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

\+ **RSA No. 291/2016**

% **28th September, 2016**

SH. SANJAY MAHAJAN ..... Appellant

Through: Mr. Sarvesh Singh, Mr. Dhananjay Kumar Singh and Mr. H.S. Rawat, Advocates.

versus

SH. SUNIL SHARMA & ANR. ..... Respondents

Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 35930/2016 (for exemption)

Exemption allowed subject to just exceptions.

C.M. stands disposed of.

C.M. Appl. No. 35929/2016 (for condonation of delay of 55 days in filing the appeal under Section 151 CPC)
and
C.M. Appl. No. 35931/2016 (for condonation of delay of 16 days in re-filing the appeal under Section 151 CPC)

These are applications seeking condonation of delays of 55 days in filing and 16 days in re-filing the appeal.

For the reasons stated in the applications, the same are allowed and delays are condoned.

C.Ms stand disposed of.

<u>RSA No. 291/2016</u>

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/plaintiff impugning the concurrent Judgments of the courts below; of the Trial Court dated 2.8.2014 and the First Appellate Court dated 19.3.2016; by which the courts below have dismissed the suit for recovery of Rs.68,800/- filed by the appellant/plaintiff.

2. The facts of the case are that the appellant/plaintiff claims that he gave a loan of Rs.40,000/- to the defendant no.1 (originally sole defendant) by cheque and which was not re-paid and hence the subject suit was filed for Rs.68,800/- being the principal amount of Rs.40,000/- along with interest totaling to Rs.68,000/-. When the suit was filed there was only one defendant, i.e, respondent no. 1 herein, and this defendant filed a written statement stating that the cheque which was issued by the appellant/plaintiff was not in the name of defendant no. 1, but was in the name of defendant no.2/company. The appellant/plaintiff thereafter added respondent no.2/defendant no. 2/company as the defendant in the suit. In the written statement of defendant no. 2 as also of the defendant no. 1 it was stated that the appellant/plaintiff was appointed as a distributor of defendant no. 2/company with respect to supply of phones for the

states of Karnataka and Maharashtra and therefore he had given the subject cheque of Rs.40,000/- to the defendant no. 2. The appellant/plaintiff has received various phones from defendant no. 2 and had even used six out of ten mobile phones, but has had not settled the accounts of defendant no. 2 and has instead falsely filed the subject suit.

3. The courts below have dismissed the suit as against respondent no.1/defendant no. 1 because it was found that the cheque on the basis of which the suit was filed was issued in the name of respondent no.2/defendant no.2 and therefore there was no loan granted to the respondent no.1/defendant no.1 as was the case of the appellant/plaintiff. As regards respondent no.2/defendant no.2, it was held that the suit was barred by limitation because defendant no. 2 was added as a defendant vide Order dated 6.12.2010 and which would be the date of filing of the suit against respondent no.2/defendant no.2 as per Section 21 of the Limitation Act, 1963, and since the subject cheque was dated 5.7.2004, Article 20 of the Limitation Act, came in and thereby the suit having been filed against respondent no.2/defendant no.2 beyond three years of the grant of loan on 5.7.2004, the same was barred by limitation.

4. The trial court had in the suit on 25.4.2011 framed the following issues:-

> "1. Whether the plaintiff is entitled for decree of Rs.68,800/- as prayed for? OPP

2. Whether the suit is barred by law and is without any cause of action? OPD

3. Relief."

5. The documents which were filed by the respective parties have been stated in paragraphs 6 and 7 of the judgment of the trial court and the same read as under:-

"(6) In order to substantiate his case, the plaintiff has examined himself as PW1 and Sh Syad Faisal Huda, Forensic Expert as PW2 and relief upon the following documents:-

(a) Statement of account as Ex.PW1/1.
(b) Receipt of one set of T-918 dt. 20.09.2004 as Ex.PW1/2.
(c) Receipt of 10 T-918 Mobile and 10 T 919 mobiles dt. 21.06.2004 as Ex.PW1/3.
(d) Delivery challan dt. 29.03.2004 as Ex.PW1/4.
(e) The copy of notice dt. 03.04.2007 as Ex.PW1/5.
(f) Original registered AD as Ex.PW1/7.
(g) The copy of UPC as Ex.PW1/6.
(h) Detailed report given by PW2 as Ex.PW2/A.

(7) On the other hand, defendant No. 1 is examined as DW1 on behalf of both the defendants and he relied upon the following documents:-

(a) Memorandum of association as Ex.DW1/1.
(b) Copy of agreement of distributorship between plaintiff and defendant No. 2 as Ex.DW1/2.
(c) Copy of challan as Ex.DW1/3 & 4.
(d) Copy of reply given by defendant as Ex.PW1/5 alongwith its acknowledgement card and receipt Ex.PW1/6, 7 & 8 respectively."

6. The trial court while discussing issue no. 1 has held that, and as already stated above, that appellant/plaintiff failed to prove grant of any loan to respondent no.1/defendant no.1 as the cheque was issued by the appellant/plaintiff in the name of respondent no.2/defendant no.2 and not in the name of respondent no.1/defendant no.1. So far as issue with respect to suit

being barred by limitation against respondent no.2/defendant no.2 is concerned, the same was dealt with under issue no. 2 and which relevant discussion and conclusion of the trial court reads as under:-

> "ISSUE NO. 2
>
> Whether the suit is barred by law and is without any cause of action? OPD
>
> Onus to prove this issue lies upon the defendants. Evidence produced on record shows that the money through cheque was paid by the plaintiff to defendant no. 2 on 06.07.2004. As per the case of plaintiff, this amount was paid as loan. Article 20 of schedule of The Limitation Act, 1963 provides that the period of limitation of three years for filing suit for recovery of such amount shall start commencing from the day when money is paid. It implies that this period of limitation should expire on 05.07.2007. The present suit was filed against defendant no. 1 on 05.07.2007 and then defendant no. 2 was allowed to be impleaded vide order dt. 06.12.2010 passed by Ld. Predecessor of this Court. Section 21 of The Limitation Act provides that suit against an added party shall be deemed to be instituted on the day when it is added as a party unless the Court orders it to be deemed impleaded from an earlier date. It is not disputed that defendant no. 2 is not ordered to be deemed impleaded as a party from any other day. Hon'ble Apex Court in ***Ramalingam Chettiar vs P.K. Pattabiraman reported as AIR 2001 SC 1185***, has held that "in the absence of any order that the impleadment of newly added or substituted party shall take effect from the date of institution of a suit, the period of limitation so far as the newly added or substituted persons are concerned shall run from the date of their impleadment in the suit". Thus the suit is deemed instituted against defendant no.2 w.e.f. 06.12.2010 i.e. the day on which the period of filing of the suit had already expired. Expiry of the period of limitation of filing a suit bars the legal remedy before the court. Thus it is held that the suit of the plaintiff against the defendant no. 2 is barred by law and due to failure on the part of plaintiff to prove the existence of any friendly loan as discussed during the decision of earlier issue, it is held that the suit of the plaintiff against the defendants is without any cause of action." (underlining added)

7. Learned counsel for the appellant/plaintiff only argued that the suit be decreed only against respondent no.2/defendant no.2 by arguing that the suit is within limitation because the suit should be taken to have been filed against respondent no.2/defendant no.2 on the original date of filing of the suit,

however, it is seen that when the order was passed by the trial court impleading defendant no. 2 there was no prayer made by the appellant/plaintiff for respondent no.2/defendant no.2 being taken as a party from the date of filing of the suit, and accordingly the trial court has by referring to the judgment of the Supreme Court in the case of ***Ramalingam Chettiar Vs. P.K. Pattabiraman and Another, (2001) 4 SCC 96*** held that as against the respondent no.2/defendant no.2, the suit will be taken to have been filed only when defendant no. 2 was added as a party and on which date the period of three years had already expired because defendant No. 2 was added on 6.12.2010 and limitation of three years expired with respect to the cheque on 5.7.2007. Thus the courts below have rightly held the suit to be time barred against respondent no.2/defendant no.2.

8. In view of the above discussion, no substantial question of law arises for this second appeal to be entertained under Section 100 CPC, and the same is accordingly dismissed.

SEPTEMBER 28, 2016 **VALMIKI J. MEHTA, J**

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