Court.

13. Shri B. L. Mandhana, learned counsel for the plaintiff-respondent has controverted the contentions advanced by the learned counsel for the defendant-appellant and has placed reliance upon the judgment of the Courts below. He has vehemently contended at the bar that no revision or review was preferred against the order dated 6-3-93 passed by learned trial Court rejecting the application of the defendant-appellant under Order 6, Rule 17, CPC seeking amendment of the written statement and in absence of which it is not open to the learned counsel for the appellant to take such plea for the (sic) me in second appeal before this Court. Learned counsel for the respondent has further contended that when the appellant himself has not taken any plea before the first appellate Court raising such objections in second appeal before this Court Would be contrary to the settled law of the land. Learned counsel for the respondent has further contended at the bar that the execution of the hundi has been duly proved by relevant evidence tendered on the record and the burden of alleging to the contrary as per Section 118A of the Negotiable Instruments Act was on the plaintiff which he had successfully discharged. I am of the opinion that since the plaintiff-respondent had successfully discharged the onus by proving the hundi by tendering all the relevant evidence on the record and since the trial Court had recorded positive findings of fact in favour of the plaintiff by decreeing the suit, the first appellate Court had not committed any error or illegality by affirming the well reasoned findings of the trial Court which are not assailable in second appeal before this Court.

13A. Shri G. C. Garg, learned counsel for the appellant while controverting the contentions of Shri Mandhana has contended at the bar that there was no evidence to hold the appellant liable for re-payment of the loan amount advanced on the basis of hundi and there is interpolation in the document Ex. P. 1 since there is no date mentioned therein regarding payment of loan amount and further there is no mention in the said document as to on what date loan amount was advanced which clearly leads to an inference that the date was later on added by the plaintiff himself.

14. In support of his contentions advanced at the bar learned counsel for the appellant has placed reliance upon the judgments of this Court in the matters of Bhan-warlal v. Chheetarmal, 1990 (2) Raj LW 244 and Kanhaiyalal v. Shrilal, 1980

WLN 469.

In the matter of Bhanwarlal v. Chheetarmal (supra) the question which had arisen for consideration of this Court was with reference to interpretation of the provisions of Section 2 Sub-section (9)(1) of the Rajasthan Money-lending Act, 1963 wherein the loan has been defined as under:-

'Loan' means an advance at interest, whether of money or in kind, but does not include an advance made on the basis of Negotiable Instruments as defined in the Negotiable Instrument Act other than a promissory note.'

It was held by this Court that the word 'hundi' cannot be given the same connotation, meaning in all cases that it is a negotiable instrument. In some cases, it may be considered for a limited purpose as a negotiable instrument while in some other cases it may not be so considered as a negotiable instrument. Section 7 of the Negotiable Instruments Act defines 'payee' as a person named in the instrument to whom or to whose order the money is by the instrument directed to be paid. It is clear from the definition that the 'payee' must be specified in name, person or persons and that it cannot consist of an indefinite class. The word 'Shah' is not specific and does not fall within the purview of the word 'payee' as used in Section 7 of the Negotiable Instruments Act. The revision petition was consequently dismissed by this Court; as not maintainable.

In the matter of Kanhaiyalal v. Shrilal, 1980 WLN 469 (supra) the question which had arisen for consideration of this Court was regarding the interpretation of Sections 22, 23 and 26 (b) of the Rajasthan Money Lending Act, 1963 as amended by the (Act of 1976). In this case while interpreting the aforesaid provisions, of the Act a reference was made to the word 'suit' occurring in Section 26 (b) of the Act as to whether it includes pending suits? It was held by this Court that keeping in view the purpose and object or the reasons and spirit of the Act, the provisions of Section 26(b) of the Act as they stand after the amendment of the Act, will apply to the pending suits also and if Sections 22 and 23 of the Act have not been complied with, then the Court has to dismiss the suit as word 'suit' as used in the amended Section 26(b) embraces within it the pending suits.

15. I have heard learned counsel for the parties at length and have also examined their rival claims and contentions as well as the legal position on the subject.

16. In the present case the plaintiff had not denied that he was not a money-lender or that he was not in possession of money-lending licence, rather it has come in evidence that the plaintiff-respondent was a moneylender but his money-lending licence was lying in deposit with the concerned authority for its renewal and for this reason learned first appellate-Court has recorded a positive finding to the effect that merely because the licence was lying for its renewal with relevant authority, adverse inference cannot be drawn against the plaintiff that he was not a moneylender or was not in possession of money-lending licence as required under the Money Lending Act, 1963. I am further of the considered opinion that the burden of proof was heavily on the plaintiff which he had successfully discharged by leading all necessary evidence on the record on the basis of which his suit had been rightly decreed by the learned trial Court and its findings have been affirmed by learned first appellate Court and in view of this position this Court in second appeal should not interfere with the concurrent findings of the Courts below which are neither perverse nor contrary to law and hence not assailable in second appeal. I am further of the opinion that 'hundi' is a negotiable, instrument within the ambit of Negotiable Instruments Act and that the contentions of the learned counsel for the defendant-appellant lack merit and are not sustainable in law. I am further of the opinion that there is positive evidence on record to hold the appellant liable for re-payment of the loan advanced to him by plaintiff-respondent and Courts below have concurrently held the defendant-appellant liable for re-payment of the loan amount. I am further of the opinion that though the burden to prove that there was any interpolation in the document Ex. P. 1 was on the defendant-appellant which he had failed to discharge before the Courts below and it is normal practice of the parties to take such false pleas when the question of re-payment of loan amount arises and such pleas are normally taken with a view to avoid liability for re-payment of the loan amount. I am of the considered opinion that the very purpose of the Legislature in incorporating Order 37 in the Civil Procedure Code, 1908 by the amending Act of 1976 which envisages summary procedure for trial and expeditious disposal of the cases in suits based upon the Bills of Exchange, hundies and the promissory notes and the suits in which the plaintiff seeks only to

recover a debt or liquidated demand in money payable by the defendant, with or without interest arising on the basis of:--

(i) a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only, would stand lost and defeated if such sham or illusory defences are allowed to be advanced by the parties and accepted by the Courts while decreeing such suits. If this position is allowed to prevail then no party would be safe in advancing the loan to any party in difficulty, since the very aim and object of the Legislature in enacting the Rajasthan Money Lenders Act, 1963 is to make a better provision for the regulation and control of transactions of money-lending in the State of Rajasthan. It is further to protect the bona fide money-lenders from exploitation at the behest of those persons to whom the loans are advanced who take the loan amount by making all promises of repayment with interest as prescribed under the law and thereafter take false plea that no loan was advanced with a view to defeat the legitimate and genuine rights of a money-lender. I am further of the opinion that the very object underlying the summary procedure for trial of suits under Order 37, C.P.C. is to prevent unreasonable delay and obstruction by a defendant who has no defence to advance. The purpose of the Legislature in introducing the legislation was to curb serious malady prevailing in the society and it was intended to keep control over money-lending transactions and also to see that excessive rate of interest was not charged from the helpless borrower by the money-lenders.

17. It will be pertinent to refer to the provisions of Sub-rule (1) of Rule 3 of Order 37, C.P.C. which envisages the procedure for appearance of the defendant on being noticed by the trial Court in a suit filed by the plaintiff under the said provisions. As per Sub-rule (5) of Rule 3 of Order 37, C.P.C. the defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to

defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just, provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. I am of the opinion that keeping in view the above provisions the trial Court was perfectly justified in declining leave to defend to the defendant-appellant as he had failed to set up any triable issue which, would have justified grant of leave to defend the suit unconditionally or upon such terms as may appear to the Court to be just and proper. Since on the basis of facts disclosed by the defendant-appellant in his application for leave to defend the suit, no justifiable defence much less a substantial defence was raised and that the defence intended to be put up was frivolous and vexatious. In my considered opinion no ground is made out by the appellant for interference with the impugned order passed by the trial Court which has been upheld by the first appellate Court and the same is perfectly valid, legal and has been passed in accordance with law. I am further of the opinion that the provisions of the Act have been enacted with a view to prevent unscrupulous money-lender exploiting the need of the weaker section of the society. Keeping in view the aforesaid aims and objects of the Legislature in enacting the Rajasthan Money Lending Act, 1963, I am of the opinion that there is no breach or violation of its provisions by the plaintiff-respondent in having advanced the loan amount to the defendant-appellant on the basis of a hundi duly executed between the parties which is a Negotiable Instrument duly enforceable under the Negotiable Instruments Act, i.e., the Central Act and the suit has rightly been decreed in favour of the plaintiff-respondent under Order 37, C.P.C. Further the amount as settled between the parties was advanced by the plaintiff-respondent to the defendant-appellant on the basis of hundi which itself is a Negotiable Instrument as defined in the [Negotiable Instruments Act, 1881](#) and also falls within the purview of Section 2(a)(i) of the Rajasthan Money Lenders Act, 1963 and, therefore, the case of the plaintiff-respondent is fully covered by the provisions of the Acts and the Courts below have rightly arrived at the conclusion that the money advanced to the defendant-appellant was outstanding by way of a loan security on a hundi for a sum of Rs. 1,00,000 / - which was got executed from the

defendant-appellant and which he was liable to pay the decretal amount of Rs. 10.000/- along with interest @ 12% per annum from due date till its payment or realisation.

18. In the result the appeal is dismissed with costs which I assess at Rs. 1.000/-. The judgment and decree passed by the trial Court on 16-8-1993 and that of first appellate Court passed on 29-10-1993 are affirmed.

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