

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

+ **RFA No.215 /2010**

% **12th December, 2011**

THE FEDERAL BANK LIMITED Appellant
Through: Mr. P.I. Jose, Advocate.

versus

M/S. RIWAZ CREATIONS & ORS. Respondents
Through: Mr. Kannan Kapur, Advocate for
respondent Nos.9 and 10.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 9.12.2009. By the impugned judgment, the trial Court dismissed the suit of the appellant/plaintiff-bank (although the appellant/plaintiff proved the necessary security documents on record) on the ground that the authority to file the suit was not shown to have been

properly proved on record. This finding is given with respect to issue No.2 in para 13 of the impugned judgment which reads as under:-

“13. Findings on issue no.2- The onus to prove this issue was on the plaintiff whose case is that suit has been filed by Sh. V.M. Unnikrishnan and his Power of Attorney was marked as Ex.PW-1/1, though the original of the same not produced. The said Sh. V.M. Unnikrishnan was not examined by the plaintiff and thus issue is not proved in favour of the petitioner in deciding the issue. Hence, this issue is decided against the plaintiffs and in favour of defendants.”

2. In my opinion, impugned judgment is clearly illegal on this finding of lack of authority for filing of the suit inasmuch as the power of attorney was duly filed and exhibited as Ex.PW1/1 . The defendants failed to appear in the suit and were proceeded exparte. There was therefore no objection to exhibition of power of attorney, and which would accordingly be proved in view of the decision of the Supreme Court in the case of ***R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Anrs. (2003) 8 SCC 752.*** Thus, the authority to file the suit was proved in view of Ex.PW1/1 and it was not necessary for the attorney to personally come and depose. In any case, this issue is no longer res integra in view of the decision of the Supreme Court reported as ***United Bank of India Vs. Naresh Kumar AIR 1997 SC 3*** and as per which judgment once the suit of

the bank is contested to the hilt then the very fact that the suit is contested to the hilt is enough to hold that the suit is validly instituted in terms of Order 29 CPC. I therefore set aside the finding of the trial Court and hold that the suit was validly instituted and was filed by a duly authorized person.

3. Counsel for the respondent Nos.9 and 10 and who were defendant Nos.9 and 10 in the suit, argued that the suit was barred by time. Counsel for the respondent Nos.9 and 10 argued that an issue was framed being issue No.3 as whether the suit was barred by time and therefore it is urged that in view of Section 3 of the Limitation Act, 1963, the trial Court ought to have held that the suit is barred by time in view of the admitted facts as set out in the plaint. The counsel for the respondent Nos.9 and 10 relied upon paras 21 and 22 of the plaint which read as under:-

“21. The cause of action against the defendants No.1 to 3 arose on 08.02.2001 when they executed loan papers and availed the credit facilities. The cause of action arose against the defendants No.4 to 8 on 24.07.2000 when they pledged their securities in favour of the plaintiff for the loan availed by defendant No.1. The cause of action against defendants No.9 and 10 arose on 26.08.1999 when they executed the guarantee documents and stood as the personal guarantors to the loan availed by defendant No.1. The cause of action also arose on all days when defendant No.1 operated its account and availed the facilities. The cause of action is continuous and subsisting.

22. The defendants No.1 to 3 executed the last loan
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documents on 08.02.2001. Hence limitation against them is expiring on 08.02.2004. Defendants No.4 to 8 pledged the NSCs on 24.07.2000. All the NSCs are maturing from December 2003 onwards. Hence, there is ample litigation time available against them. Limitation against defendants No.9 and 10 expires on 12.01.2007 as the Lawyer notice invoking the guarantees was issued on 12.01.2004. Hence the suit is filed within limitation period.”

4. In reply, learned counsel for the appellant has referred to me the guarantee in question which has been exhibited before the trial Court as Ex.PW1/16 to argue that the guarantee is a continuing guarantee. It is also argued that guarantee has never been withdrawn/revoked, and the subject suit which has been filed for the amount which is less than the agreement of guarantee of ₹ 7 lacs is thus within limitation. Learned counsel for the appellant argued that the suit is also within limitation inasmuch as respondent Nos.9 and 10 had pledged fixed deposit receipts which have been adjusted on 30.3.2002/24.3.2003 and only whereupon cause of action would have accrued against respondent Nos.9 and 10. It is argued that the liability of a guarantor only arises on default of the principal borrower, and in the present case the principal borrower can be said to have defaulted either when the amounts were adjusted pursuant to the default on 30.3.2002/24.3.2003 or actually when the notice dated 12.1.2004 was sent to the defendants asking

the principal borrower to make the payment within 15 days. It is argued that in law the cause of action arises against the guarantors only on the default of the principal borrower not to comply with the legal notice dated 12.1.2004 and thus the suit filed is well within limitation.

5. In my opinion, there is merit in the arguments as raised on behalf of the appellant inasmuch as the subject suit was filed for recovery of ₹ 6,40,497.36/- (i.e. below the amount of ₹ 7 lacs for which respondent Nos.9 and 10 agreed to make themselves liable) on the basis of the letter of guarantee executed by the respondent Nos.9 and 10 which has been exhibited as Ex. PW1/16 and which shows that it is a continuing guarantee for an amount of ₹ 7 lacs with further interest thereon. This continuing guarantee was never withdrawn or revoked by the respondent Nos.9 and 10 and therefore the cause of action against respondent Nos.9 and 10 has, at the very best, arisen on 30.3.2002/24.3.2003 when the fixed deposit receipts, which were pledged by the respondent Nos.9 and 10, were adjusted towards the liability. The suit has been filed on 9.2.2004 i.e. within three years of the adjustment. In fact, the suit is within limitation because liability of the guarantor arises only when the principal borrower commits a default, and in the present case the principal borrower committed default in not making the

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payment after not complying with the demand raised by the legal notice dated 12.1.2004. The suit filed on 9.2.2004 was thus definitely within limitation.

6. In view of the above, the appeal is allowed. The impugned judgment and decree dated 9.12.2009 is set aside. Suit of the appellant/plaintiff stands decreed for a sum of ₹ 6,40,497.36/- alongwith pendente lite and future interest @ 12% per annum simple till payment. In case, the appellant/plaintiff -bank has received amounts after the filing of the suit then the appellant/plaintiff-bank will be bound to give adjustment for such amounts which have been received by it.

7. Appeal is allowed and disposed of accordingly. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

VALMIKI J. MEHTA, J

DECEMBER 12, 2011

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