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

% *Date of Decision: November 25, 2016*

+ **RFA(OS) 5/2016**

MANJU BARJATYA

..... Appellant

Represented by: Mr.J.P.Sengh, Sr.Advocate
instructed by Mr.Rajesh Gupta
and Mr.Harpreet Singh,
Advocates

versus

UMA SINGH (SINCE DECEASED)
THROUGH LRs & ANR

..... Respondents

Represented by: None

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J. (ORAL)

RFA(OS) 5/2016 & CM No.1365/2016

1. There is a delay of 3628 days in filing the appeal. But for the reasons mentioned hereinafter, so compelling is the cause of justice that we would be constrained to not only condone the delay in filing the appeal but even allow the appeal.

2. But before that, we would need to note that the plaintiff in the suit was Ms.Uma Singh who has since expired. Her sons : Gautam Singh and Vikram Aditya Singh have been impleaded as R-1(a) and R-1(b). The two were served for November 18, 2016. None appeared for them. We had re-

notified the matter for today. Neither at the first call nor at the second call there is any representation from the side of R-1(a) and R-1(b). The two are accordingly proceeded against ex-parte.

3. We further note that as per the appellant, till date, in the execution petition filed by Ms.Uma Singh, no application has been filed by her legal heirs seeking substitution. Further, the application seeking execution of the decree dated November 08, 2005 was filed on August 01, 2013.

4. Now the reasons to condone the delay as also set aside the impugned decree.

5. In a suit invoking Order XXXVII of the Code of Civil Procedure, Ms.Uma Singh impleaded four defendants. Defendant No.1 was M/s Gem Exports. Defendant No.2 was Subhash Barjatya. Defendant No.3 was Manju Barjatya. Defendant No.4 was M/s Precious Arts & Jewels.

6. As per the plaint, Subhash Barjatya and Manju Barjatya were partners of M/s Gem Exports and M/s Precious Arts & Jewels was the sole proprietary firm of Subhash Barjatya. It was pleaded in para 2 of the plaint that being a family friend, Subhash Barjatya requested Ms.Uma Singh for a friendly loan in the name of his sole proprietary firm : M/s Precious Arts & Jewels. Accordingly, vide three cheques dated June 19, 1995, June 30, 1995 and June 30, 1995, ₹1,02,50,500/- (Rupees One Crore Two Lakhs Fifty Thousand and Five Hundred only) was advanced as loan with rate of interest agreed @ 18% per annum. It was pleaded that on August 10, 1995 Subhash Barjatya executed an affidavit confirming having received the loan in the name of his sole proprietary firm with liability to pay interest as pleaded in the plaint.

7. Suffice it to highlight that as per the plaint the loan was taken by

Subhash Barjatya in the name of his sole proprietary firm : M/s Precious Arts & Jewels.

8. Till para twelve of the plaint the pleadings are qua liability of Subhash Barjatya. The singular suddenly turns into plural in para thirteen of the plaint, wherein it is pleaded that the defendants are bound and liable to pay to the plaintiff the suit amount.

9. It is apparent that the application seeking leave to defend filed by M/s Gem Exports and Manju Barjatya, being IA No.564/2001, projected a defence that in view of the pleadings, far from case being made out against them to proceed under Order XXXVII of the Code of Civil Procedure, no case whatsoever was made to even issue summons to defendants No.1 and 3 and therefore qua them the plaint was liable to be rejected.

10. Needless to state application seeking leave to defend by Subhash Barjatya had to project such facts, which if established, would disentitle Ms.Uma Singh to a decree. We need not bother about the facts projected by Subhash Barjatya for the reason they have been opined to be a moonshine and application seeking leave to defend filed by him has been dismissed. He has not challenged the impugned order.

11. It appears that the attention of the learned Single Judge escaped noticing the facts which we have noted hereinabove. The impugned order notes in plural as if the cheques were to the account of defendants No.2 to 4. The impugned order overlooks the fact that in the plaint clear case pleaded is that it was Subuash Barjatya who made a request for a friendly loan to be advanced in the name of his sole proprietary firm M/s Precious Arts & Jewels. There are no pleadings in the plaint that either the partnership firm M/s Gem Exports or, in her personal capacity, Manju Barjatya stood as a

guarantor and ever agreed to clear the liability of Subhash Barjatya. There is no discussion in the impugned order regarding this aspect of the matter clearly pleaded in the application filed by M/s Gem Exports and Manju Barjatya seeking leave to defend.

12. So compelling is the cause of justice in the instant case that we are constrained to condone 3628 days delay in filing the appeal and thus we allow CM No.1365/2016.

13. Simultaneously the appeal is allowed. Impugned judgment and decree is set aside qua the appellant.

14. The application seeking leave to defend filed by the appellant is not only allowed, but noting the facts hereinabove, the plaint qua the appellant is rejected.

15. No costs.

CM No.1366/2016

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

NOVEMBER 25, 2016
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