

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

+ **RFA No.17/2012**

% **9th January, 2012**

SMT SUSHMA JAIN Appellant
Through Mr. O.P. Aggarwal, Advocate.

versus

M/S. LOVENEET BUILDERS PVT LTD Respondent
Through Mr. K.N. Kataria, Sr. Advocate with
Mr. K.P. Mavi, Advocate.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CAVEAT NO.24/2012

Learned counsel appears for the caveator. He has been heard. Caveat stands discharged.

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1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial court dated 13.10.2011 decreeing the suit of the respondent / plaintiff for Rs.14,28,000/- along with pendente lite and future
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interest @ 10% p.a.

2. The facts of the case are that the respondent / plaintiff had given a loan of Rs.14,50,000/- to the appellant / defendant vide cheque no.211727 dt. 22.6.1995. The appellant / defendant thereafter executed a Memorandum of Understanding (MOU) dated 4.7.2000 acknowledging that she had taken a loan of Rs.14,50,000/- and that she had paid Rs.6 lakhs to the respondent / plaintiff as stated in the MOU and undertook to pay the balance amount of Rs.8,50,000/- with interest @ 2% per month. The appellant / defendant paid thereafter last cheque towards interest for September 2000 of Rs.17,000/- on 16.11.2000. Since no further amounts were paid, the respondent / plaintiff issued a legal notice dated 16.7.2003. Even this legal notice came to yield no result and therefore the subject suit for recovery of moneys came to be filed.

3. The appellant / defendant in the written statement took the defence that there was no transaction of loan between the parties but really the appellant / defendant had agreed to sell a property to the respondent / plaintiff, and for which certain advance amounts were stated to be received. It was pleaded that since the agreement came to an end, the appellant /

defendant had agreed to return the amount, and it was this amount which was the subject matter of transaction between the parties. It was pleaded that the complete amount was paid back.

4. The trial court after the pleadings were completed framed the following issues:

- “1. Whether suit is bad for mis-joinder of parties? OPD.
2. Whether defendant had executed Memorandum of Understanding on 04.07.2000? OPP.
3. Whether defendant had paid amount to plaintiff as mentioned in para no.2 of reply on merits of the Written Statement? OPD.
4. Whether plaintiff is entitled to decree in the sum of ₹14,28,000/- or any other sum? OPP.
5. Whether the plaintiff is entitled to interest @24% p.a. or any other rate and for what period? OPP.
6. Relief.”

5. The trial court qua main issues No.2, 3 and 4 held that the MOU dated 4.7.2000 was in fact executed between the parties. The trial court held that if the appellant denied her signatures on the MOU, she was the best person to prove her signatures, including by calling the handwriting expert. The trial court has also held that there was no agreement to sell alleged between

the parties as neither any such agreement to sell was filed nor were the details of any property mentioned which was the subject matter of the agreement to sell. The trial court disbelieved the allegation of the appellant / defendant of having made payment of the principal amount essentially in cash inasmuch as the payments which were stated to have been made by cash, were not supported by the receipts of the transactions. The appellant / defendant claimed to have made payments on 13 occasions out of which only 2 payments were stated to be made by cheques. So far as the 11 payments in cash are concerned, the trial court has rightly found that the same should be disbelieved because no proof was filed of such payments. So far as the two cheque payments are concerned, one is of Rs.1 lakh dated 15.5.1997 and another is of Rs.6 lakhs dated 6.7.2000. So far as the first payment of Rs.1 lakh is concerned, no proof whatsoever was filed on behalf of the appellant / defendant in the trial Court, and so far as the second amount of Rs.6 lakhs is concerned, the respondent / plaintiff admits to have received the same, and mention of which has been duly made in the MOU dated 4.7.2000.

6. I completely agree with the findings and conclusions of the trial court

with respect to there not being any transaction of agreement to sell or that the appellant / defendant had made payments on 11 occasions in cash without any documentary proof. Further, as per Section 106 of the Evidence Act, 1872 if a thing is in the special knowledge of a person, it is such person who has to prove that fact. What and where were the admitted signatures appearing on various unquestioned documents such as bank document of the appellant, was in the personal knowledge of the appellant / defendant, and the appellant /defendant therefore ought to have summoned a handwriting expert who would have compared the disputed signatures on the MOU dated 4.7.2000 with the admitted signatures of the appellant / defendant appearing on various unquestioned documents including bank documents, which were in the personal knowledge of the appellant. The appellant / defendant having failed to do so cannot be said to have discharged the onus of proof which had shifted upon her once the respondent / plaintiff proved the MOU dated 4.7.2000 by the testimonies of the witnesses to the MOU. Further, it is not believable that payment of huge amounts varying between ₹13,000/- and ₹2 lakhs on as many as 11 occasions would be made in cash without taking any receipts thereof. A civil suit is decided on balance of probabilities and the balance of

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probabilities in the present case show that the appellant / defendant had taken the loan and had failed to repay back the same.

7. There is, however, one aspect in the impugned judgment, which calls for interference, though the said aspect has not been argued on behalf of the appellant. This aspect is the claim of the high rate of interest @ 24% p.a. A Division Bench of this Court in the case of ***Pandit Munshi Ram Associates v. DDA, 2010 (9) AD (Delhi) 313*** has held that courts have power to interfere with high rates of pre-suit interest once the same is found to be against public policy. In the present case, learned senior counsel for the respondent / plaintiff has been more than fair in stating that the respondent / plaintiff is agreeable to accept interest @12% p.a. simple from the date of execution of the MOU.

8. In view of the above, the appeal is allowed to the limited extent of granting a decree of ₹8,50,000/- to the respondent / plaintiff along with interest @ 12% p.a. simple from 4.7.2000 till the date of the filing of the suit, however, pendente lite and future interest will remain @10% p.a. as granted by the trial court.

9. At this stage, learned counsel for the appellant says that the appellant

will pay the decretal amount as ordered by this Court within a period of four months and therefore, execution be not pursued for this period. Learned senior counsel for the respondent / plaintiff, on instructions, has no objection to such a course of action subject to the fact that it is also agreed that in case the appellant / defendant does not make payment of the decretal amount as per today's judgment within a period of four months from today, then, the concession granted in the rate of interest by today's judgment will stand withdrawn, and the appellant / defendant will be then liable to pay pre-suit interest from 4.7.2000 till the date of the filing of the suit @18% p.a. simple. Counsel for the appellant agrees.

10. In view of the aforesaid statement of the counsel for the parties, the appeal is disposed of as compromised by recording the undertaking of the appellant / defendant to make payment of the decretal amount as per today's judgment within four months, and failing which the pre-suit interest would be @18% p.a. simple. Parties are left to bear their own costs. The appeal is disposed of accordingly.

VALMIKI J. MEHTA, J.

JANUARY 09, 2012

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