

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

% **Date of decision: 1st October, 2018.**

+ **RSA 145/2018 & CM No.40652/2018 (for stay)**

SUDESH SETHI Appellant

Through: Mr. S.C. Arora, Adv.

Versus

**STRATEGIC INFOTECH SYSTEMS PVT LTD
& ORS**

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.40653/2018 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

RSA 145/2018 & CM No.40652/2018 (for stay)

3. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 24th July, 2018 in RCA No.61308/2016 of the Court of Additional District Judge-13 (Central)] allowing the First Appeal under Section 96 of the CPC preferred by the respondents/defendants against the judgment and decree [dated 24th January, 2012 in Suit No.299/06 (Case ID C0185572003) of the Court of Civil Judge] allowing the suit of the appellant/plaintiff for recovery of Rs.1,05,650/- in the sum of Rs.90,000/- with interest @ 12% per annum with effect from 10th November, 2002.

4. The counsel for the appellant/plaintiff has been heard and copies of the Suit Court record annexed to the memorandum of appeal perused.
5. The *sine qua non* for entertaining a Second Appeal is the existence of a substantial question of law, as recently held by the Supreme Court in **Surat Singh Vs. Siri Bhagwan** (2018) 4 SCC 562 and **Vijay Arjun Bhagat Vs. Nana Laxman Tapkire** (2018) 6 SCC 727; even a notice of Second Appeal under Section 100 CPC cannot be issued without framing a substantial question of law. I have thus, straightway enquired from the counsel for the appellant/plaintiff, the substantial question of law which this appeal raises.
6. The counsel for the appellant/plaintiff has argued “that the First Appellate Court has neither discussed any issues nor any evidence and without doing so, has set aside the judgment and decree of the Suit Court and decided in favour of the respondents/defendants”. Besides this, the counsel for the appellant/plaintiff has drawn attention to pages 130 and 131 of the paper book, being the cross-examination recorded on 28th July, 2011 of DW1 Dhiraj Oberoi i.e. the respondent/defendant no.4 herein by the counsel for the appellant/plaintiff, where he admitted that a sum of Rs.90,000/- was received by the respondent/defendant no.1 Strategic Infotech Pvt. Ltd. through a cheque drawn by the appellant/plaintiff and contends that inspite of this admission of the respondents/defendants, the First Appellate Court has held that it was incumbent upon the appellant/plaintiff to appear in the witness box and for this reason only allowed the appeal and dismissed the suit.
7. I have perused the paper book.

8. The appellant/plaintiff instituted the suit, pleading (i) that the respondent/defendant no.1, through its Directors respondents/defendants no.2 to 4 i.e. Sandeep Bajaj, Kapil Oberoi and Dhiraj Oberoi, had taken a loan of Rs.90,000/- from the appellant/plaintiff vide cheque dated 9th November, 2001, on the promise of paying interest thereon @ 3% per month, for one year only; (ii) that the respondents/defendants, on 23rd August, 2002 issued account payee cheque of Rs.30,000/- in favour of the appellant/plaintiff towards part payment of interest; (iii) that the loan amount of Rs.90,000/- and the balance interest was however not paid; and, (iv) that the respondents/defendants however, in their books and balance sheet as on 31st March, 2001 and Income Tax Return filed, had shown the said loan as taken from its erstwhile Director Anand Sethi but which fact was wrong. Hence the suit for recovery of loan amount of Rs.90,000/- together with interest till the date of institution of the suit i.e. for a total sum of Rs.1,05,650/-.

9. The respondents/defendants contested the suit by filing a written statement pleading (i) that the son of the appellant/plaintiff i.e. Anand Sethi was inducted as a Director of the respondent/defendant no.1 and had paid a sum of Rs.1,00,000/- out of which Rs.10,000/- was towards share application money and the balance Rs.90,000/- was as interest free loan; (ii) that subsequently the relationship between the respondents/defendants and the said Anand Sethi had soured and in fact the resignation submitted by Anand Sethi from the Board of Directors has not been accepted; and, (iii) that the loan amount of Rs.90,000/- received from Anand Sethi had been adjusted.

10. On the aforesaid pleas, the following issues were framed in the suit on 31st July, 2003:-

- “1. Whether the plaintiff had given a loan of Rs.90,000/- to the defendant as interest @ 3% per month and the same was returnable after the expiry of one year? OPP.*
- 2. Whether the plaintiff had paid an amount of Rs.90,000/- on behalf of her son, Sh. Anand Sethi as interest free loan to defendant No.1, as alleged by defendants? If so, its effect? OPD.*
- 3. Whether the plaintiff is entitled for suit amount as prayed for? OPP*
- 4. Whether the plaintiff is entitled for any interest. If so, at what rate and for what period? OPP*
- 5. Relief.”*

11. The appellant/plaintiff did not appear in the witness box and only the husband of the appellant/plaintiff appeared in the witness box as attorney of the appellant/plaintiff. The respondents/defendants examined respondent/defendant no.4 Dhiraj Oberoi aforesaid in their defence. The said Dhiraj Oberoi proved Resolutions of the meetings of the Board of Directors of the respondent/defendant no.1 held on 5th November, 2001 qua induction of Anand Sethi and the receipt of loan from him and for the said loan to be converted into equity shares on enhancement of the share capital.

12. The Suit Court decided in favour of the appellant/plaintiff reasoning, (i) that there was no writing given by the appellant/plaintiff to the respondent/defendant no.1 to the effect that the cheque for Rs.90,000/- in

favour of the respondent/defendant no.1 was being given on behalf of her son Anand Sethi; (ii) that the appellant/plaintiff had failed to prove that there was any agreement for payment of interest; rather it was proved that the loan was interest free, owing to Anand Sethi, son of the appellant/plaintiff having been inducted into the Board of Directors of respondent/defendant No.1; (iii) that the appellant/plaintiff had failed to prove that the cheque for Rs.30,000/- given by the respondents/defendants to the appellant/plaintiff was towards payment of interest on the said amount; and, (iv) that the said cheque was a separate transaction but there was no need in the suit to decide the exact nature thereof. Hence, the Suit Court granted a decree for recovery of Rs.90,000/- with interest from 10th November, 2002 in favour of the appellant/plaintiff.

13. The First Appellate Court, on appeal by the respondents/defendants, has reasoned (i) that though the respondents/defendants had filed an application under Order XLI Rule 27 of the CPC to also prove balance sheet as on 31st March, 2002 to show that therein also, as in the balance of 31st March, 2001, the amount was shown as received from Anand Sethi who was then a Director, but there was no need therefor; (ii) that considering the defence of the respondents/defendants in the written statement, it was incumbent upon the appellant/plaintiff and her son Anand Sethi to appear in the witness box; (iii) it was not the case of the appellant/plaintiff that her relations with her son Anand Sethi were not good; (iv) that as per dicta in ***Vidhyadhar Vs. Manik Rao*** (1999) 3 SCC 573 it was necessary for the appellant/plaintiff and Anand Sethi to appear in witness box and having not done so, adverse inference has to be drawn against them; (v) on the contrary, the records maintained by the respondents/defendants for the

contemporaneous period in the normal course of business and during which years the son of the appellant/plaintiff was a Director of the respondent/defendant no.1, showed the amount having been received from Anand Sethi, son of the appellant/plaintiff; (vi) considering the timing also, it was believable that the said amount of Rs.90,000/- was part of induction of Anand Sethi into the Board of Directors of respondent/defendant no.1; (vii) the Suit Court had also not believed the claim of the appellant/plaintiff of the payment of Rs.30,000/- by respondent/defendant no.1 to the appellant/plaintiff being towards interest; and, (viii) the appellant/plaintiff had thus failed to prove that it was in fact she who had advanced the loan of Rs.90,000/- to the respondent/defendant no.1.

14. I must at this stage state that the way the counsel for the appellant/plaintiff had drawn attention to pages 130 and 131 of the paper book was to convey as if the respondent/defendant no.4, in cross-examination, had made an admission contrary to what was pleaded in the written statement. However, going through the papers it is found that the alleged admission of the respondent/defendant no.4 in cross-examination is in consonance with the defence of the respondent/defendant in the suit. The admission of respondent/defendant No.4 of having received cheque of Rs.90,000/- drawn by appellant/plaintiff cannot be read in isolation. The respondent/defendant No.4 also explained that the said amount was on behalf of Anand Sethi son of appellant/plaintiff.

15. No merit is also found in the contention of the counsel for the appellant/plaintiff of the First Appellate Court having not given findings issue-wise. What the First Appellate Court has done is to have, after

recording the gist of the pleadings and after reproducing the issues and having crystallised the controversy, decided the same. Considering the nature of the controversy also, it cannot be said that the First Appellate Court has not dealt with any of the issues.

16. It is not necessary for a judgment to follow any defined format and once, on reading of the entire judgment, it is found that it has been dictated after digesting the entire controversy and is dealing with each and every aspect, though not under specific issues, no fault can be found therewith.

17. Reference in addition to *Vidhyadhar Vs. Manik Rao* (1999) 3 SCC 573 cited by First Appellate Court, can also be made to *Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd.* (2005) 2 SCC 217 and *Man Kaur Vs. Hartar Singh Sangha* (2010) 10 SCC 512 wherein it has been held that where the issue required proof of something which is in the personal knowledge of a litigant, the litigant cannot appoint attorney to depose on their behalf and has to personally appear in the witness box and subject himself/herself to cross-examination. It was not the case of the appellant/plaintiff in the plaint or otherwise that the appellant/plaintiff, in the matter of transaction with the respondents/defendants, was acting through her husband and attorney. The counsel for the appellant/plaintiff today also confirms that the power of attorney on the basis of which the husband of the appellant/plaintiff appeared as a witness was only for the purposes of the suit.

18. The appellant/plaintiff, at the time of institution of the suit itself, was aware that the respondent/defendant in its books had shown the monies which were claimed in the suit as having been received, not from the

appellant/plaintiff but from her son Anand Sethi. The appellant/plaintiff however, neither sought any relief in that respect nor made her son a defendant to the suit. Rather, in the plaint it was not even disclosed that Anand Sethi was the son of the appellant/plaintiff. He was only described as erstwhile Director of the respondent/defendant no.1. In spite of the respondents/defendants in their written statement having reiterated what was already in the knowledge of the appellant/plaintiff, that the monies were received not from the appellant/plaintiff but from her son Anand Sethi and a specific issue being framed thereon, the appellant/plaintiff, who alone could have deposed that the loan transaction between her and the respondents/defendants was independent of the directorship of her son and/or her son Anand Sethi who alone could have denied that the monies were not advanced by him and who alone could have explained the circumstances in which the monies in the books of account were shown as received from him, were not produced in evidence. The First Appellate Court was therefore fully justified in drawing adverse inference against the appellant/plaintiff and in dismissing the suit.

19. The appeal raises no substantial question of law.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 01, 2018

‘pp’..