

(2009) 08 DEL CK 0120

Delhi High Court

Case No: IA No's. 2387, 2388 and 2751 of 2009 in CS (OS) No. 344 of 2009

Ms. Anupam Gupta

APPELLANT

Vs

Mr. Manish Aggarwal and Others

RESPONDENT

Date of Decision: Aug. 26, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 9, Order 38 Rule 5, Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 7
- General Clauses Act, 1897 - Section 27
- Negotiable Instruments Act, 1881 (NI) - Section 138

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: Anil Kumar Gupta, Vineet Jain and Party in Person, for the Appellant; Vivek Chib and Vibhore K. Singh for Defendant Nos. 2-5, for the Respondent

Judgement

Manmohan Singh, J.

By this order I shall dispose of I.A No. 2387/2009 under Order XXXIX Rules 1 and 2 read with Section 151 of the CPC, I.A No. 2388/2009 under Order XXXVIII Rule 5 read with Section 151 of the CPC and I.A No 2751/2009 under Order XXVI Rule 9 read with Order XXXIX Rule 7 and Section 151 of the CPC. All three applications have been filed by the plaintiff in the present case.

2. The brief facts of the case are that defendant No. 1 along with defendant nos. 2 to 5 approached the plaintiff in January, 2008 for short term funds to be arranged as loans of different amounts for some urgent business purpose of defendant No. 1, totaling in all a sum of Rs. 17,95,000/-. Thereafter, the plaintiff was convinced that defendant No. 1 would return her money with interest at the decided rate of 2% p.m. as his business would be successful and also as defendant nos. 2 to 5 stood as guarantors on behalf of defendant No. 1.

3. It is not disputed that the defendant No. 1 issued two post dated cheques being cheque nos. 886852 and 886940 dated May 20, 2008 and June 11, 2008 for Rs. 8,50,000/- and Rs. 9,45,000/- respectively. Both cheques were drawn on ICICI Bank Ltd., Chennai, Mount Road Branch, Karumuttu Nilayam, New No. 192, Anna Salai, Chennai- 600 002. It was also agreed between the parties that the said defendant would pay the interest amount borne by the plaintiff in arranging the said loan.

4. It is further not disputed that despite requests of repayment by the plaintiff so that she could further return the loan amount and despite the fact that a period of six months had been decided for such repayment, the said defendant did not pay back the loan amount. Further, when the cheques issued by defendant No. 1 were presented for payment, they were returned as dishonoured by the defendant No. 1's bankers at RPC, E-4, Jhandewalan Extension, New Delhi Branch vide memos dated May 26, 2008 and June 14, 2008 due to insufficient funds.

5. The plaintiff then sent a notice dated June 23, 2008 to the defendant No. 1 demanding that he make the payment against the above two dishonoured cheques. However, notices sent at both the addresses of the defendant No. 1 were returned as unclaimed etc as the said defendant is allegedly attempting to evade the service of the same on him. plaintiff submits that the defendant should be considered served with the notice on June 25, 2008 as contemplated in Section 27 of the General Clauses Act.

6. Aggrieved by the behavior of defendant No. 1, the plaintiff filed a complaint u/s 138 of the Negotiable Instruments Act, 1881 and the same is pending disposal before the learned MM's Court, Delhi.

7. The plaintiff contends that the defendant is also liable to pay interest @ 24% p.a on the principal amount of Rs. 17,95,000/- which comes to a sum of Rs. 4,30,800/-, thereby making a total of Rs. 22,25,800/- payable to the plaintiff. However, as the defendant No. 1 did not appear in any proceedings, the learned court had to issue bailable warrants against him. The plaintiff further submits that there has been a Public Notice by the other defendants in order to evade payment of the loan to the effect that defendant No. 1 has been missing since April 8, 2008.

8. The plaintiff submits that defendant Nos. 2 to 5 are now trying to take away the goods lying in defendant No. 1's tenanted shop and have even taken away the name board thereof. The plaintiff apprehends that the said defendants are attempting to remove goods worth more than Rs. 10 lac and also to surrender the tenancy rights of the said shop at a huge premium. The plaintiff has thus approached this Court for a decree of permanent injunction restraining the defendants from creating any third party interest in property No. 2723, Churiwala, Bazar Sita Ram, Delhi - 110006 and from removing any goods or articles lying in shop No. M-3 and 10-A, Central Market, Vasant Kunj, New Delhi - 110070 and from surrendering the tenancy rights as regards the same to anyone. The plaintiff has

also prayed for a decree of recovery of Rs. 22,25,800/- along with pendent lite and future interest @ 2% p.m. from the date of filing of the suit till realisation.

9. Defendant nos. 2 to 5, who are the family of defendant No. 1, have submitted in their reply that they have been arrayed as parties in the present suit only with the intention of harassment and without any cause of action being shown against them. The said defendants have also submitted that the plaintiff has filed this suit only to illegally take over the tenancy rights of the answering defendants and that the entire case of the plaintiff is based on forged and fabricated documents. As per the answering defendants, defendant No. 1 went missing on March 5, 2008 and came back on March 11, 2008 whereafter he again went missing on April 8, 2008. Thereafter, the answering defendants filed a complaint in the nearby police station as regards the missing defendant No. 1 and still have no idea as to his whereabouts.

10. The answering defendants submit that they were in no manner involved in any alleged financial transaction between the plaintiff and defendant No. 1. As far as the answering defendants know, no such transaction has ever taken place. Defendant nos. 2 to 5 deny that they have ever stood as guarantors for defendant No. 1 in front of the plaintiff.

11. The plaintiff filed I.A No. 2387/2008 for restraining the defendants from removing any goods lying in shops No. M- 3 and 10-A, Central Market, Vasant Kunj, New Delhi - 110070, from surrendering the tenancy rights in the above mentioned shops and from creating any third party rights in property No. 2723, Churiwala, Bazar Sita Ram, Delhi - 110006. By order dated February 18, 2009 passed by this Court, an ad interim injunction was granted in the said application restraining the defendants from removing any goods from the two shops mentioned above.

12. The plaintiff filed I.A No. 2751/2009 praying that this Court appoint a local commissioner in order to take an inventory of the goods lying in the two shops of defendant No. 1. This Court passed an order on February 27, 2009 whereby a Local Commissioner Mr. Sanjay Dua, Advocate was appointed to visit the said shop premises of defendant No. 1 to make an inventory of all the goods therein. The Local Commissioner submitted his report on March 3, 2009.

13. The plaintiff also filed I.A No. 2388/2009 submitting therein that defendant No. 1 is absconding and the other defendants, in collusion with defendant No. 1, are trying to dispose of the goods lying in the shops M-3 and 10A, Central Market, Vasant Kunj, New Delhi - 110070 and to surrender the tenancy rights thereof as well. In view of the loan amount to be repaid to the plaintiff, the plaintiff submits that the defendants should either furnish security ensuring the repayment of loan or the properties of the defendants should be placed at this Court's disposal so that in any eventuality, the grievance of the plaintiff is not left without remedy.

14. I have perused the submissions of both the parties. The plaintiff has submitted various bank statements which show large cash withdrawals, as well as the

promissory note executed by defendant No. 1 on January 6, 2008 and a statement dated March 20, 2008 given in writing by defendant No. 1 wherein he has admitted taking loans for expanding his business while submitting that he has been unable to do the same and is neck deep in debt now.

15. During the hearing of the interim application, the defendants No. 2 to 5 were agreeable not to dispose of the properties against the interim orders issued till the disposal of the suit as well as not to create any third party interest. A suggestion was given by them to pay the amount in monthly installment against the liability of defendant No. 1. However, counsel for the plaintiff is not agreeable to any of the suggestions made by the defendants and has argued that the defendants should be restrained from removing any goods and articles lying in the shop No. M-3 and M-10-A, Central Market, Vasant Kunj, New Delhi as per the inventory made by the Local Commissioner till the disposal of the suit.

16. Considering the overall circumstances of the matter, it appears that at this stage the suggestion given by the defendants are quite reasonable while considering the facts that (i) the present suit has been filed by the plaintiff for recovery of money and (ii) it is a matter of fact that even though the defendant No. 1, who has actually taken the loan from the plaintiff is not available, the defendant Nos. 2 to 5 are still ready to suffer the injunction as suggested by them. I feel that in case the defendants are directed not to remove and sell the goods and articles lying in the said shop, no purpose would be served because under those circumstances, the goods would become outdated as some of the products are in the nature of cosmetics etc.

17. In view of the above, I am of the considered view that the ex-parte interim order dated 18th February, 2009 is modified to the extent that during the pendency of the suit the defendants are restrained from surrendering the tenancy rights of the said shop Nos. M-3 and M-10-A, Central Market, Vasant Kuni, New Delhi and from delivering the possession thereof to the owner or to any other third party. The defendants are also restrained not to create third party interest in property No. 2723, Choori Walan, Bazar Sita Ram, Delhi-1100 06 during the pendency of the suit. All the pending applications are disposed of accordingly.

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List the matter before the Court on 5th October, 2009.