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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA 594/2002

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17th November, 2011

ANIL KUMAR SUNIL KUMAR Appellant
Through : Mr. Ateev Mathur, Mr. Kanishk
Ahuja and Mr. S. Anand, Advocates.

versus

ASHA RASTOGI Respondent
Through : Ms. Rachna Agrawal and Ms. Payal
Jain, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of Code of Civil Procedure, ('CPC') is to the impugned judgment of the trial Court dated 28th May, 2002. By the impugned judgment, the suit for recovery of loan granted with interest was dismissed, though, the appellant/plaintiff proved the claim of loan and interest, inasmuch as the trial Court held that the suit was barred by limitation and also because the provision of Section 69 of the Partnership Act, 1932 was held to be not complied with.

2. The facts of the case are that the appellant/partnership firm gave a loan to the respondent/defendant of Rs. 5 lakhs by means of a cheque dated 25th November, 1989. The loan was to carry interest @12% per annum simple. There was no specific period fixed for the loan, and it is pleaded that the respondent/defendant from time to time only postponed payment of loan but made various payments towards interest. The plaintiff was forced to serve a legal notice dated 21st April, 1994, which failed to invoke the desired response. The subject suit thus came to be filed.

3. In the written statement, the respondent/defendant did not deny receipt of the loan but however claimed that it was agreed that no interest was payable. It was also contended, at the time of final arguments in the suit, though there was no such issue, that the suit was barred by limitation.

4. There are three main issues, therefore, to be decided in the present appeal. One is as to whether the suit is barred by limitation. The second issue is as to whether the suit is barred by Section 69 of the Partnership Act, 1932. The third issue is as to whether there was any agreement to pay interest.

5. So far as, the second issue of the suit being barred under Section

69 of the Partnership Act, 1932 the Trial Court has held that though, the appellant/plaintiff filed an exhibited, proof of registration of the firm under Section 69 of the Partnership Act, 1932 by virtue of Form B Ex.PW1/1, however, there was no Form A which was filed which showed that Sh. Anil Kumar Jain, the partner of the appellant/plaintiff firm through whom the suit was filed, was a partner in the firm.

6. Along with this appeal, the appellant has filed an application under Order 41 Rule 27 CPC for taking on record the certified copy of Form A to show that Sh. Anil Kumar Jain was the partner in the firm.

7. In my opinion, the present is a fit case in the interest of justice to allow the application under Order 41 Rule 27 CPC inasmuch as otherwise it was proved that the firm was registered. Infact, additional evidence is also required for this Court to have clarity on the issue as to whether Sh Anil Kumar Jain was shown or not shown as a partner in the firm which was otherwise registered under Section 69 of the Partnership Act, 1932. Therefore, I allow the application under Order 41 Rule 27 CPC being C.M. No. 1474/2002 and take on record the certified copy of Form A which shows that Mr. Anil Kumar Jain was a partner in the firm. This document is a public document and therefore the same need not be proved.

8. The finding of the trial Court is accordingly set aside that the suit is barred by Section 69 of the Partnership Act, 1932 and it is held that Sh. Anil Kumar Jain was a partner in the firm and through whom the suit is thus properly filed/instituted.

9. Thus, next issue is the first issue as to whether the suit was barred by limitation. The trial Court has referred to Article 19 of the Limitation Act, 1963 to hold the suit as barred by limitation because it was held that the suit for recovery of loan has to be filed within three years from the date when the loan is granted. In my opinion, this finding of the trial Court is also incorrect inasmuch as it is not that in all cases of loan the suit has to be filed within three years of grant of the loan inasmuch as a loan can be given for more than three years and therefore it cannot be urged that suit for recovery of loan has necessarily to be filed only within three years. What has to be seen are the facts and circumstances of each case as to the period for which the loan is granted. In the present case, it has come on record that the loan was not granted for any fixed period, and therefore, recovery of such loans would fall under Article 113 of the Limitation Act, 1963 because cause of action for such loan arises when the cause of action accrues and the cause of action accrues when a demand for payment is made.

10. In the present case, a legal notice of demand was sent on 21st April, 1994 and the suit was filed on 15th February, 1996. The suit is therefore filed within three years of the demand having been made. The suit has therefore very much been filed within limitation. In any case, the suit is not barred by limitation because the respondent/defendant has made payments towards the debt/interest and which is an acknowledgment in terms of Section 19 of the Limitation Act. The appellant/plaintiff exhibited the statement of account as Ex.PW1/10 in the trial Court, and which statement of account shows various entries from the years 1991 to 1995. All these entries are payments by cheques by the respondent towards the debt due/interest. There is no cross-examination on any entry of the statement of account by the respondent/defendant and therefore I hold that the suit is within limitation also on account of the payments having been made towards the amount due by means of cheques as reflected in the statement of account, Ex.PW1/10.

11. The final issue is as to whether the respondent/defendant agreed to pay interest. No doubt there is no written agreement, however, admittedly the parties are not in such close relations, such as father and son or in-laws or very close friends, that the loan would not have carried interest. The appellant plaintiff has deposed that interest was infact payable. A civil case is decided on balance of probabilities and

balance of probabilities show that there was an agreement to pay interest, which in any case is most reasonable @12% per annum simple. I, therefore, hold that there was an agreement to pay interest @ 12% per annum simple.

12. Finally, it is also argued by learned counsel for the respondent that the payments which were made as have been reflected in the statement of account, are infact towards the principal amount. When asked whether the respondent/defendant while making the payment had said that the amount paid should first be taken towards principal, learned counsel for the respondent/defendant was unable to point out and nor is there any such letter on the trial Court record that the payments made will be first taken towards principal amount. Ordinarily in law, as per the provisions of Sections 59 to 61 of the Contract Act, 1872, unless otherwise specified, payments which are made by a debtor to a creditor can be taken by the creditor towards accrued interest and only when the accrued interest is exhausted would the payments be taken towards the principal due. I thus hold that the appellant is entitled to adjust the payment first towards the accrued interest. Reference in this behalf is also invited to the judgment of the Supreme Court in the case of ***Gurpreet Singh v. Union of India*** **2006(8)SCC457**.

13. I, therefore, hold that the respondent/defendant was liable to pay interest @12% per annum.

14. Before proceeding to pass the operative portion of this appeal I must note that there was a part decree on admissions against the respondent/defendant for an amount of Rs.1,15,000/-, and which amount has been paid to the appellant/plaintiff during the pendency of the suit. Accordingly, while passing a decree for a sum of Rs.4,99,000/- along with pendente lite and future interest @ 12% per annum simple, it is also observed that the appellant/plaintiff will be bound to give adjustment of the amount paid of Rs.1,15,000/- by adjusting it against the total amount of principal and interest due on the date when the payment was made by the respondent/defendant by first adjusting the payment towards accrued interest if any. It is informed that the amount of Rs.1,15,000/- has been paid in installments and therefore when each installment was paid, the same will be adjusted towards the total amount due on that date from the respondent/defendant in terms of the present judgment and decree. Appeal is allowed. Impugned judgment is set aside. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J.

NOVEMBER 17, 2011/*AK*