

**\*IN THE HIGH COURT OF DELHI AT NEW DELHI**

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**Date of decision: 30<sup>th</sup> September, 2013**

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**RFA 51/2003**

**THE H.P.STATE COOP. BANK LTD.**

**..... Appellant**

Through: Mr. Sumant De, Mr. Vivek Agarwal  
& Mr. A.K. Mehta, Advs.

versus

**M/S VINOD KUMAR & CO. & ANR.**

**..... Respondents**

Through: Mr. P.S. Goindi, Advs.

**CORAM :-**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**RAJIV SAHAI ENDLAW, J**

1. The counsel for the appellant/plaintiff Bank states that the costs of Rs.10,000/- imposed on 9<sup>th</sup> September, 2013 while restoring the appeal have been paid.
2. The counsel for the respondents/defendants confirms the said fact but seeks an adjournment stating that the Trial Court records were not available with him and he needs to reconstruct the file.
3. The appeal was posted for hearing for today vide order dated 9<sup>th</sup> September, 2013 and this being already a ten years old matter cannot be adjourned further. The counsel for the respondents/defendants has not argued at his own risk.
4. The counsel for the appellant/plaintiff Bank has been heard.

5. The appeal impugns the judgment and decree dated 8<sup>th</sup> April, 2002 of the Court of the learned Addl. District Judge, Delhi of dismissal of Suit No.53/1996 filed by the appellant/plaintiff Bank for recovery of Rs.2,08,678.15p jointly and severally from the two respondents/defendants.

6. Notice of the appeal was issued. Vide order dated 9<sup>th</sup> September, 2003 the appeal was admitted for hearing. The counsel for the respondents/defendants has been appearing in the appeal since 28<sup>th</sup> May, 2010. The respondent/defendant no.2 Shri Vinod Kumar died during the pendency of the appeal and vide order dated 27<sup>th</sup> July, 2012 his legal heirs i.e. his widow, son and daughter were substituted in his place. The appeal was dismissed in default on 22<sup>nd</sup> January, 2013 but was restored vide order dated 9<sup>th</sup> September, 2013 on the application of the appellant/plaintiff Bank.

7. The appellant/plaintiff Bank had instituted the suit from which this appeal arises, pleading:-

- (a). that it is a registered Cooperative Society under the Himachal Pradesh Co-operative Societies Act, 1968;
- (b). that the respondent/defendant no.1 was a sole proprietorship concern of the deceased respondent/ defendant no.2 Shri Vinod Kumar;
- (c). that the respondents/defendants were having current account with the appellant/plaintiff Bank and had taken overdraft in the said account against their own cheques and against the clearing cheques which were later on bounced/dishonoured ;

- (d). that the respondents/defendants had agreed to pay interest at 25% per annum at monthly rest;
- (e). that after availing the overdraft facility in the current account from time to time, the respondents/defendants failed to comply with the terms & conditions of the said facility and also failed to keep sufficient amount and maintain the said overdraft account;
- (f). that the respondents/defendants failed and neglected to pay the outstanding amount;
- (g). that after taking into consideration all the debits and credits, at the time of institution of the suit a sum of Rs.2,08,678.15p was overdue and outstanding from the respondents/defendants with interest up to 30<sup>th</sup> April, 1996;
- (h). that the respondents/defendants made withdrawal over and above the sanctioned limit by presenting fake cheques which were ultimately dishonoured resulting into huge overdues;
- (i). that the appellant/plaintiff Bank invoked Section 72 of the Himachal Pradesh Co-operative Societies Act, 1968 and initiated arbitration proceedings before the Registrar, Co-operative Societies Himachal Pradesh against the respondents/defendants; and,
- (j). that however in view of objections raised by the other defaulters in similar arbitration proceedings, with respect to maintainability of such arbitration proceedings and to avoid

multiplicity of litigation, the appellant/plaintiff Bank was invoking the civil remedy (impliedly meaning that the arbitration proceedings were abandoned).

8. The respondents/defendants contested the suit by filing a written statement *inter alia* denying the entire transaction and each and every averment in the plaint.

9. Replication was filed by the appellant/plaintiff Bank but the same was merely in reiteration of the contents of the plaint and denial of the contents of the written statement, without stating any further substantial fact.

10. On the pleadings of the parties, the following issues were framed in the suit on 7<sup>th</sup> January, 1998:-

“(i). *Whether the plaint does not disclose any cause of action and is liable to be rejected u/O 7 R.11 CPC? OPD*

(ii). *Whether the suit is bad for non-joinder and mis-joinder of parties? OPD*

(iii). *Whether the suit is barred by limitation? OPD*

(iv). *Whether the suit has been signed, verified and instituted by a competent person? OPP*

(v). *Whether the plaintiff is entitled to recover the suit amount? OPP*

(vi). *Whether the plaintiff is entitled to interest, if so, at what rate and for what period? OPP*

(vii). *Relief.”*

11. The appellant/plaintiff Bank examined its Senior Law Officer and General Power of Attorney holder to prove the due signing and verification of the plaint and its official Shri Rakesh Kumar. The respondent/defendant no.2 examined himself.

12. The learned Addl. District Judge by the impugned judgment has found/observed/held:-

- (i). issues No.1 to 4 in favour of the appellant/plaintiff Bank and against the respondents/defendants;
- (ii). that the only witness examined by the appellant/plaintiff Bank in support of its claim namely Shri Rakesh Kumar was only an Office Assistant and had not proved that he was empowered to sanction any overdraft facility as claimed by him;
- (iii). the appellant/plaintiff Bank had not proved any request of the respondents/defendants for grant of overdraft facility;
- (iv). that the Statement of Account placed on record was not certified under the Bankers Books Evidence Act, 1891 and was inadmissible in evidence;
- (v). that the dispatch or service of the only letter dated 14<sup>th</sup> May, 1994 of demand had not been proved; in fact the said letter had also not been proved;

- (vi). that the only other document produced was a photocopy of a specimen signature card but which had also not been proved in accordance with law;
- (vii). that the appellant/plaintiff Bank had not even mentioned the account number of the respondents/defendants with the appellant/plaintiff Bank;
- (viii). that the signatures on the photocopy of the specimen signature card were illegible;
- (ix). that the appellant/plaintiff Bank had failed to prove that any account was ever opened by the respondents/defendants with the appellant/plaintiff Bank;
- (x). the Statement of Account did not mention to which account it pertained;
- (xi) mere mention of M/s Vinod Kumar & Co. on the Statement of Account was not sufficient to fasten the liability on the respondents/defendants;
- (xii) that the appellant/plaintiff Bank had not examined any of its principal officers to prove that the account was opened;
- (xiii) that the examination of the Office Assistant Mr. Rakesh Kumar did not prove the case of the appellant/plaintiff Bank; and,
- (xiv) there was no evidence on record that the respondents/defendants ever opened an account, operated or

availed of any overdraft facility from the appellant/plaintiff Bank.

Accordingly the suit was dismissed.

13. The counsel for the appellant/plaintiff has argued that the learned Addl. District Judge having held under issue No.3 that the claim of the appellant/plaintiff Bank was within time, has contradicted herself in holding that the appellant/plaintiff Bank had not proved the opening of the account.

14. A perusal of the discussion under issue No.3 shows that the decision thereunder is on the basis of the averments in the plaint of the appellant/plaintiff Bank, and not on the basis of any evidence. The learned Addl. District Judge while deciding issue No.3 has held that as per the averments in the plaint the current account was opened on 5<sup>th</sup> July, 1993 and since the suit had been filed on 17<sup>th</sup> May, 1996 i.e. within a period of three years from the date of the “alleged sanction of overdraft facility in respect of that facility” hence could not be said to be barred by limitation. I therefore do not find the present to be a case of any contradiction.

15. The counsel for the appellant/plaintiff Bank has next argued that besides placing a photocopy of the letter dated 14<sup>th</sup> May, 1994 on record and on which during the evidence of Shri Rakesh Kumar, Office Assistant of the appellant/plaintiff Bank, Ex.PW2/2 was put, the appellant/plaintiff Bank has also placed on record a photocopy of a postal receipt; it is contended that the learned Addl. District Judge has thus erred in holding that there was no proof of dispatch of the Demand Notice dated 14<sup>th</sup> May, 1994.

16. The present are civil proceedings which are to be decided not from pleadings alone or from documents on record but from proof thereof. The witness of the appellant/plaintiff Bank has in his examination-in-chief not referred at all to the said postal receipt. On the contrary when he was asked in his cross examination whether he had placed on record any proof as to how the said letter dated 14<sup>th</sup> May, 1994 was dispatched, he deposed that the appellant/plaintiff had not placed any such proof. Merely because a photocopy of a postal receipt is found on record is no ground to read the same in evidence when the witness of the appellant/plaintiff Bank has not only not proved the same but has feigned ignorance of the same.

17. The counsel for the appellant/plaintiff Bank has next contended that the presumption of service from the postal receipt has to be drawn.

18. The said argument also is without any merit. The counsel himself is unable to state as to in what circumstances and under what law presumptions are to be drawn. For drawing of such a presumption, the parameters as laid down by the Full Bench of the Gujarat High Court in ***Memon Adambhai Haji Ismail Vs. Bhaiya Ramdas Badiudas*** AIR 1975 Guj 54 and Division Bench of this Court in ***Surender Bala Vs. Sandeep Foam Industries P. Ltd.*** 85 (2000) DLT 478 have to be established in evidence i.e. that the postal receipt pertains to the document which is stated to have been dispatched, that it was the said document which was put in an envelop bearing the correct address of the addressee, and that the said letter was put in the post. Nothing of the sort exists in the present case.



19. The counsel for the appellant/plaintiff Bank has next contended that the specimen signatures card Ex.PW2/1 bears the account number as 1211 and the learned Addl. District Judge is in error in holding that the account number had not been disclosed. The counsel however fairly admits that the Statement of Account on which Ex.PW2/3 has been put does not bear the account No.1211.

20. The counsel also states that the signatures on Ex.PW2/1 are visible and not illegible, as observed in the impugned judgment.

21. At the outset it may be stated that Ex.PW2/1 is a photocopy and there is nothing to show that the original of the same was brought to the Court; rather the witness in the cross examination stated that the original was lying with the Enforcement Department. The witness of the appellant/plaintiff Bank did not identify the signatures on Ex.PW2/1 as that of the deceased respondent/defendant no.2. On the contrary when the counsel for the appellant/plaintiff Bank in the cross examination of the deceased respondent/defendant no.2 showed him Ex.PW2/1, he denied that the signatures thereon was his. The said document even though a photocopy thus remains unproved. Further, mere specimen signatures card cannot be proof of opening of an account when the same is denied.

22. No other argument has been raised by the counsel for the appellant/plaintiff Bank.

23. I have otherwise perused the evidence. The appellant/defendant Bank has indeed failed to prove its case. The only witness examined by the appellant/plaintiff Bank on the merits of its claim, in his cross examination,

admitted (i) that the account opening form had not been produced; (ii) that he did not know the respondent/defendant No.2 personally; (iii) that the Statement of Account did not bear the signatures of the respondent/defendant no.2 in token of the receipt of the same; (iv) that the Statement of Account had not been sent to the respondents/defendants; (v) that no documents relating to the transactions w.e.f. 2<sup>nd</sup> July, 1993 till 30<sup>th</sup> April, 1996 had been produced; the reason given therefor was that the same were with the Enforcement Department; (vi) that except for the specimen signature card and the Statement of Account there was no document with the appellant/plaintiff Bank to show that the facility of overdraft had been given by the appellant/plaintiff Bank to the respondents/defendants; and, (vii) that the criminal case was registered against two of the employees of the appellant/plaintiff Bank pertaining to the opening of the bank account of National Fruit Agency with the appellant/plaintiff Banks.

24. The respondent/defendant no.2 in his examination-in-chief stated (i) that he was working with M/s National Fruit Agency as a Clerk at the relevant time; (ii) that he used to go to the appellant/plaintiff Bank to deposit cash or cheque in the appellant/plaintiff Bank as per the directions of his employer M/s National Fruit Agency; (iii) that he had never opened any account at any point to time in the appellant/plaintiff Bank and never taken any overdraft facility from the appellant/plaintiff Bank; (iv) that he was never having any business under the name and style of M/s Vinod Kumar & Co.; and, (v) that his employers in collusion with appellant/plaintiff Bank had falsely implicated him;

25. Nothing could be elicited by the appellant/plaintiff Bank in the cross examination of the respondent/defendant No.2.

26. In the aforesaid state of evidence, no error can be found in the conclusion drawn by the learned Addl. District Judge of the appellant/plaintiff Bank having not proved its claim at all.

27. There is thus no merit in the appeal which is dismissed.

28. The counsel for the respondents/defendants having not argued; no costs.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW, J**

**SEPTEMBER 30, 2013**

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