

THE HIGH COURT OF SIKKIM: GANGTOK
(Civil Appellate Jurisdiction)

Single Bench: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

R.F.A. No. 4 of 2019

Kuber Raj Rai,
Son of late P.M. Rai,
Aged about 57 years,
Resident of Pakyong,
P.O. and P.S. Pakyong,
East Sikkim.

..... **Appellant**

Versus

1. Saran Thapa,
Son of R.S. Thapa,
Resident of Middle Syari,
Near Central School,
P.O. & P.S. Gangtok, East Sikkim.

2. Ranjit Rai,
Son of Late K.B. Rai,
Resident of Namcheybong,
Rai Goan, P.O. & P.S. Pakyong,
East Sikkim.

..... **Respondents**

**Appeal under Order XLI Rules 1 and 2 of
the Code of Civil Procedure, 1908.**

Appearance:

Mr. S.S. Hamal, Advocate for the appellant.

Mr. Sushant Subba, Advocate for the respondents no. 1 and 2.

Date of hearing : 20.08.2021

Date of judgment: 14.09.2021

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. This is a regular first appeal against the judgment and decree, both dated 28.02.2019, passed by the learned

District Judge, Special Division-I, Sikkim at Gangtok (the learned District Judge), whereby the Money Suit No. 165 of 2017 (the Money Suit) filed by Kuber Raj Rai, the appellant (plaintiff) was dismissed. The Money Suit was filed on 26.10.2017 against the two respondents, i.e., Saran Thapa (defendant no.1) and Ranjit Rai (defendant no.2). For clarity, they shall be referred to as plaintiff and defendants.

2. In the plaint, the plaintiff pleaded that in connection with a civil work, i.e., *“Mastic Alphabet and Repairing of Road Surface, Drain, etc., in between Rangpo - Ranipool (018.500 kms) under 13th Finance Commission during 2013-2014 of Government of India, Office of the Central Public Work Department, Matigara, Siliguri – 734001, Dist. Darjeeling”* (the civil work), the defendants had taken a loan of Rs.30,60,000/- from the plaintiff on various dates through separate money receipts as detailed in paragraph 1 of the plaint. On 1.10.2014, the defendant executed a document titled loan agreement (exhibit-5) in which they acknowledged the receipt of Rs.30,60,000/- as loan amount from the plaintiff and agreed to return it along with interest of Rs.5,00,000/- on or before 14.11.2014. In spite of the demands and assurances, the defendants failed to pay the amount of Rs.35,60,000/-. On 19.12.2014, the plaintiff sent a legal notice demanding payment within 15 days of its receipt. The defendants failed to comply with the legal notice. According to the plaintiff,

the cause of action for the suit first arose on 1.10.2014 when the document titled loan agreement was made and thereafter on 14.11.2014, when the defendants failed to pay the sum of Rs.35,60,000/- on expiry of fifteen days of the legal notice dated 19.12.2014 and continues till date. The plaintiff therefore prayed for recovery of Rs.35,60,000/- from the defendants jointly and severally for payment of interest @12% per annum on the said amount and cost of the suit.

3. On 27.12.2017, the defendants filed their written statements. They took various preliminary objections including the maintainability of the suit. They pleaded that the plaintiffs had not come with clean hands and had concealed material facts trying to mislead the court. It is stated that the defendant no.1 used to work as an assistant to the plaintiff. The defendant no.2 was the plaintiff's cousin and a government employee by profession. Whereas the plaintiff is a first-class contractor, the defendants had neither knowledge or experience nor the required documents and investment for pursuing contract works. The defendant no.1 was employed by the plaintiff and the defendant no.2 was sometimes approached by the plaintiff to help him with his miscellaneous works for his ongoing contracts. The plaintiff had promised the defendants verbally and in writing that in return for helping him out the plaintiff would monetarily compensate and reimburse them. It was asserted that the

plaintiff had himself undertaken the civil work and the defendants had been asked to help the plaintiff. The defendants had not taken any loan from the plaintiff and that, the four money receipts were not executed against the loan taken by them. The money receipts handed over by the plaintiff to the defendants were for paying wages of labourers, payment to suppliers and some paid to them as commission, compensation, and reimbursement for their health. The defendants were made to endorse on the loan agreement fraudulently, under coercion and on misrepresentation. It was alleged that the plaintiff was fraudulently trying to extort money from the defendants by misusing the documents submitted by the defendants as security with the plaintiff on good faith. The "suit" filed by the plaintiff against defendant no.1 under section 138 and 142 of the Negotiable Instrument Act, 1881 was rightly dismissed. The defendant no.2 received the legal notice in utter shock and thereafter, went to meet the plaintiff. The plaintiff apologetically assured him that he meant no harm or any court litigation. After proper verification of his fund account handled by the defendants, the plaintiff issued a proper receipt to the defendants discharging them of their liabilities.

4. On these pleadings, the learned trial court framed six issues. The plaintiff (PW-1) examined himself, Sukman Tirwa

(PW-2) and Kamlesh Kumar Gupta (PW-4). The defendants examined only themselves.

5. The learned District Judge held that the plaintiff had put up a false case and that the defendants had not taken the loan of Rs.30,60,000/-. The learned District Judge also held that the four money receipts were not receipts for the loan as sought to be made out. The learned District Judge further held that the plaintiff had executed the undertaking (exhibit-A) agreeing to pay Rs.70,00,000/- to the defendants in three instalments. The learned District Judge held that the loan agreement dated 1.10.2014 (exhibit-5) was a sham document prepared at the instance of the plaintiff for his convenience. It was held that the plaintiff had issued the discharge certificate dated 29.12.2014 (exhibit-B) discharging the defendants of any liability, even if there was any which they owed towards the plaintiff. In the circumstances, the learned District Judge held that the suit was not maintainable and the plaintiff was not entitled to any relief.

6. Mr. S.S. Hamal, learned counsel for the plaintiff, vehemently argued that the judgment and decree of the learned District Judge is perverse, expressly illegal, contrary to materials on record and suffers from wrong appreciation of facts and law. The observations about issues no. 2, 3 and 6 are incorrect and contrary to material on record. It was urged that the learned District Judge failed to appreciate that the respondent had not

denied the execution of the loan agreement dated 1.10.2014 (exhibit-5) or its content and that their only contention was that it was executed by them under coercion, fraud and undue influence. The learned District Judge failed to appreciate that there was no connection between exhibit-A and exhibit-5 which were exhibited at different times for different context. That, exhibit-A was undated and contained unlawful consideration. It was also urged that evidence which came in cross-examination was not considered by the learned District Judge. Mr. S.S. Hamal relied upon **S. Bhattacharjee vs. Sentinel Assurance Co. Ltd.**¹.

7. During the pendency of the present appeal, the appellant had filed I.A. no. 3 of 2021 on 1.3.2021 under Order XLI Rule 27 read with section 151 of the Code of Civil Procedure, 1908 (CPC) (the application) for additional evidence, i.e., application of one Sonam Sherpa dated 17.5.2019 under the Right to Information Act, 2005 to the office of the Central Public Works Department; reply dated 17.05.2019 of the Public Information Officer of the Central Public Works Department to Sonam Sherpa and copy of the FIR dated 1.10.2019 lodged by the plaintiff before the Station House Officer, Pakyong Police Station bearing GD entry no. 24 dated 8.11.2019. The defendants have filed their written objection to the said application submitting that it is misconceived, not maintainable

¹ AIR 1955 Calcutta 594

and unnecessary. It is also contended that allowing it would cause prejudice to the defendants as the documents is sought to be produced to fill up the lacuna in the case. In support of this contention Mr. S.S. Hamal relies upon ***Union of India vs. Ibrahim Uddin and Another***² and ***Uttaradi Mutt vs. Raghavendra Swamy Mutt***³.

8. Mr. Sushant Subba, learned counsel for the defendants, submits that under section 63 of the Indian Contract Act, 1872 every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such promise, or may accept instead of it any satisfaction which he thinks fit. Exhibit-B, therefore, in terms of section 63 of the Indian Contract Act, 1872 rarely dispenses with the performance in settlement of all the dues discharging the defendants of all the liabilities.

9. Evidently, the plaintiff has based his case on two sets of documents, i.e., the money receipts (exhibit-1 dated 18.06.2014, exhibit-2 dated 25.6.2014, exhibit-3 dated 21.6.2014 and exhibit-4 dated 30.6.2014) and loan agreement dated 1.10.2014 (exhibit-5). The plaintiff also relies upon a cheque for an amount of Rs.35,60,000/- dated 14.11.2014 issued by defendant no.2 in favour of the plaintiff (exhibit-11). This cheque was examined by the learned Chief Judicial

² 2012 8 SCC 148

³ AIR 2018 SC 4796

Magistrate, East & North Sikkim at Gangtok, in its judgment dated 3.10.2016, in a proceeding initiated by the plaintiff against the defendant no.1 in Private Complaint Case No. 12 of 2015. The learned Chief Judicial Magistrate found the case of the plaintiff highly improbable and acquitted the defendant no.1 under section 138 of the Negotiable Instruments Act, 1881. The money receipts states that the sum specified therein was received from the plaintiff in connection with the civil work issued in the name of contractor Bhaichung Bhutia. The money receipts are signed by both the defendants. Sukman Tirwa (PW-2) and Kamlesh Kumar Gupta (PW-4) are witnesses to exhibit-1. Indra Prasad Rai and Sukman Tirwa (PW-2) are witnesses to exhibit-2 and exhibit-3. Sukman Tirwa (PW-2) and Deepraj Pradhan are witnesses to exhibit-4. Indra Prasad Rai and Deepraj Pradhan were not examined by the plaintiff.

10. According to the plaintiff, these money receipts totalling to Rs.30,60,000/- were issued by the defendant no.1 for cash received as a loan on various dates. Sukman Tirwa (PW-2) as well as Kamlesh Kumar Gupta (PW-4) also stated that the money receipts were for the loan given to the defendants by the plaintiff. None of the money receipts specify that they were receipts for the loan taken by the defendants. During his cross-examination, the plaintiff admitted that the money receipts were regarding payment made as per exhibit-A. Exhibit-A was a

document exhibited by the defendants and under the signature of the plaintiff, who admitted signing it. It is also signed by the defendants as well as two witnesses Indra Prasad Rai and Bijay Chettri. Neither Indra Prasad Rai nor Bijay Chettri were examined by the defendants. The contents of Exhibit-A reads that the plaintiff had agreed to pay Rs.70,00,000/- to the defendants for providing him the civil work. It was to be paid in three instalments of Rs.6,00,000/- on 19.06.2014, Rs.5,00,000/- on 24.6.2014 and the remaining Rs.59,00,000/- on the day of site visit by the officials from CPWD, Matigara, Siliguri. If the admission of the plaintiff regarding exhibit-A is to be considered, then his version in the plaint was completely different.

11. On a reading of the plaint, it is evident that there was some understanding between the plaintiff and the defendants about the civil work. The plaint does not disclose for what purpose such a huge amount of loan was taken by the defendants nor the details of the cash transaction. The plaintiff in his evidence on affidavit also does not enlighten on this aspect. However, on reading the loan agreement (exhibit-5) filed by the plaintiff there is a suggestion that after the plaintiff decided to ask Bhaichung Bhutia to revoke the general power of attorney dated 18.06.2014 purportedly given to him it was the defendants who had agreed to execute the contract work. However, neither Bhaichung Bhutia was examined, nor the

general power of attorney dated 18.6.2014 exhibited by the plaintiff. Although, a series of paper trail seems to have been created, except for the specific amounts mentioned in the documents exhibited by the plaintiff as well as the defendants there is no money trail of such huge amounts. As rightly concluded by the learned District Judge there is certainly more than meets the eye. The story of the plaintiff does not inspire confidence. It is quite evident that the plaintiff has withheld much more than what has been disclosed selectively to make out a case. The pleadings in the plaint do not reflect the facts in the same manner as in the documents exhibited by the plaintiff. If, as admitted by the plaintiff, it is true that the money receipts were regarding payments made as per exhibit-A, then the plaintiff's case as put up in the plaint cannot be sustained. There is a clear disconnect between the four money receipts (exhibits-1 to 4) and the loan agreement (exhibit-5). If the money receipts are allowed to speak for itself the plaintiff's deposition seeks to provide evidence to show that it was not meant to be money receipts but loan documents which is impermissible. The plaintiff desirous of the court to give judgment as to his legal right and the defendants liability to pay the alleged loan amount must prove on the existence of facts which he asserted in the plaint. The plaintiff failed to do so. Therefore, although it is seen that the defendants had signed the loan agreement (exhibit-5), this court has no hesitation to uphold the findings of the learned

District Judge that the plaintiff has made out a false case by claiming that he had paid the concerned amounts indicated in the money receipts (exhibits-1 to 4) as loan. It is also quite clear that the loan agreement (exhibit-5) is a sham document prepared at the instance and for the convenience of the plaintiff as held by the learned District Judge.

12. A perusal of the discharge certificate (exhibit-B) exhibited by the defendant also supports the finding of the learned District Judge about the loan agreement (exhibit-5) being a sham document and the doubt it had on the case put up by the plaintiff. The discharge certificate (exhibit-B) in the last paragraph clearly states that the defendant no.2 had settled all the dues on behalf of the defendants and that the plaintiff had “.....no more claims from them and hereby discharge them of all their liabilities”. The defendants in the written statements had pleaded that on receipt of the legal notice, the defendant no.2 had approached the plaintiff who apologetically assured him that he meant no harm and after verification of his fund amount handled by the defendant issued exhibit-B discharging them of their liabilities. The plaintiff in his evidence on affidavit deposed that the discharge certificate (exhibit-B) is a manufactured, false and forged document created by the defendants. During his cross-examination, the plaintiff admitted his signature thereon but volunteered to say that it was a blank document signed by

him. He also stated that Exhibit-B was not a genuine document; it was not in his original letter pad and out of the three cell phone numbers mentioned therein only the last number belonged to him. The plaintiff also cross examined the defendants. The defendant no.1 admitted that exhibit-B was in the custody of defendant no.2. He denied that exhibit-B was a manufactured document. The defendant no.2 stated the facts as narrated in the written statements about exhibit-B. He denied the suggestion that exhibit-B was a manufactured document and except the signature of the plaintiff, the rest of the contents was filled by him. He also admitted that he did not know who filled exhibit-B and where it was prepared. The defendant no.2 however, volunteered to say that exhibit-B was given to him by the plaintiff in his house at Pakyong. This document too is not clear. The defendants have failed to explain the contents thereof. This court has upheld the findings of the learned District Judge that no loan had been taken by the defendants from the plaintiff in the manner sought to be projected. If it was so, then the discharge certificate (exhibit-B) couldn't have been related to the loan which was not taken. Quite evidently, the discharge certificate (exhibit-B) seems to be a document prepared purportedly in settlement of whatever disputes the plaintiff and the defendants had in connection to their understanding about the civil work which has been suppressed by the plaintiff as well as the defendants. These facts known to the plaintiff as well as

the defendants have not been disclosed. The issues are answered accordingly. The plaintiff has failed to prove that the defendants had taken a loan of Rs.30,60,000/- from him. The four money receipts, although executed by the defendants, did not concern the loan purportedly taken by the defendants from the plaintiff. The defendants have not been able to establish that the loan agreement (exhibit-5) was executed by them under coercion, fraud or undue influence. Although, it is clear that the discharge certificate (exhibit-B) was signed by the plaintiff, the defendants have not been able to clearly prove the contents thereof. Similarly, although it is certain that the signature in the written undertaking (exhibit-A) was of the plaintiff, the defendants have not been able to prove the contents thereof.

13. At this juncture, it is important to decide the application filed by the plaintiff on 01.03.2021. The plaintiff urges that it had come to his knowledge that one Sonam Sherpa had applied under the Right to Information Act, 2005 and procured certain information after the impugned judgment which led to the plaintiff filing a First Information Report before the Pakyong Police Station on 01.10.2019. The plaintiff states that these documents, viz., the application made by Sonam Sherpa dated 17.05.2019; the reply dated 17.05.2019 by the Public Information Officer and even the FIR filed by him, strangely; were not within his knowledge and therefore even after exercise of due

diligence could not have produced it during the trial. There is not even an attempt to disclose who is Sonam Sherpa and how the plaintiff procured his application and reply. Curiously, the information sought by Sonam Sherpa was about the civil works and the reply was that the work order was not issued from the office of the Central Public Works Department and that the signature on the tender document purportedly of the then Superintendent Engineer did not match. This information makes the case even more curiouser. The relevancy of the documents and whether it is required to pronounce judgment are two vital considerations to such an application. At the threshold there is a bar in taking additional evidence. The exception carved out is on exceptional circumstances and the relief is discretionary. The plaintiff has failed in all counts. The documents sought to be produced at this stage would not help this court to pronounce judgment. The plaintiff has also failed to establish an exceptional case. The case of the plaintiff was that the defendants had taken a loan from him but not returned. The additional documents would not have any relevancy to decide if the loan had in fact been taken and if the defendants were required to return it. The application is rejected.

14. It is evident that both the plaintiff as well as the defendants have not stated the entire truth before the court, although they were in the know of it. The reliefs have been

sought by the plaintiff alone which cannot be granted due to the manner he has chosen to approach a court of law.

15. In the circumstances, it is held that the plaintiff is not entitled to the reliefs prayed for.

16. The appeal is dismissed.

17. No order as to costs.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes/No**
Internet : **Yes/No**

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