

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

+ **RSA No.34/2014**

% **6th May, 2014**

SMT. LAL KAUR

..... Appellant

Through: Mr. Navjot Kumar, Advocate.

Versus

SH. SHIV CHARAN

..... Respondent

Through: Mr. Sahil Dhawan, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.1997/2014 (condonation of delay of 463 days)

1. In spite of the fact that respondent has been served for the last date and he appeared through counsel before the Registrar on 17.4.2014, yet, no reply has been filed and since there is no opposition to the application, this application for condonation of delay of 463 days is allowed. Application is also allowed because appellant is a poor widow lady of about 70 years and she states that she was a victim of misguidance by her earlier Advocate. Considering the facts of the present case which have been

detailed in the main judgment below, I find that the present is a fit case for condonation of delay more so in view of the ratio of the judgment of the Supreme Court in the case of *N. Balakrishnan Vs. M. Krishnamurthy AIR 1998 SC 3222* that there is some amount of negligence when condonation of delay is prayed for but that itself is not sufficient for dismissing the application for condonation of delay unless and until there is want of good faith on behalf of the applicant.

Application for condonation of delay is therefore allowed and disposed of.

+ FAO No.34/2014 and C.M. No.1996/2014 (stay)

2. This Second Appeal is filed impugning the judgment of the first appellate court dated 5.7.2012 by which the first appellate court accepted the appeal filed by the plaintiff against the judgment of the trial court dated 27.4.2010 which had dismissed the suit for recovery of Rs.2 lacs alongwith interest @ 24% per annum simple filed by the respondent/plaintiff against the appellant/defendant.

3. Counsel for the respondent at the outset on the first call stated that he wanted time to file reply to the application for condonation of delay as also the appeal, however considering the facts of the present case, adjournment was declined including for the reason that in an appeal no reply

is required to be filed but the appeal is argued on the basis of the trial court record. After the matter was passed over, a new excuse is given that the counsel for the respondent is not well, and which reason was not given when the matter was passed over on the first call and therefore it is clear that adjournment is being prayed as a matter of strategy and a tactic to delay and defeat the rights of the appellant/defendant. I have therefore heard the counsel for the appellant and after perusing the record am proceeding to decide the appeal.

4. The facts of the case are that the respondent/plaintiff filed a suit against the appellant/defendant for recovery of Rs.2 lacs alongwith interest @ 24% per annum. The amount of Rs. 2 lacs was stated to be loan given to the appellant/defendant by the respondent/plaintiff. A decree for permanent injunction was also sought against the defendant from transferring, alienating or parting with possession of property bearing no.16/291-E, Tank Road, Bapa Nagar, Karol Bagh, New Delhi. The case of the respondent/plaintiff was that he gave a cash loan of Rs.2 lacs on 6.8.2002 to the appellant/defendant and for which purpose an 'ikrarnama'(Ex.PW1/A)/acknowledgment deed was signed by the appellant/defendant admitting to the receipt of the loan of Rs.2 lacs and payment of interest @ 24%. Respondent/plaintiff claimed that the

appellant/defendant did not return the loan amount and consequently the suit came to be filed. As per the plaint, respondent/plaintiff stated that the ikrarnama dated 6.8.2002 was signed by the appellant/defendant in the presence of two witnesses, namely Sh. Ram Kishan and Sh. Phool Singh.

5. Appellant is an aged widow of 70 years having one school going son, presently studying in college. Appellant/defendant denied ever having taken a loan from the respondent/plaintiff and stated that signatures on the ikrarnama have been forged and fabricated by the respondent/plaintiff. The ikrarnama dated 6.8.2002 was pleaded to be a bogus/non-genuine document. The appellant/defendant also denied that she intended to sell her house at Tank Road as was being pleaded by the respondent/plaintiff.

6. Trial court by its judgment dated 27.4.2010 dismissed the suit. Trial Court observes that the respondent/plaintiff introduced the third witness, namely Sh. Ashok Kumar, to the ikrarnama and whose presence is not shown either in the ikrarnama or mentioned in the plaint where reference is made only to two witnesses, Sh. Ram Kishan and Sh. Phool Singh. Trial court also refers to various other contradictions in the depositions of the respondent/plaintiff and his witness including of when the loan amount was asked for being refunded. Trial court also notes that a case of mortgaging

the house has been sought to be proved by the witnesses to the ikrarnama who have deposed as PW2 (Sh. Ram Kishan) and PW3(Sh. Phool Singh), however, there is not even a whisper of mortgaging the property of the appellant/defendant at Tank Road to the respondent/plaintiff in terms of the subject ikrarnama. Trial court has also made observations with respect to the fact that the stamp papers on which the ikrarnama is written was issued not to the respondent/plaintiff but went to one Sh. Ved Prakash who was a resident of 125, Piliri. Trial court also notes that respondent/plaintiff has not examined the author of the agreement i.e who drafted and wrote out the ikrarnama. The most relevant aspect in the judgment of the trial court is that it notes that respondent/plaintiff failed to show how he had with him a huge amount of Rs.2 lacs when admittedly as per the plaint the case of the respondent/plaintiff was that he was earning only two meals from his cloth business.

7. Following are the relevant observations of the trial court:-

“18. On careful analysis of the evidence on record, it is apparent that the plaintiff has made inconsistent statement with regard to the source of loan amount. The plaintiff in the para no. 1 of the plaint stated that he is earning two times meals from his cloth business. In the pare no.2 of the plaint, the plaintiff stated that he after making assessment regarding possibility of giving loan of Rs. 2,00,000/- to the defendant, he agree to advance the said loan to the defendant. In the para no. 4 of the plaint, the plaintiff stated that he had made

arrangement of Rs. 2,00,000/-. The plaintiff has not led any evidence as to how he arranged the said loan amount. The plaintiff in his affidavit came out with a new case that he after making arrangement from his hard earnings of Rs. 2,00,000/-, informed the defendant to receive the said loan amount. It was not the case of the defendant that he arranged the loan amount from his hard earnings. His case was that he was earning two times meal from his cloth business and he and arranged the loan amount. In these circumstances, it was incumbent upon the plaintiff to disclose the source of the amount advanced to the defendant. The plaintiff has not placed any evidence on record to show his earnings from his cloth business and his capacity to advance a loan of Rs. 2,00,000/- to the defendant on 06.08.2002.

19.The case of the plaintiff was that the loan of Rs. 2,00,000/- was advanced to the defendant on 06.08.2002 in the presence of Sh. Ram Kishan (PW-1) and Sh. Phool Singh (PW-1). It was further case of the plaintiff that a loan agreement Ex. PW-1/1 was executed between the parties and signed by PW-2 and PW-3 as attesting witness. It was further case of the plaintiff that he had visited the defendant on 30.11.2003 and 15.12.2004 with PW-2 and PW-3 and demanded the loan amount and the defendant refused to repay the said loan amount.

20.In his affidavit filed in evidence, the plaintiff (PW-1) deposed that Sh. Ashok Kumar (PW-4) was also present at the time of advancement of loan to the defendant on 06.08.2002. Sh. Ashok Kumar (PW-4) deposed that he was also present at eh time of advancement of loan on 06.08.2002. On bare reading of the plaint, it is clear from a reading of the plaint that the plaintiff has not stated that Sh. Ashok Kumar (PW-4) was present at the time of advancing loan amount to the defendant on 06.08.2002 besides PW-2 and PW-3. PW-2 and PW-3 have not deposed that PW-4 was present at the time of advancement of loan to eh defendant and execution of loan agreement dated 06.08.2002 Ex. PW-1/A.

21.Further, Sh. Ashok Kumar (PW-4) deposed in his affidavit that the plaintiff demanded the loan amount of Rs. 2,00,000/- many times in his presence. He further deposed that the defendant refused to return the loan amount on 30.11. 2003 and 15.11.2003 in his presence. It is clear from the plaint that it was not the case of the plaintiff that he had visited the defendant with PW-4 and the defendant refused to return the said loan amount in the presence of PW-4. The case of the plaintiff was that the defendant refused to return the loan amount on 30.11.2003 and 15.12.2003 in the presence of PW-2 and PW-3. PW-1 to PW-3 have not stated in their depositions that PW-4 was present at the time of refusal of the defendant to return the loan amount on 30.11.2003 and 15.12.2003.

22.PW-2 to PW-4 deposed that the defendant mortgaged her built up house no. 16/291-E, Tank Road, Bapa Nagar, Karol Bagh, New Delhi against the said loan in favour of the plaintiff on 06.08.2002. It was neither the case of the plaintiff nor he deposed to this effect in his deposition. Moreover, Agreement dated 06.08.2002 Ex.PW-1/A was a loan agreement and not a mortgage deed.

23.In para no.3 of the reply on merits of the replication, the plaintiff denied that PW-2 and PW-3 (marginal witnesses) were his close friends whereas Sh. Ashok Kumar (PW-4) stated that there were five persons present and they were related to each other. The plaintiff has not stated in his plaint or depositions his relations with, and reason for the presence of PW-2 and PW-3 on 06.08.2002.

24.It is apparent from loan agreement Ex. PW-1/A that 10 Rupee Stamp paper on which the said agreement was written, was not issued to the plaintiff but to some Ved Praksh, r/o 125, Piliri etc. In his plaint, the plaintiff stated that an agreement regarding loan of Rs. 2,00,000/- was written on a stamp paper which was lying in the custody of the plaintiff but he has not stated to this effect in his depositions. Further, PW-4 stated that the stamp paper, on which the agreement was written, was not brought in his presence.

25.The plaintiff not examined stamp vendor/Sh. S.P. Srivastava, L. No. 925, Tis Hazari Courts to prove that the said stamp was issued to the plaintiff for the purpose of loan agreement on 05.08.2002.

26.In the plaint or his depositions, the plaintiff (PW-1) and PW-2 to PW-3 did not state as who had written the said agreement Ex. PW-1/A. PW-4 in his cross-examination stated that the said agreement was written by as orderly of an Advocate. The plaintiff has not examined the author of the said agreement. The said agreement contains technical words known to a person having knowledge and experience of drafting such agreement. Even the name and address of the author of the said writer are not mentioned in the said agreement Ex. PW-1/A.” (underlying added)

8. For the disposal of this second appeal, the following substantial questions of law are framed:-

“(i). Whether the first appellate court has committed a gross illegality and perversity in setting aside the detailed findings and conclusions of the trial court and has wrongly on personal comparison found the signatures of the appellant/defendant on the written statement, vakalatnama, etc to be allegedly similar to the signatures appearing on the ikrarnama?

(ii) Whether the first appellate court has committed a gross illegality and perversity in failing to appreciate that even if the appellant/defendant did not lead evidence the respondent/plaintiff was bound to lead credible evidence in support of his case, and which was not done as shown in the detailed findings and conclusions in the judgment of the trial court?

(iii) Whether the first appellate court has committed an illegality in ignoring the contradictions with regard to the fact that the ikrarnama did not talk of any mortgage of the property of the appellant/defendant at Tank Road in favour of the respondent/plaintiff but this has been deposed to by the witnesses to the ikrarnama?”

9. In my opinion, all the aforesaid questions of law have to be answered in favor of the appellant/defendant and against the respondent/plaintiff. The reasons for the same are contained hereinafter.

10. Firstly, it must be stated at the outset that the suit appears to be a strategy of the respondent/plaintiff to misappropriate the property of the appellant/widow aged 70 years and which property is situated at Tank Road, Delhi. Appellant/defendant is an illiterate aged widow and has only one son who at the relevant time was studying in a school. Facts on record show that the respondent/defendant has clearly hatched out a plan to defraud the appellant/widow and misappropriate her property. That the respondent/plaintiff has hatched out a scheme to defraud the appellant is clear from the detailed conclusions given by the trial court and which are reproduced above. Some of the most important reasons given by the trial court, and with which I agree, are as under:-

(i) Surely, if the respondent/plaintiff claimed to have only limited financial means, and his own case was that he was earning only two meals from his cloth business, the respondent/plaintiff had to show that he possessed the funds of Rs.2 lacs for the payment of the said amount as loan to the appellant/defendant and he failed to show how he had means to pay a sum of Rs.2 lacs to the appellant/defendant.

(ii) Not only no evidence has been led as to how respondent/plaintiff had the huge amount of Rs.2 lacs with him, but also how the said amount in cash could be lying with the respondent/plaintiff has not been explained.

(iii) Also, there is no sufficient reason given in the pleading of the respondent/plaintiff or in the evidence led by the respondent/plaintiff as to why the respondent/plaintiff would trust the appellant/defendant with a loan of huge amount of Rs.2 lacs and that too without any security.

(iv) The third witness, namely Sh. Ashok Kumar has been introduced at the stage of evidence, and the existence of such witness is mentioned neither in the ikrarnama nor in the plaint. In fact, the name of Sh. Ashok Kumar who is alleged to be the third witness in the presence of whom ikrarnama was signed was not even mentioned in the list of witnesses filed by the respondent/plaintiff.

(v) What was the purpose for which the appellant/defendant would have wanted the loan has not been established because the loan has to be taken for a purpose and once a loan is a huge amount of loan considering the status of the parties, the specific purpose of the loan could have been clearly stated instead of a so called general purpose of 'domestic need'.

(vi) There is no mention of any alleged mortgage in the ikrarnama and consequently a story has been created to do away with the immovable property of the appellant/defendant/widow of 70 years of age by introducing such aspect in the evidence led of the respondent/plaintiff.

11. At this stage, I would like to observe that the first appellate court has clearly fallen into an error in holding that signatures of the appellant/defendant on the ikrarnama are similar to the signatures of the appellant/defendant appearing on the written statement, vakalatnama etc and for which purpose I have examined the trial court record. It is clear that it cannot be said that the signatures of the appellant/defendant on the ikrarnama are similar to the signatures appearing on the written statement, vakalatnama and affidavit by way of evidence because the signatures of the appellant/defendant on the ikrarnama are in slanted manner whereas the signatures which appear on the written statement, vakalatnama and affidavit by way of evidence are in horizontal manner. To this aspect, I would also

like to note that if the ikrarnama was genuine, in all probability, the said document would have had the thumb impression of the appellant/defendant inasmuch as whereas it is possible to forge signatures, it would be impossible to forge a thumb impression because a thumb impression is unique to each and every individual. The finding of the first appellate court with respect to the fact that signatures of the appellant/defendant on the ikrarnama are same as found in the written statement, affidavit by way of evidence is therefore clearly flawed and being perverse is set aside.

12. Finally, I must add that merely because evidence is led by a party in a case, it is not necessary that Courts have to necessarily believe the evidence. There is a difference between evidence which is led and the weight which has to be attached to the evidence by the court. As per the definition of expression 'proved' found in Section 3 of the Evidence Act, 1872 a fact is proved only when the Court after considering the matters before it believes the fact to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it exists. The totality of the facts of the present case show that the trial court was completely justified in arriving at the finding that the respondent/plaintiff failed to prove that loan of Rs. 2 lacs was given by the respondent/plaintiff to the appellant/defendant, and

consequently had rightly dismissed the suit for recovery of Rs.2 lacs alongwith interest @ 24% p.a.

13. In view of the above, the appeal is allowed. Impugned judgment of the first appellate court dated 5.7.2012 is set aside. Judgment of the trial court dated 27.4.2010 dismissing the suit is restored. Parties are left to bear their own costs.

MAY 06, 2014
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VALMIKI J. MEHTA, J.