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IN THE HIGH COURT OF DELHI AT NEW DELHI

RFA NO. 65 OF 2005

Judgment reserved on: 8th September, 2009
Judgment delivered on: 14th September, 2009

SARR FREIGHTS CORPORATION & ORS. Appellants
! Through: Mr. Pawan Mathur, Advocate

Versus

\$ **SURYA ENTERPRISE PVT. LTD.** Respondent
! Through: Ms. Beenashaw N. Soni, Advocate

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. Whether Reporters of local papers may be allowed to see the Judgment?(No)
2. To be referred to the Reporter or not?(No)
3. Whether the judgment should be reported in the digest?(No)

JUDGMENT

P.K.BHASIN, J:

This appeal is by the unsuccessful defendants whose application for leave to defend the suit under Order XXXVII of the Code of Civil Procedure, 1908 (for short 'CPC') filed against them by the respondent-plaintiff has been rejected by the Court of Additional District Judge vide order dated 03/11/2007 and a decree for a sum of Rs. 7,70,000/- with pendente lite and future interest thereon @ 18% p.a. has been passed.

2. The relevant facts for the purpose of the present appeal are that the respondent herein (which shall hereinafter be referred to as 'the plaintiff') doing the business of financing had on 27/06/2003 given a loan of Rs. 5,00,000/- to appellant no. 1, which was arrayed as defendant no.1 in the suit and shall be referred to, as such in this judgment also, vide cheque dated 27/06/2003. The loan was given for two months and was repayable with interest @ 18% p.a. The defendants paid interest on the loan amount upto 27/08/03 vide cheque dated 01/07/03. However, the period of return of the loan amount was extended by the plaintiff for a further period of two months and the defendants paid interest for the extended period vide cheque dated 01/09/03 and once again the period of re-payment of the loan was extended for another three months. The last extension given by the plaintiff was upto 31st January,2004 and for that period also the payment of interest was made by defendants in advance vide cheque dated 03/11/03 and after the expiry of the loan re-payment period the defendant no.1 gave to the plaintiff one cheque no. 476217 dated 31/01/2004 for Rs.5,00,000/- being the principal loan amount. That cheque was presented to the defendant's bank for encashment but the same was not honoured as the defendant no.1 had issued 'stop payment' instructions to its bank. Thereafter, the defendant no.1 and two of its partners Sunil Kapoor and S.M.Kapoor were called upon by the plaintiff to make the payment of the dishonoured cheque by serving upon them a demand notice dated 29/02/2004 though an

advocate but neither they made any payment nor sent any reply to that notice and consequently the plaintiff filed the suit under Order XXXVII CPC for recovery of Rs. 7,70,000/- which included a sum of Rs.5,00,000/- as the principal loan amount and Rs. 2,70,000/- on account of interest. In the suit the plaintiff impleaded the partnership firm i.e. defendant no.1 and three other persons as its partners, namely, Sunil Kapoor(as defendant no.2), S.M.Kapoor(as defendant no.3) and Smt. Swaran Lata Kapoor(as defendant no.4). The suit was instituted on 31/01/07.

3. On being served with the summons of the suit defendants entered appearance in the trial Court and in due course they also sought leave to defend the plaintiff's suit as required under Order XXXVII Rule 3(5) CPC by filing an application supported by an affidavit of defendant no.2. Defendant no.3 also moved an application under Order 1 Rule 10(2) CPC for striking off his name as he was not the partner of defendant no.1 Firm. That application was allowed by the trial Court vide order dated 03/11/07.

4. In the affidavit filed by defendant no.2 in support of the application for leave to defend it was admitted that the plaintiff had given a loan of Rs.5,00,000/- to defendant no.1 as claimed in the suit. It was also admitted that interest @ 18% p.a. was payable. It was claimed that in May, 2003 at the request of the plaintiff Company payment of Rs.5,00,000/- vide cheque no. 458147 had been made to the plaintiff's sister concern and then in June, 2003 the plaintiff gave a loan of

Rs.5,00,000/- to defendant no.1. Then again at the request of the plaintiff the defendant no.1 vide cheque no. 470287 dated 30/09/03 made another payment of 5,00,000/- and at that time it was represented by the plaintiff that that payment to its sister concern shall be treated as the re-payment of the loan which had been given to the defendants in June,2003 but the plaintiff did not honour that understanding and the defendants also under bona fide mistake kept on paying interest to the plaintiff. In fact, the plaintiff should have treated the payment of Rs.5,00,000/- made by it to defendant no.1 in June, 2003 as re-payment of the money which the defendant no.1 had paid to the plaintiff's sister concern in May, 2003. Regarding the issuance of the dishonoured cheque in question the defendants claimed in October/November 2003 on false representation made by the plaintiff the defendant no.1 was constrained to issue a post dated cheque dated 31st January, 2003 even though the loan in question had already been re-paid by defendant no.1 and the understanding between the parties at that time was this cheque was given as a part of security and was to be returned back to the defendant no.1. In respect of the dishonouring of the cheque dated 31st January,2004 the plea taken by the defendants was that after certain irregularities were noticed in the business of defendant no. 1 after the issuance of that cheque in October/November,2003, instructions were issued to its bank not to honour any cheque which might have been issued by it including the aforesaid cheque for Rs.5,00,000/- which had

been issued in advance in favour of the plaintiff and plaintiff was also telephonically requested not to present that cheque but despite that request the cheque was presented and the same got dishonoured. It was also pleaded in the affidavit that the deponent had initially protested against such kind of transaction but he was assured that there was nothing wrong in such kind of transactions particularly when the payments were being made to the sister concern of the plaintiff. Thus, according to the defendants the dishonoured cheque in question was without consideration.

5. The plaintiff in its reply to the defendants' application for leave to defend while not denying the alleged payments to its sister concern by the defendants denied the allegation that it had asked the defendants to make any payment to its sister concern towards re-payment of the loan given by the plaintiff to the defendants in June, 2003. It was pleaded that the defendants had independent dealings with the plaintiff's sister concern also and the payments made to the sister concern were towards discharge of the defendants' liability towards the plaintiff's sister concern and so the payments made to that concern could not be considered as the payments to the plaintiff towards re-payment of the loan advanced by it.

6. The learned trial Judge dismissed the application of the defendants for leave to defend the suit and consequently the suit was decreed in favour of the plaintiff vide order dated 03/11/2007. It was observed by

the trial Court that the plea taken by the defendants that on the instructions of the plaintiff they had made the payment of the loan amount to M/s Surya Finlease Pvt. Ltd., a sister concern of the plaintiff cannot be believed because it was a commercial transaction and without any written instructions from the plaintiff the payment ought to have been made to the plaintiff and not to any other party. The plaintiff firm sent a legal notice dated 29/02/2004 to the defendants, but the defendants had not given any reply to that notice.

7. The defendants felt aggrieved by the order of dismissal of their application for leave to defend and so preferred the present appeal questioning the correctness of the trial Court's decision.

8. Learned counsel for the appellants urged two points during the course of hearing of the appeal. The first point raised is with regard to the limitation. The learned counsel for the appellant submitted that the suit of the plaintiff was barred by limitation since the plaintiff is relying upon the issuance of cheque dated 31st January, 2004 as the payment towards the principal amount and is seeking the benefit of Section 19 of the Limitation Act but that cheque admittedly got dishonoured and, therefore, there was no payment made by the defendants to entitle the plaintiff the benefit of Section 19 of the Limitation Act. In support of this argument learned counsel cited one judgment of Patna High Court reported as **AIR 1971 Patna 278** and one judgment of Bombay High Court reported as **1956 Bombay 553**. These two judgments do not help the

appellants even though it has been held therein that when the cheque given by a debtor towards payment of the principal amount or interest gets dishonoured fresh period of limitation would not start from the date of that cheque. Learned counsel for the respondent, on the other hand, had cited two judgments of this Court reported as **136 (2007) DLT 223** and **AIR 1998 Delhi 80** wherein this Court had held that even if the cheque given by a debtor towards payment of the principal or interest is dishonoured on presentation to the bank the creditor would still get the benefit of commencement of fresh period of limitation as provided under Section 19 of the Limitation Act. In view of these two judgments of this Court the argument of the counsel for the appellants that the suit was time barred cannot be accepted. The defendants had admittedly given a cheque dated 31st January, 2004 to the plaintiff towards payment of the principal loan amount and, therefore, fresh period of limitation commenced from 31st January, 2004 as provided under Section 19 of the Limitation Act. The suit having been filed on 31st January, 2007 was, therefore, not time barred.

9. Even on the merits of the defence plea of repayment of the loan amount by the defendants as claimed by them in their application for leave to defend I am not inclined to accept that plea to be a bona fide plea entitling them to get the leave to defend. I am in full agreement with the decision of the learned trial Court that the plea that loan was repaid by the defendants by making payment to the plaintiff's sister

concern is without any substance and has been raised only to prolong the litigation.

10. I, therefore, do not find any merit in this appeal which is accordingly dismissed.

P.K.BHASIN,J

SEPTEMBER 14, 2009
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