

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

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Date of decision: 20th November, 2013

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RFA 94/2005

G.R. ARYA (THROUGH LRS)

..... Appellant

Through: Mr. S.N. Kalra, Adv.

Versus

VEENA BANGA & ORS.

.....Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 20.11.2004 of the Court of Additional District Judge (ADJ), Delhi of dismissal of suit No.74/2002 filed by the appellant / plaintiff for recovery of Rs.7,08,500/- along with interest and for permanent injunction. Notice of the appeal and of the application for interim relief was issued though no interim relief granted. The appeal was on 18.07.2006 admitted for hearing and the Trial Court record requisitioned. The appellant / plaintiff filed CM No.12139/2006 under Order 41 Rule 27 of the CPC and which was on 08.09.2006 ordered to be taken up along with the appeal. The appellant / plaintiff died during the pendency of the appeal and notice of the said

application was issued to respondents / defendants. Though the said respondents / defendants filed a reply to the application but failed to appear. Vide order dated 20.12.2012 the legal representatives of the appellant / plaintiff were substituted in his place. The appeal was on 01.05.2013 dismissed in default of appearance of the appellant / plaintiff or his counsel. An application for restoration was filed when it was felt that instead of mechanically issuing notice thereof, it should be found whether there was any merit in the appeal to justify keeping it pending any longer. On going through the records, *prima facie* there did not appear to be any merit in the appeal. Accordingly, the counsel for the appellant / plaintiff was given an opportunity to address finally on the appeal. The counsel for the appellant / plaintiff has been heard.

2. The deceased appellant / plaintiff instituted the suit from which this appeal arises pleading:

- (a) that the appellant/plaintiff had from time to time advanced a loan of Rs.7,08,500/- to Sh. Bhupinder Banga husband of the respondent /defendant No.1 and father of the respondent / defendants No.2&3 Sh. Rohit Banga and Ms. Preeti Banga;

- (b) that Sh. Bhupinder Banga committed suicide on 16.03.1995 leaving the three respondents / defendants as his only legal heirs and a huge estate *inter alia* comprising of a three storey shop with basement at F-1/7, Madangiri, New Delhi;
- (c) that after the demise of Sh. Bhupinder Banga, his legal heirs declared themselves as insolvent;
- (d) that the appellant / plaintiff was one of the plaintiffs in suit No.2/1996 which was filed against the legal heirs of Sh. Bhupinder Banga; however the said suit was dismissed and RCA No.5/2000 preferred against the judgment of dismissal was also dismissed by the learned ADJ on 03.04.2001; RSA No.164/2001 preferred against the same was also dismissed with the observation:

“In case, the legal heirs have inherited any part of the estate of the debtor, the only remedy available to the appellants, in my view, is to file appropriate proceedings for recovery of the debt but the provisions of the Provincial Insolvency Act cannot be resorted to against the said persons”.

- (e) hence, the suit from which this appeal arises, was being filed;

- (f) that the appellant / plaintiff has been pursuing his case from the very beginning and Section 14 of the Limitation Act was quoted;
- (g) that the appellant / plaintiff had lent monies to Sh. Bhupinder Banga vide cheques dated 15.09.1989, 28.01.1991, 26.09.1992 (two), 08.06.1994 (three), 21.02.1995 (two) and by cash on 15.02.1989, 01.02.1990 and 20.02.1995;
- (h) that amounts had accrued to the appellant / plaintiff on maturity of the committees on 15.09.1992, 10.01.1993, 16.04.1994, 11.08.1994 and 01.01.1995 but the same were also retained by Sh. Bhupinder Banga as loan;
- (i) that the respondents / defendants being the legal heirs of Sh. Bhupinder Banga were liable to repay the said total loan amount of Rs.7,08,500/- to the appellant / plaintiff;
- (j) that the respondents / defendants had agreed to sell the shop of Sh. Bhupinder Banga and of which complaint had been made to the police;

- (k) that the cause of action for the suit had accrued to the appellant / plaintiff on 05.07.1996 when the appellant / plaintiff sent legal notice to the respondents / defendants; that the appellant / plaintiff had filed a petition under Section 9 of the Provincial Insolvency Act which was rejected on 06.01.2000 and the appeals thereagainst were dismissed on 03.04.2001 and 09.07.2002.

Accordingly, on 23.08.2002, the suit from which this appeal arises was filed for recovery of Rs.7,08,500/- with interest at 24% per annum and for permanent injunction restraining the respondents / defendants from alienating, encumbering or parting with possession of the shop aforesaid.

3. The respondents / defendants contested the suit by filing a written statement pleading:

- (i) that the suit was time barred;
- (ii) denying that any loan was advanced by the appellant / plaintiff to the deceased Sh. Bhupinder Banga;

- (iii) admitting that the appellant / plaintiff had filed a petition under Section 16 of the Provincial Insolvency Act for declaring the respondents / defendants to be insolvent;
- (iv) admitting the deceased Sh. Bhupinder Banga to have left the shop aforesaid;
- (v) denying that the respondents / defendants had filed any proceedings for declaring themselves as insolvent; and
- (vi) confirming the Agreement to Sell the shop aforesaid and contending that they were fully entitled to do so.

4. The appellant / plaintiff filed a replication reiterating his case.

5. A perusal of the Trial Court file shows that no interim injunction sought by the appellant / plaintiff for restraining the respondents / defendants from selling the shop aforesaid was granted and vide order dated 05.07.2004, the following issues were framed in the suit:

- 1. *Whether the present suit is time barred? OPP.*
- 2. *Whether there is no cause of action for filing the suit against the defendants and in favour of the plaintiff? OPD.*

3. *To what amount, if any, the plaintiff is entitled to recover from the defendants? OPP.*
4. *Whether the plaintiff is entitled to the injunction prayed for in this suit? OPD.*
5. *Relief.”*

6. The appellant / plaintiff examined himself only in support of his case. The respondent / defendant No.1 appeared as the sole witness on behalf of the respondents / defendants.

7. The learned ADJ vide the impugned judgment has dismissed the suit finding / observing / holding:

- (i) that the appellant / plaintiff had pleaded having given loan to the predecessor-in-interest of the respondents / defendants in installments from 15.09.1989 till 11.03.1995;
- (ii) that the appellant / plaintiff had sought to prove the suit instituted on 23.08.2002 to be within limitation by referring to Section 14 of the Limitation Act and to the observation in the judgment dated 09.07.2002 in RSA No.164/2001 supra giving

liberty to the appellant / plaintiff to file the appropriate proceedings for recovery of the debt claimed by him;

- (iii) that the appellant / plaintiff had however not filed the pleadings of the insolvency petition finally disposed of by judgment dated 09.07.2002 in RSA No.164/2001;
- (iv) even the date of filing of the said insolvency petition had neither been pleaded nor proved;
- (v) that the subject matter of the suit i.e. for recovery of money and permanent injunction, could not be said to be the same as the subject matter of the proceedings before the insolvency Court;
- (vi) that since the two proceedings were different, the appellant / plaintiff could not get the aid of Section 14 of the Limitation Act in computing the period of limitation; and,
- (vii) that in view of the decision on the issue of limitation, the other issues were also decided against the respondents / defendants.

8. I have perused the Trial court record.

9. The suit was not accompanied by any application under Section 14 of the Limitation Act. Though the appellant / plaintiff in the plaint quoted Section 14 but has not even pleaded that he was prosecuting the insolvency proceedings in good faith in Court which, from defect of jurisdiction or other acts of like nature was unable to entertain it. The appellant / plaintiff in his affidavit by way of examination-in-chief also has not stated the date of institution of the insolvency proceedings though from the number (Suit No.2/1996) thereof, it appears to have been instituted in the year 1996. No pleadings of the said proceedings are also found on record. The appellant / plaintiff did not even prove the judgment of the insolvency Court dismissing the said proceedings. There is however found on record a copy of the judgment dated 03.04.2001 of the Court of ADJ of dismissal of first appeal being RCA No.5/2000 preferred against the dismissal of the insolvency proceedings and which shows; i) that even the said appeal was filed beyond the period prescribed for filing thereof; and, ii) that though an application for condonation of delay was filed but there were no particulars or reasons therein and the application for condonation of delay was dismissed and resultantly the appeal was also dismissed.

10. I also find on the Trial Court record a copy of the order dated 09.07.2002 of this Court in RSA No.164/2001 stated to have been preferred against the aforesaid judgment. The said judgment also records that the counsel for the appellant / plaintiff had not been able to give any reasons for the delay in filing the first appeal. This Court did not set aside the judgment of the ADJ dismissing the appeal as time barred but merely observed that the Provincial Insolvency Act nowhere provided for institution of a petition for declaring the legal heirs of a deceased debtor as insolvent and that it was not even the case of the appellant / plaintiff that the respondents / defendants were the debtors of the appellant / plaintiff within the meaning of the said Act. The appeal was thus held to be misconceived and was dismissed.

11. Before considering the aspect whether the appellant / plaintiff can get the benefit of Section 14 of the Act, it is worthwhile to mention that the judgment dated 03.04.2001 in RCA No.5/2000 and the order dated 09.07.2002 in RSA No.164/2001 do not even show the appellant / plaintiff to be a party thereto. The title of the said proceedings is Raghbir Singh & Ors. Vs. Veena Banga & Ors. There is thus nothing to show that the appellant / plaintiff indeed was a party to those proceedings. Even ignoring the aforesaid material factor, if the legal question whether the benefit of

insolvency proceedings can be obtained under Section 14 of the Limitation Act in a subsequent suit for recovery of money were to be examined, I find the answer to be in the negative.

12. As far back as in *Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari* AIR 1951 SC 16, it was held that there could be no exclusion of time occupied by insolvency proceedings which clearly was not for the purpose of obtaining the same relief. It was held that the relief sought in insolvency is different from the relief sought (in a suit for recovery of money); in insolvency proceedings an adjudication of the debtor as insolvent is sought with the vesting of all his estate and administration of it by the Official Receiver for the benefit of all the creditors; it may be that ultimately in insolvency proceedings (the petitioner) may be able to realize his debt wholly or in part but this is a mere consequence or result; not only is the relief of a different nature in the two proceedings but the procedure is also widely divergent.

13. This Court in *Anil Pratap Singh Chauhan Vs. Onida Savak Ltd.* AIR 2003 Delhi 252, relying on the aforesaid and considering a plethora of other

judgments applied the principle to also proceedings for winding up of a company which were held to be akin to insolvency proceedings.

14. Thus the very premise on which the appellant/plaintiff seeks to aver the suit to be within limitation is erroneous.

15. There is another aspect of the matter; for Section 14 of the Limitation Act to apply pleading and proof of good faith is essential. The Division Bench of this Court in *Debjoyti Gupta Vs. Indiabulls Securities Ltd.* 202 (2013) DLT 563 has held that if a party seeks the benefit of exclusion which is permissible in accordance with any law akin to Section 14 of the Limitation Act, the onus is upon such party to clearly plead and prove the attendant facts and circumstances and in the absence of any pleading, argument is without force. Reference in this regard may also be made to *Nina Garments Pvt. Ltd. Vs. Unitech Ltd.* 196 (2013) DLT 57, *Alliance Paints & Varnish Works Pvt. Ltd. Vs. Hari Kishan Gupta* 168 (2010) DLT 591 and *Susanne Lenatz Vs. C.J. International Hotels Ltd.* MANU/DE/8192/2007 where it was held that it is obligatory under Order 7 Rule 6 of the Code of Civil Procedure, 1908 for a plaintiff to specifically plead such an exemption in the plaint and in the absence thereof, the Court

under Section 3 of the Limitation Act would be required to dismiss/reject the suit if otherwise barred by limitation. In ***Paras Ram Vs. Sheoji Ram*** MANU/DE/1282/2010, this Court has held a separate application under Section 14 is not mandatory to avail the benefit thereunder. Though some of the High Courts in ***Binodilal Vs. Satyendra Singh*** AIR 1956 MP 57, ***Patel Babu Lal Pranal Brothers Vs. Pameric Export International, Cochin*** AIR 1999 Kerala 355 and ***Union Bank of India Vs. Suresh Bhailal Mehta*** AIR 1997 Gujarat 48 appear to have taken a different view but in the light of the judgments aforesaid of this Court, I am bound thereby though may observe that if the essential ingredients of Section 14 are found to be pleaded whether in the plaint or by way of a separate application, mere non reference thereto would not come in the way of the Court giving the relief thereunder.

16. There is neither pleading nor any proof of good faith. The appellant / plaintiff wants exclusion of the time during which RCA and RSA aforesaid were pursued. The appellant / plaintiff has however not even filed the judgment of the insolvency Court. There is nothing to show that the appellant / plaintiff was *bona fide* or in good faith inspite of well reasoned judgment of the Insolvency Court advised to pursue the matter further in first appeal and in second appeal. Moreover, the first appeal was dismissed

not on merits but as barred by time. The second appeal against the said dismissal was also dismissed. Once the appellant / plaintiff has already been found to have no sufficient ground for condonation of delay in filing the first appeal and upon the second appeal having been dismissed, the said order has attained finality, the question of it being held in these proceedings that the appellant / plaintiff was pursuing the first appeal and the second appeal in good faith does not arise.

17. Thus, whichever way one looks at, there is no merit in this appeal.

18. The application of the appellant/plaintiff under Order 41 Rule 27 of the CPC is to place on record documents in support of his claim on merits and which documents have no bearing on the aspect of limitation. This appeal being also dismissed on the ground of the suit claim of the appellant/plaintiff being barred by time, there is no need to deal with the said application concerning the merits of the claim of the appellant/plaintiff.

19. The appeal is accordingly dismissed. However, I refrain from imposing any costs on the appellant / plaintiff.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

NOVEMBER 20, 2013/‘gsr ’..