

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.318/2010 & CM Nos.8249-51/2010

PAWAN GUPTA

...Appellant through
Mr. D.K. Singh with
Mr. Pradeep Shukla &
Mr. Sanjay Kumar, Advs.

versus

PRITPAL SINGH SALUJA

.....Respondent through
None

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Date of Hearing : May 04, 2010

Date of Decision : July 30, 2010

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MR. JUSTICE A.K. PATHAK

1. Whether reporters of local papers may be
allowed to see the Judgment?

No

2. To be referred to the Reporter or not?

Yes

3. Whether the Judgment should be reported
in the Digest?

Yes

VIKRAMAJIT SEN, J.

1. This Appeal arises from dismissal of an application bearing IA No.2520/2010 filed under Order VII Rule 11 in CS(OS) No.1054/2004. The Application was for dismissal of the Suit being barred by law of limitation.

2. The said Suit is for recovery of amount of ₹ 20,20,311/- along with interest. The Plaintiff in his Suit avers that he had extended loans to the Defendant on various dates commencing from 17.07.1996 to 30.03.2000. All these amounts were paid by cheques. The Defendant made some payments towards discharge

of his liability to the Plaintiff from 25.10.1997 till 06.05.1999. It is stated that no payment was made after that date, however, the Appellant offered to transfer his car bearing DL-1CG-0189 and Chassis No.101964 and Engine No.001022 for a consideration of ₹ 5,60,000/- which amount was to be set off against the total loan amount due. An Agreement to Sell for the said car was also entered into by the parties on 28.08.2001 to transfer the ownership of the same to the Plaintiff after getting it cleared from the hypothecation made with the Citibank.

3. In this Suit, the pleadings are complete and the Issues have been struck. It is at this stage that the Appellant filed his Application for rejection of suit on the ground of the bar of limitation as, according to the Defendant, the Suit has been filed three years after the last payment made by the Plaintiff as averred in the Plaint itself. He further states that the Agreement for the sale of the car make no mention of any loan transaction and thus cannot be construed as an acknowledgment.

4. The Defendant has objected to the Application firstly that it has been filed at a belated stage and secondly that in light of a specific Issue having been framed regarding the plea of limitation. Reliance has been placed on behalf of the Plaintiff on ***ITC Limited -vs- Debts Recovery Appellate Tribunal***, AIR 1998 SC 634 where their Lordships have opined "that the fact that issues have been framed in the suit cannot come in the way of consideration of this

application filed by the appellant under Order 7, Rule 11, CPC". The learned Single Judge has held that the Complaint narrates a series of transactions between the Plaintiff and Defendant No.1 by way of advancing of loans and repayment by the Defendant. These transactions and the relevant dates are reflected in the Books of Account of the Plaintiff and are admissible under Section 34 of Evidence Act, 1872 and on those premises the suit is within limitation, and thus the Plaintiff has a right to prove his case in the Trial, and he cannot be non-suited at a preliminary stage.

5. We are in complete agreement with the reasoning of the learned Single Judge. The power vested in a Civil Court to reject a complaint on a preliminary examination is very harsh and has to be used with circumspection. In *Abdul Gafur -vs- State of Uttarakhand*, (2008) 10 SCC 97 their Lordships have held that every person has an inherent right to bring a civil suit to a Civil Court unless specifically barred by any law. Their Lordships while referring to another Judgment of Supreme Court, namely, *Church of North India -vs- Lavajabhai Ratanjibhai*, (2005) 10 SCC 760 further held thus –

It is trite that the rule of pleadings postulates that a complaint must contain material facts. When the complaint read as a whole does not disclose material facts giving rise to a cause of action which can be entertained by a civil court, it may be rejected in terms of Order 7 Rule 11 of the Code. Similarly, a plea of bar to jurisdiction of a civil court has to be considered having regard to the

contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety and the court would not be justified in determining the question, one way or the other, only having regard to the reliefs claimed dehors the factual averments made in the plaint.

6. We find it pertinent to mention, in the present context, the provision of Code of Civil Procedure, 1908 ('CPC' for short) which provides for framing of preliminary issues. Order XIV Rule 2(2) of CPC reads as follows:-

Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

7. Thus, an issue pertaining to lack of jurisdiction or the suit being barred by any law, may be framed as a preliminary issue only where evidence is not required to be recorded, that is, where it is a pure question of law. Where these questions are questions of both facts and law, the decision on these issues has to await at least the reception of evidence in this regard. No doubt, it is true

and pragmatic for obvious reasons that when the Pleint on the face of it is barred by any law, or when the Court finds no cause of action being made out from the averments made in the plaint, or when a cause of action is sought to be created by means of clever drafting, the plaint must be rejected at the earliest. However, a party cannot be muzzled at the outset where contentious and triable issues have been raised in the pleadings.

8. In the present case, the Pleint alleges various loan transactions at different points in time. Unless it is determined on the basis of the evidence, which the Court is yet to receive, the question of limitation cannot be answered by the Court. The Pleint, as it stands, discloses a cause of action and is not patently barred by any law. The reliance on ***ITC Limited*** is also misplaced. In the said Judgment, the Hon'ble Supreme Court was vexed with a case where the Pleint alleged 'fraud' which was done to create a cause of action and overcome the bar of Order VII Rule 11. After going through the averments made in the Pleint, their Lordships were of the view that "the alleged non-movement of goods by the seller could be due to variety of tenable or untenable reasons. The seller may be in breach of the contract but that by itself does not permit the Plaintiff to use the word 'fraud' in the Pleint and get over the Objections that may be raised by filing an application under Order VII Rule 11." In light of these facts, the Court held that an application under Order VII Rule 11 may lie even at a stage where

issues are framed and the suit is proceeding for trial and also allowed the Application for Rejection of Plaintiff.

9. In this case, no such ground has been made before the Single Judge or before us that would require the court to reject the Plaintiff before giving the Plaintiff an opportunity to prove his case at trial. It has also been pointed out that the Appellant had filed a similar application before the Trial Court bearing IA No.11600/2006 which was dismissed as withdrawn. We are of the opinion that the later Application, which is the subject matter of the present Appeal, is filed reagitating the points taken in the earlier Application to stall the Trial from proceeding. We are in agreement with the observation of the learned Single Judge that the subject Application is not only belated but is also actuated by an ulterior motive to delay the disposal of the case.

10. Appeal is devoid of merits and is dismissed with costs of ₹20,000/-. Pending applications are also dismissed.

(VIKRAMAJIT SEN)
JUDGE

(A.K. PATHAK)
JUDGE

July 30, 2010
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