IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 4598 of 2012(O&M)

Date of Decision: December 2 , 2015.

Sandeep Marwaha ...... APPELLANT (s)

Versus

Mrs. Sunita Rana and another

...... RESPONDENT (s)

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Mahabir Singh Sindhu, Advocate
for the appellant.

Mr. Shailendra Jain, Senior Advocate with
Mr. Gaurav Aggarwal, Advocate
for respondent No.1.

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1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

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LISA GILL, J.

Appellant-defendant has filed this Regular Second Appeal impugning judgment and decree dated 04.03.2011 passed by the Civil Judge (Senior Division), Gurgaon as well as judgment and decree dated 15.06.2012 passed by the learned District Judge, Gurgaon upholding the judgment of trial court.

Brief facts of the case are that, respondent No.1-plaintiff Sunita Rani filed a suit for recovery of ₹8,64,000/- against the appellant-defendant and one Skywing Developers Private Limited through its authorized nominee and Director, Mr. Sandeep Marwaha. Respondent-plaintiff's case is that appellant Sandeep Marwaha is a Pilot well known to her husband, who was a Senior Pilot working with the Indian Airlines. Appellant-defendant approached plaintiff's husband for financial aid when his pilot licence was suspended by the Govt. of India due to his involvement in an air crash. Appellant took a personal loan of ₹6,00,000/- on 07.02.1996 from the plaintiff on behalf of M/s Skywing Developers Private Limited. Agreement note in the shape of loan receipt dated 07.02.1996 was executed in the presence of witnesses wherein appellant agreed to repay the loan amount upto 15.11.1996 with interest at the rate of 24% per annum. Total interest for the period of nine months i.e., from February, 1996 to November, 1996 was calculated as ₹1,08,000/-. Appellant issued two post-dated 01.11.1996 cheques bearing No. 147299 and 147300 drawn on Corporation Bank, Sikanderpur Branch, Gurgaon, one for an amount of ₹6,00,000/- and another for ₹1,08,000/- towards interest. It was further agreed that said cheques would be returned if appellant-defendant would return the payment in-cash on or before 15.11.1996. When the amount in question was not returned even after 15.11.1996, respondent-plaintiff raised demand for its return. However, appellant-defendant evaded the matter on one pretext or the other. He pleaded shortage of money and asked for concession of returning it in installments but amount in question was not returned. Consequently respondent-plaintiff was constrained to file the present suit.

When defendants did not appear despite service, they were proceeded against *ex parte* on 02.05.2000 by the trial court. *Ex parte* evidence of the plaintiff was recorded and suit of the plaintiff was decreed on 18.12.2001.

Appellant however, appealed against the same and *ex parte* judgment and decree dated 18.12.2001 was set aside on 17.12.2005 by the learned Additional District Judge, Gurgaon and the matter was placed before the trial court for adjudication on merit after hearing both the parties.

Stand taken by appellant-defendant No.2 in his written statement is that being a junior of Capt R.N.Singh i.e., husband of the plaintiff, a lot of trust and faith was reposed in him by the appellant. In the year 1996, Capt. R.N.Singh alongwith the plaintiff proposed starting of a business in real estate. Appellant expressed his inability as he was having no expertise in such business and furthermore, in Govt. service he could not carry on any such business in his name. It was, thus, suggested by the plaintiff's husband that a private limited company can be floated, said defendant's wife being its Director. Consequently, a company namely Skywing Developers Private Limited i.e., defendant No.1 in the suit was formed. Appellant and his wife contributed a sum of ₹3,00,000/- for running the affairs of this company. Signatures of the appellant and his wife were allegedly obtained by the plaintiff and her husband on several blank and printed papers. They were asked by the plaintiff and her husband to contribute another sum of ₹6,00,000/- by 15.10.1996 for purchasing land in the name of defendant-company failing which appellant would be liable to pay interest at the rate of 24% per annum.

It is on this account, cheques of ₹6,00,000/- and ₹1,08,000/- dated 01.11.1996 were obtained from the appellant. No land was purchased and when the appellant asked for return of ₹3,00,000/- already paid by him, they refused to return the same.

Learned trial court on considering the facts as well as the pleadings, framed the following issues:-

1. Whether plaintiff is entitled for decree for recovery of ₹8,64,000/- from the defendants (wrongly mentioned as 'plaintiff') as alleged? OPP
2. If issue No.1 is proved, whether plaintiff is entitled to any interest if so at what rate? OPP
3. Whether the suit is not maintainable? OPD
4. Whether plaintiff has no locus standi to file the present suit? OPD
5. Whether plaintiff has no cause of action to file the present suit? OPD
6. Whether plaintiff is estopped from filing the present suit by her own act, conduct, omissions, admissions, acquiescence and latches? OPD
7. Whether suit is bad for mis-joinder and non-joinder of necessary parties? OPD
8. Whether suit has not been filed by authorised person? OPD
9. Whether plaintiff has not approached the court with clean hands? OPD
10. Relief.

On consideration of the evidence on record, suit filed by the respondent-plaintiff was decreed while deciding Issues No.1 and 2 in the plaintiff's favour and Issues No.3 to 9 against the defendants. Appeal preferred by appellant-defendant Sandeep Marwaha was dismissed by learned District Judge, Gurgaon on 15.06.2012.

Both the learned courts below have specifically held the suit to be within limitation and that appellant had obtained a loan of ₹6,00,000/- from the plaintiff and did not return the same. Agreement Ex.P1 is proved on record therefore, appellant cannot deny his liability. Aggrieved from the said decisions, present regular second appeal has been preferred by the appellant/ defendant.

Learned counsel for the appellant, on 23.07.2013, had given up service upon respondent No.2 – M/s Skywing Developers Private Limited while stating that respondent No.1 is the only contesting respondent.

Learned counsel for the appellant vehemently argues that substantial questions of law are involved in this appeal inasmuch as firstly, suit filed by the plaintiff-respondent is barred by limitation. Reference is made to clause 21 of schedule of the Limitation Act.

Furthermore, there is misreading of evidence as the alleged receipt Ex.PW1/A is signed by two witnesses but they have not been examined and it is not proved on record. Plaintiff herself did not appear in the witness-box to support her case and the suit cannot be allowed on the basis of evidence of plaintiff's husband Capt R.N.Singh who is a stranger to the lis. Provision of Order 3 Rules 1 and 2 CPC do not empower a Power of Attorney to depose in place of the principal. Furthermore, appellant cannot be held personally liable being Director of the respondent-company. Thus it is prayed that this appeal be allowed and both the impugned judgments and decrees be set aside.

Mr. Shailendra Jain, learned senior counsel for respondent No.1 while refuting the said contentions vehemently argues that no substantial question of law is involved for consideration in this appeal. Concurrent findings of fact have been returned by both the learned courts below and no ground whatsoever is made out in the appellant's favour.

Having heard learned counsel for the parties and going through the record which had been requisitioned, it emerges that a sum of ₹6,00,000/- was taken as a personal loan on interest at the rate of 24% per annum by the appellant as reflected by Ex.PW1/A dated 07.02.1996. Loan amount was to be repaid by 15.11.1996. Default therefore occurred on 15.11.1996 and the suit was filed on 30.10.1999. Therefore, it has rightly been held by the learned courts below that suit was within limitation and not barred in any manner. Reliance by learned counsel for the appellant on clause 21 of the schedule of Limitation Act is misplaced as this provision would be applicable in those cases where loan in question is repayable on demand. In the present case, specific date i.e. 15.11.1996 has been stipulated for return of the loan amount. Clause 21 of the schedule of Limitation Act reads as under:-

Description of suits	**Period of limitation**	**Time from which period begins to run**
xx xx	xx xx	xx xx
21. For money lent under an agreement that it shall be payable on demand	Three years	When the loan is made
xx xx	xx xx	xx xx

In this situation, it has been rightly held that for the period of limitation the relevant date would be the date of default i.e., 15.11.1996. Suit in question was filed on 30.10.1999. Therefore, the suit was filed within limitation.

Contention of learned counsel for the appellant that agreement in question is not proved is not unacceptable. Appellant appearing as DW1 has not denied his signatures on the cheques Ex.P2 and P3 as well as loan receipt Ex.PW1/A and writing Ex.P4 wherein appellant has undertaken to refund the money in three installments within three months with interest at the rate of 24% per annum.

Argument that appellant's signatures were obtained on blank papers which were later converted into loan receipts Ex.P1/A to Ex.P4, is devoid of any merit. Learned District Judge, Gurgaon has correctly observed that this plea is not believable as the appellant is a well educated person. Furthermore, circumstances explained by him regarding appending of his signatures have not passed the test of genuineness. Burden was cast upon the appellant to prove that he had not executed the said documents. Such burden has not been discharged by the appellant. It is rightly observed by the learned District Judge that document Ex.PW1/A is so clear and transparent that even repayment schedule has been fixed therein. Cheques Ex.P2 and P3 were given as per terms and conditions of agreement Ex.P1. It is further relevant to note that DW2 Shakti Yadav, an attesting witness of documents Ex.PW1/A and Ex.P4 has not been able to wriggle out of signatures appearing on the said documents. Learned counsel for the appellant is unable to point out any evidence on record which militates against this finding.

Another argument raised and vehemently urged on behalf of the appellant is that plaintiff herself has not stepped into the witness box but has examined her husband Capt. R.N.Singh as PW1, who tendered in evidence, his affidavit PW1/A. Therefore, an adverse inference should be drawn against the plaintiff as she did not appear in the witness-box herself and her suit be dismissed on this account itself. It is vociferously contended that provisions of Order 3 Rules 1 and 2 CPC empower the Power of Attorney holder to act on behalf of the principal but it does not empower him to depose on behalf of the principal. Reliance is placed on judgment of Hon'ble Supreme Court in S.Kesari Hanuman Goud v. Anjum Jehan and others, *(2013) 12 SCC 64*.

PW1 Capt. R.N.Singh, husband of the plaintiff has been appointed as a Special Power of Attorney by her to appear and record evidence in the said case as well, as per the Special Power of Attorney dated 25.07.2009, Ex.P1. He is clearly well conversant with the facts of the case and had personal knowledge of all the facts as is reflected in the written statement itself. Case of the appellant, in fact, revolves around the fact that the plaintiff's husband was his senior and he was misled by him. Contention of learned counsel for the appellant that Capt R.N.Singh was not present at the time of transaction and hence is not competent to lead evidence, is misplaced in view of the specific averment in the written statement itself that he was part of each and every transaction. Furthermore, he has not been cross-examined to this effect. It is pointed out by learned senior counsel for respondent No.1 that at the initial stage when the mater had been decided while proceeding *ex parte* against the appellant, plaintiff had appeared but she fell sick thereafter. It is due to this reason that Special Power of Attorney, Ex.P1 was executed in favour of her husband.

Hon'ble Supreme Court in **Man Kaur (dead) by L.R's v. Hartar Singh Sangha**, ***2011(1) RCR (Civil) 189*** has summarised the position as to who should give evidence in regard to matters involving personal knowledge as hereunder:-

> "12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:
>
> (a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.
>
> (b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.
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> (c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.
>
> (d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.
>
> (e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that

attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

Thus in the factual matrix of this case, this argument is untenable, hence rejected.

It is also to be noted that there is no evidence on record to prove formation of the defendant-company with wife of the appellant as its Director. Defence set up by the appellant is not substantiated by any evidence. There is no evidence on record to show that a sum of ₹3,00,000/- had ever been handed over by the appellant to the plaintiff or her husband. Admittedly, no action has ever been taken for recovery of the said amount. Whereas, the respondent-plaintiff has succeeded in proving her case on the basis of specific evidence on record which remains unrebutted.

Keeping in view the facts and circumstances of this case, no question of law, much less a substantial question of law is involved for consideration in this appeal.

Appeal is accordingly dismissed.

(LISA GILL)
December 2 , 2015. **JUDGE**
'om'