(2009) 02 DEL CK 0263

Delhi High Court

Case No: Regular First Appeal No. 1 of 1997

Krishan Kumar	APPELLANT
Vs	
Syndicate Bank and Another	RESPONDENT

Date of Decision: Feb. 19, 2009

Acts Referred:

- Evidence Act, 1872 - Section 101, 102, 73

Hon'ble Judges: P.K. Bhasin, J

Bench: Single Bench

Advocate: Indrani Ghosh, for the Appellant; None, for the Respondent

Final Decision: Allowed

Judgement

P.K. Bhasin, J.

This appeal is against the judgment and decree dated 06-12-96 passed by the learned Additional District Judge, Delhi in suit No. 313/88 (old. No. 248/86) whereby the suit for recovery of Rs. 41,579.75 filed by the respondent No. 1-Bank was decreed in its favour and against the appellant and respondent No. 2 herein.

2. Respondent No. 1-Bank(hereinafter to be referred as the ''plaintiff'') filed a suit for recovery on the allegations that respondent No. 2 herein, who was impleaded as defendant No. 1 in the suit (hereinafter to be referred as ''defendant No. 1''), was given a loan of Rs. 25,000/- on 05-10-83 by the plaintiff bank and for its re-payment the appellant herein, who was impleaded as defendant No. 2 in the suit and who shall now onwards be referred to as defendant No. 2, had given his personal guarantee by executing alongwith defendant No. 1 an agreement of loan-cum-guarantee. It was pleaded in the plaint that after availing of this loan facility defendant No. 1 failed to repay the same which as per the terms of loan was repayable in 25 instalments of Rs. 1000/- each commencing from 15-11-83. Since defendant No. 1 defaulted in repayment of the loan instalments he was called upon to clear the bank dues and defendant No. 2 was also required to make the payment

as he was also equally liable to repay the loan amount disbursed to defendant No. 1 being his guarantor but they did not accede to that demand. Hence, the suit.

3. Defendant No. 1 did not contest the suit and it proceeded against him ex-parte. However, defendant No. 2 contested the plaintiff''s case and in his written statement he denied having given any guarantee for defendant No. 1. In fact, he claimed that there was no such person. It was also pleaded in the written statement that one bank manager Smt. Uma Dhobri had played a big fraud by creating forged documents in the names of many fictitious persons and opening fake loan accounts and withdrawing Bank''s money and then the Bank had filed many cases against fictitious persons and in all the cases, including the present one, defendant No. 2 was impleaded as a guarantor relying upon certain documents purporting to have been signed by him although he had never signed any of those documents.

4. On the pleadings of the parties learned trial Judge framed the following issues:

1. Whether plaint does not disclose any cause of action against the defendant No. 2 as alleged? OPD.

2. Whether the plaint has been signed, verified and filed by a duly authorized person in accordance with law? OPP.

3. Whether the alleged guarantees is not enforceable against defendant No. 2 as alleged? OPD

4. Whether the signature of defendant No. 2 was forged and appended in the present suit due to fraud committed by the branch manager of plaintiff bank as alleged in para 4 of preliminary objection of written statement? OPD.

5. Whether the suit is within time? OPP

6. Whether plaintiff is entitled to recover a sum of Rs. 41,579.75 as alleged? OPP.

7. Whether plaintiff is entitled to any interest, if so at what rate, for what period and to what amount? OPP.

8. Relief.

5. From the side of the plaintiff bank three witnesses were examined while defendant No. 2 examined only himself as his own witness.

6. Learned trial Judge after examining the evidence adduced from both the sides decreed the plaintiff''s suit holding that defendant No. 1 had taken loan and had not repaid the same and further that defendant No. 2 was the guarantor and so he was also liable. Both the defendants were thus held to be jointly and severally. Defendant No. 2 felt aggrieved and filed this appeal. Other defendant does not appear to have filed any appeal.

7. I have heard learned Counsel for the appellant and also gone through the pleadings, plaintiff''s documents and the evidence of the parties, certified copies whereof had been placed on record by the appellant. As far as respondents are concerned nobody appeared on their behalf today when the appeal was taken up.

8. As noticed already, the defendant No. 2 had pleaded in his written statement that he had not signed any loan-cum-guarantee agreement, as was being claimed by the plaintiff and even in his evidence he claimed so. The learned trial Judge, however, rejected this defence of defendant No. 2 and decided issues No. 1, 3 and 4 against him and held that the loan-cum-guarantee agreements relied upon by the plaintiff had actually been executed by him as a guarantor and he had failed to adduce sufficient evidence to discharge the burden of proving that the signatures on the agreements, Ex. PW-3/2 and Ex.PW-3/3, purporting to be his signatures were forged and further that his bare denial that the said document did not bear his signature was not sufficient to reject the plaintiff''s claim against him. In my view, and as has been rightly argued by learned Counsel for the appellant also, the entire approach of the learned trial Judge in this regard has been totally erroneous. He has decreed the suit against defendant No. 2 totally ignoring the basic principle of evidence that in a civil suit the burden of proof in respect of a factual averment which is not admitted by the defendant is always upon the plaintiff and if that burden is not discharged the plaintiff has to fail and not the defendant. This principle is embodied in Sections 101 and 102 of the Indian Evidence Act. Section 101 reads as under:
Burden of proof- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

And Section 102 reads as under:

On whom burden of proof lies- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

9. Here, defendant No. 2 had claimed that he had not signed any document undertaking to repay any money to the plaintiff in the event of defendant No. 1 failing to repay the same. This he deposed in his examination-in-chief also. That was all which was required to be pleaded in written statement and then stated on oath by him in evidence. The initial burden of proving the fact that the loan-cum-guarantee agreement relied upon by the plaintiff was signed by defendant No. 2 also lay on the shoulders of the plaintiff. The plaintiff bank has not examined any witness who could say that defendant No. 2 had signed the loan agreement in his/her presence. The only witness from the bank is PW-3. Although he deposed that defendant No. 2 had signed the loan-cum-guarantee agreement but in cross-examination he admitted that he had not seen defendant No. 2 signing

that agreement since he had joined the concerned branch in 1987 while the agreement in dispute was signed by defendant No. 2 in 1983. So, his evidence was of no value as far as the execution of the agreement by defendant No. 2 is concerned. No attempt was made during the trial to have the admitted signatures of the defendant No. 2 compared with the signatures on the disputed agreement of guarantee by a handwriting expert. Learned trial Judge has erroneously held that the hand-writing expert should have been examined by defendant No. 2 which he had not done for the reasons best known to him only.

10. The learned trial Judge accepting the submission made on behalf of the plaintiff by its Counsel to the effect that the Court itself could also compare the signatures on the disputed documents which the defendant No. 2 was disowning with his admitted signatures on the written statement and the vakalatnama which he had signed in favour of his Counsel compared the disputed signatures of defendant No. 2 and his signatures appearing on his written statement and vakalatnama of his Counsel came to the following conclusion in para No. 10 of the impugned judgment:

I have perused the signatures on the questioned document Ex. PW-3/2 and written statement, vakalatnama and signatures on the statement of DW-1. It is not to be seen that the signatures are exactly the same because it is not possible even the admitted signatures of defendant No. 2 here have much difference...the signatures of defendant No. 2 can be compared by naked eyes. The characters of questioned signatures are of similar nature. Ld. Counsel for plaintiff further argued that the persons who are expert in defrauding will purposely make some difference in their signatures but the nature of characters, motion and spacing will connect the person with handwriting. The argument of Counsel for plaintiff has weight because the professionals in defrauding have different ways to falsify the investigations. Here the signatures on questioned documents with naked eyes look similar by their characteristic.... The clever person often will leave this difference which is immaterial when the basic characteristics are totally tallying with the admitted signatures. That is the reason the defendant has not led evidence of handwriting expert. Mere oral statement is not sufficient to disclaim the signatures until and unless cogent evidence is produced on the record to establish that the questioned signatures are forged.

11. On the aspect of the learned trial Judge himself venturing to compare the signatures on the disputed documents with the signatures of defendant No. 2 on his written statement, vakalatnama etc. the submission of learned Counsel for the appellant was that the learned trial Judge should not have based his findings on such comparison in view of the following observations of the Hon''ble Supreme Court in The State (Delhi Administration) Vs. Pali Ram, made in para No. 29:

29. The matter can be viewed from another angle, also. Although there is no legal bar to the Judge using his own eyes to compare the disputed writing with the admitted writing, even without the aid of the evidence of any handwriting expert,

the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is, therefore, not advisable that a Judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert.

12. Learned Counsel also placed reliance upon one judgment of Orissa High Court in Laxmibai v. A. Chandrawati AIR 1995 Ori 131 in which a Division Bench of Orissa High Court made the following observations in para No. 9 of the judgment with reference to Section 73 of the Indian Evidence Act:

We may state here that u/s 73 of the Evidence Act, a Court is competent to compare the disputed writings of a person with other writings which are admitted or proved to be his writings. Such comparison by the Court is with a view to appreciate properly the other evidence available on record on the question of writings. It would, however, be too hazardous for a Court to use his own eyes and merely on the basis of personal comparison decide a very vital issue between the parties centering round the handwriting or signature of a person.

In view of the afore-said two decisions relied upon by learned Counsel for the appellant I am in full agreement with the contention that in the absence of any other evidence having been adduced by the plaintiff to establish that defendant No. 2 had given any guarantee for repayment of alleged loan amount given to defendant No. 1 plaintiff''s claim against defendant No. 2 could not have been decreed merely on the basis of comparison of the disputed signatures and the admitted signatures of defendant No. 2 by the learned trial Judge himself. Even otherwise also no value can be attached to the comparison done by the learned trial Judge in the present case since the original agreements bearing the disputed signatures of defendant No. 2 were not available before the trial Judge for the purposes of comparison of the disputed signatures thereupon with the admitted signatures of defendant No. 2. It is the plaintiff''s own case, as is evident from the evidence of PWs 1 & 2, that original documents having the disputed signatures of defendant No. 2 had been seized by CBI when it was investigating the complaint regarding the defrauding of plaintiff bank by its officials in conspiracy with the present appellant-defendant No. 2. The learned trial Judge appears to have compared the signatures of defendant No. 2 appearing in his written statement and evidence with the disputed signatures on the disputed agreements of which only photocopies were available on record. There was, thus, no comparison of admitted signatures and the disputed signatures since the original disputed signatures were not even before the Court.

13. The findings of the learned trial Judge to the effect that defendant No. 2 was liable to repay the plaintiff bank''s money as a guarantor of defendant No. 1 being

totally conjectural and having been arrived at by adopting a totally erroneous approach in the matter cannot be sustained at all and need to be reversed. Accordingly, the findings on issues No. 1,3 and 4 are reversed and it is held that the plaintiff has failed to establish that defendant No. 2 had executed any agreement of guarantee in favour of the plaintiff bank guaranteeing the repayment of any money which allegedly was taken as loan by defendant No. 1.

14. In view of the afore-said findings, this appeal is allowed with costs and the impugned judgment and decree of the learned trial Judge passed against the appellant/defendant No. 2 Krishan Kumar is set aside.