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IN THE HIGH COURT OF SIKKIM
GANGTOK

Regular First Appeal (C) No.02 of 2008

Prakash Bista Chettri,
S/o Laxmi Prasad Chettri,
R/o Mazi Gaon,
P.O. & P.S. Jorethang,
South Sikkim. ..... ***Appellant/Plaintiff.***

Versus

Rabin Rai,
S/o Late Bahadur Rai,
R/o Nandu Gaon,
Poklok Bloock,
P.O. Nandu Gaon,
P.S. Jorthang,
South Sikkim. ..... ***Respondent/Defendant.***

For the Appellant/Plaintiff : Mr. A. K. Upadhyaya, Senior Advocate with Mr. Ashim Chettri, Advocate.

For the Respondent/Defendant : None.

Date of last hearing : 29.07.2009
Date of judgment : 07.08.2009

PRESENT : THE HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE.

J U D G M E N T

S.P.Wangdi,J.

This is an appeal filed by the appellant/plaintiff against the impugned judgment dated 28.06.2008 in Title Suit No.03 of 2007 passed by the learned District Judge, South & West Sikkim at Namchi, whereby a suit filed by him against the defendant who is the respondent in this appeal was dismissed.

2. The facts involved in the suit are quite brief. It was alleged by the appellant/plaintiff that the respondent/defendant had agreed to sell a piece of land measuring 40' x 40' bearing plot number 492 situated at Nandu Gaon, Poklok Block, South Sikkim, against which an advance of Rs. 1 lakh had been paid by him to the respondent/defendant. A document to that effect termed as "Dhan Rashid" marked as Ext.1 was executed on 05.04.2007 by the respondent in presence of witnesses in which he had acknowledged the receipt of the said sum as advance and that he had agreed to sell the land to the appellant/plaintiff. It was the case of the appellant/plaintiff, that the respondent/defendant was expected to repay the loan taken by his deceased father, Bom Bahadur Rai, from the State Bank of India, Jorthang Branch, out of the said advance of Rs. 1 lakh, so that he could obtain a No Objection Certificate from the bank, necessary for getting the sale deed in respect of the land registered before the appropriate authority. It is the case of the appellant/plaintiff that the respondent/defendant resiled from the agreement Ext.1 and also failed to keep his promise made therein of getting the land transferred in his name compelling him to issue a legal notice through his Counsel and also filed a petition for appropriate action before the Sub-Divisional Magistrate, South Sikkim at Namchi. Having failed to move the respondent/defendant even thereafter, the appellant/plaintiff filed T.S.Case No.3 of 2007 before the learned District Judge seeking for a decree for execution and registration of sale deed in respect of the suit-land in his name, interest upon the advance paid to the respondent/defendant, etc.

3. It is further the case of the appellant/plaintiff that the respondent/defendant failed to appear before the learned trial Court despite having received notice issued by the Court and, was accordingly, proceeded ex parte. Affidavits of evidence were affirmed and filed by the appellant/plaintiff and two other witnesses which were confirmed in the absence of the respondent/defendant.

4. After hearing arguments on behalf of the appellant/plaintiff, ex parte against the respondent/defendant, the learned trial Court dismissed the suit on the finding that the appellant/plaintiff had failed to discharge the burden of proof placed upon him by law for him to succeed. Learned trial Court was of the view that the appellant/plaintiff and his witnesses other than exhibiting the documents did not identify the signature appearing on the "Dhan Rashid" marked as Ext.1 which went to the root of the case and that, even in the letter dated 01.05.2007 marked as Ext.2, the appellant/plaintiff did not prove his own signature when he had filed and exhibited it to prove that he had written that letter to the respondent/defendant asking him to comply with the promise that he made vide Ext.1. On these, the learned trial Court came to the ultimate conclusion that the appellant/plaintiff had failed to prove execution of the Dhan Rashid, Ext.1 which was the basis of his claim in the suit.

5. I have given my thoughtful consideration to the entire facts of the case, the evidence and the materials available in the

records, and I am of the view that the impugned judgment of the learned trial Court has to be set aside for the reasons that shall follow hereafter.

6. There is no dispute in so far as the events that took place preceding the stage when the impugned judgment was passed. The suit was proceeded ex parte as the respondent/defendant failed to appear inspite of having been issued necessary notice by the Court. It appears that the respondent/defendant evinced no interest in contesting the suit, a fact which assumes greater credibility as he failed to appear even before this Court inspite of him being issued with a notice.

7. The question that now needs to be answered is that, in the facts and circumstances where the defendant chooses not to contest a claim and also leaves statements of facts appearing in the plaint uncontroverted, would it be necessary for the plaintiff to adduce evidence to prove each and every fact including those un-denied documents filed as exhibits ? In order to answer these questions it would be necessary to examine certain provisions of procedural and substantive laws contained in the Civil Procedure Code and the Indian Evidence Act, 1872 respectively.

8. The burden of proof lies upon that person who would fail if no evidence at all were given on either side. Sections 101 and 102 of the said Act prescribes that. As per Section 103 the burden of proof as to any particular fact lies on that person who wishes the Court to

believe in its existence. Now, the law of evidence would come into play after completion of the procedure laid down under Order XIV of the Civil Procedure Code for settlement of issues. In other words, only after settlement of issues prescribed under the Civil Procedure Code, would come the stage for adducing evidence by the parties. If the defendant in a suit chooses not to appear and contest the suit by filing written statement to the statements and claims made in the plaint, the question of deciding an issue would not arise, as issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. We may refer to Rule (1) of Order XIV of the Civil Procedure Code in this regard, which is reproduced below :-

> **"Framing of issues.**
>
> **(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.**
>
> **(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.**
>
> **(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.**
>
> **(4) Issues are of two kinds:**
> **(a) issues of fact,**
> **(b) issues of law.**
>
> **(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and [after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.**
>
> **(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence".**

8. As can be seen from the above, sub-rule 6 of Rule (1) of Order XIV clearly specifies that nothing in the Rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

9. We may now consider the case in the light of Order VIII Rules, 1, 3 and 5, relevant portions of which are extracted below :

> **"ORDER VIII**
>
> **1. *Written statement.* – The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence.**
>
> **Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, ...**
>
> **3. *Denial to be specific.* – It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.**
>
> **5. *Specific denial.* –**
>
> **(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:**
>
> **Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.**
>
> **(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.**
>
> **(3) .....**
>
> **(4) .....**"

10. In our case, since the defendant has not at all appeared in

Court to contest the suit by filing necessary written statement, there are no issues to be decided by the Court. From this, it can be reasonably presumed and taken that the allegations of fact contained in the plaint are admitted by the respondent/defendant by application of sub-rule (1) of Rule 5 of Order VIII Civil Procedure Code and as a natural corollary the procedure prescribed under sub-rule (2) of Rule 5 of Order VIII ought to follow resulting in the pronouncement of judgment.

11. We may also consider the case in another aspect. The extent of the proof of contents of documents required is prescribed under Chapter 5 of the Indian Evidence Act 1872. The provisions which are relevant for the purpose of this case are Sections 61, 62, 64 and 67 of the said Act which are reproduced below for convenience :-

> **"61. *Proof of contents of documents* – The contents of documents may be proved either by primary or by secondary evidence.**
>
> **62. *Primary evidence* - Primary evidence means the document itself produced for the inspection of the Court.**
>
> **64. *Proof of documents by primary evidence.* – Documents must be proves by primary evidence except in the cases hereinafter mentioned.**
>
> **67. *Proof of signature and handwriting of person alleged to have signed or written document produced.* – If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting".**

12. In the present case, the foundation of the appellant's/plaintiff's case, is the document exhibit 1 which he alleges to have been executed by the respondent/defendant in presence of

witnesses who also have countersigned in that document. Two of those witnesses have appeared as PWs 2 and 3 and filed their affidavits in evidence before the learned trial Court. Section 61 of the Evidence Act as can be seen, prescribes that the contents of documents may be proved either by primary or by secondary evidence. Now Section 62 defines primary evidence to mean the document itself produced for inspection of the Court and Section 64 requires that documents must be proved by primary evidence. No doubt, it is true that Section 67 makes it necessary that the signature or the handwriting contained in a document must be proved if it is alleged to have been signed or written wholly or in part by any person, but I am of the view that Section 67 would be relevant only in a case where the defendant has appeared and has chosen to contest by filing his written statement denying the execution of or the very existence of such document.

13. In the case at hand, the document Ext.1 which is the foundational document relied upon by the appellant/plaintiff has been exhibited, thereby satisfying the requirements of Sections 61, 62 and 64 of the Evidence Act. There being no denial as to the existence or authenticity of the said document by the respondent/defendant the question of complying with the provisions of Section 67 of the said Act in my view, would not arise. The Hon'ble Supreme Court in the case of ***Narbada Devi Gupta*** vs. ***Birendra Kumar Jaiswal & Another AIR 2004 SC 175*** has laid down the following :-

> **"16. Reliance is heavily placed on behalf of the appellant on the case of Ramji Dayawala and Sons (P) Ltd. (supra). The legal position is not in dispute that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence that is by the 'evidence of those persons who can vouchsafe for the truth of the facts in issue'. <u>The situation is, however, different where the documents are produced, they are admitted by the opposite party</u>, signatures on them are also admitted and they are marked thereafter as exhibits by the Court. ....."** *(Emphasis supplied)*

14. In the case referred to above, quite different from the case at hand, the opposite party had appeared and admitted the contents and signatures contained in the questioned document, but the principle that in an admitted position, there is no necessity to adduce evidence would equally apply here also. In this context, we may also refer to ***AIR 1971 SC 2548*** in the matter of ***Dattatraya*** vs. ***Rangnath Goparao Kawathekar***.

15. Considering the legal position and the facts indicated hereinbefore, the impugned judgment appears to have been passed on an erroneous construction of law with regard to the compliance of the rigors of the Evidence Act as set out above. The exasperation of the learned trial Court in his observation contained in the last paragraph of the impugned judgment is well appreciated, but in my view, that should be the very reason why we the dispensers of justice be more vigilant and ensure that justice is not only done but also appear to have been done. The well settled principle that a litigant should not be made to suffer on account of ineptitude or incompetence of his lawyer would be

fully applicable in the facts and circumstances of the case. As the record reveals and which have been dealt with hereinbefore also, the respondent/defendant was proceeded ex-parte as he had failed to appear despite notice. The records also reveal that in the affidavit of the examination-in-chief of the appellant/plaintiff and his two witnesses, they have exhibited the hand note (Dhan Rashid) as exhibit 1, contents of which are as the plaintiff claims it to be and that the names and the signatures of the defendant and the two witnesses who have appeared in Court, namely, Basant Rai and Sangay Bhutia are clearly visible. Deliberate absence of the respondent/defendant in Court undoubtedly gives rise to the adverse presumption that he has nothing to state in defence contained in the plaint. All these in my view are preponderance of probabilities that would clearly go in favour of the appellant/plaintiff entitling him to the grant of the decree sought by him in the suit.

15. In the above facts and circumstances, the impugned order passed by the learned District Judge, South and West at Namchi, South Sikkim, is set aside and the suit stands decreed in terms of the prayers contained in the plaint.

No order as to costs.

Records of the lower court be sent forthwith.

(S. P. Wangdi)
Judge
07.08.2009.

at

HIGH COURT OF SIKKIM
GANGTOK

"DECREE IN APPEAL"

(Under Order 41 Rule 35 of C.P.C.)

The Regular First Appeal No. 02 of 2008 against the Judgment & Order dated 28/06/2008 passed by the District Judge, South & West at Namchi, South Sikkim in Title Suit No.03 of 2007.

Prakash Bista Chettri,
S/o Laxmi Prasad Chettri,
R/o Mazi Gaon,
P.O.& P.S. Jorethang,
South Sikkim. .....**Appellant**

Versus

Rabin Rai,
S/o Late Bahadur Rai,
R/o Nandu Goan,
Polok Block,
P.O.Nandu Gaon,
P.S.Jorethang,
South Sikkim. .....**Respondent**

This Appeal coming up for final hearing on 29/07/2009 before the Hon'ble Justice Shri S.P.Wangdi, Judge of this Court in the presence of Ld. Senior Advocate Shri A.K.Upadhyaya, assisted by Ld. Advocate Shri Dhurba Tewari, Advocates for the Appellant.

Respondent proceeded ex-parte.

On hearing Ld. Senior Advocate Shri A.K.Upadhyaya, assisted by Ld. Advocate Shri Dhurba Tewari, Advocates for the appellant, the impugned order passed by the Ld. District Judge, South & West at Namchi, South Sikkim, is set aside and the suit stands decreed in terms of the prayers contained in the plaint.

No order as to costs.

Given under my hand and seal of the Court on this the 10th day of August, 2009 at Gangtok.

10/8/09.

(MEENAKSHI M. RAI)
REGISTRAR GENERAL
HIGH COURT OF SIKKI M
GANGTOK

Prepared by :-

10/8/09

(KAMAL PD.CHHETRI)
READER
HIGH COURT OF SIKKIM
GANGTOK