

IN THE HIGH COURT OF BOMBAY AT GOA**FIRST APPEAL NO. 63 OF 2010**

Dr. Mrunal Bhagat, aged about 76 years,
ordinarily residing at 503 Cushing Road,
New Market, New Hampshire, 03857
USA and presently at D-9 Ocean Park,
Dona Paula, Goa.

.... Appellant

Versus

1. Mrs. Merle Irene Carvalho, aged
about 30 years,
2. Mr. Stanne Pascol Fernandes, aged
about 30 years,
Both residing at Raul Residency,
Ground Floor, Miraton Gardens,
behind Chicalim Grounds, Airport
Road, Chicalim, Goa.

.... Respondents

Shri Guru Shiroadkar, Advocate for the Appellant.

Shri V.A. Lawande, Advocate for the Respondents.

CORAM:- C. V. BHADANG, J.

DATE:- 18th SEPTEMBER, 2017

ORAL JUDGMENT:

The challenge in this Appeal, is to the judgment and decree dated 25.02.2010, passed by the learned Senior Civil Judge at Vasco-Da-Gama in Special Civil Suit No. 23/2006/B. By the impugned judgment, the suit filed by the appellant/plaintiff for recovery of an amount of Rs.98,40,994/- from the respondents/defendants, has been dismissed.

2. The brief facts necessary for the disposal of the Appeal may be stated thus:

The appellant is an American Citizen and is married to Mrs. Irene Fernandes Bhagat. The appellant is of Indian origin and the appellant as well as his wife, regularly visit Goa and stay in their bungalow at Dona Paula.

Julie Carvalho is the sister of the wife of the appellant. The respondent no. 1 happens to be the daughter of Julie Carvalho. The respondent no. 1 was married to the respondent no. 2 somewhere in October, 2005 and at the relevant time was staying at Chicalim, Mormugao, Goa. The respondent no. 1 was working as a Teacher in St. Andrew's High School at Vasco. Her mother was working as an office staff in the said School. The respondent no. 1 lost her father somewhere in the year 1988. Melroy Carvalho, who is the brother of respondent no. 1, is without any gainful employment. Prior to her marriage, respondent no. 1 was staying with her mother and brother, Melroy Carvalho.

The appellant got acquainted with the respondent no. 1 during his visit to Goa and in fact, the respondent no. 1 was introduced to the appellant by his wife, the respondent no. 1 being her niece.

3. It is the material case of the appellant that somewhere in August 2002, the respondent no. 1 requested the appellant to advance her a “friendly loan” of Rs.5 lakhs for purchase of a flat at Porvorim. She assured to repay the amount within a period of three years. Acting on the request of the respondent no. 1, the appellant advanced her a loan of Rs.5 lakhs by way of cheque from his NRE Savings Account No.30631. The respondent no. 1 encashed the cheque on 17.08.2002 by crediting the amount to her Bank Account.

4. Subsequently, somewhere in November 2002, the respondent no. 1 again requested the appellant for a friendly loan of Rs.1,80,000/-, which she said was required by her to repay one Sita D'Souza. The respondent no. 1 had represented, that she will repay the amount, alongwith the amount of Rs.5 lakhs. Again, acting on the said representation, the appellant paid Rs.1,80,000/- to the respondent no. 1 from the aforesaid NRE Account.

5. Again, in the year 2004, the respondent no. 1 represented the appellant that she want to buy a bigger flat at Porvorim and requested for further loan, which she promised to

repay by October, 2005 and assured that if, she fails to do so, she would pay interest thereon at the rate of 18% per annum with quarterly rests. Acting on the said representation, the appellant advanced an amount of Rs.25,76,850/- to the respondent no. 1 in the year 2004, comprising of Rs.22,16,850/- by way of a cheque from his NRE Account and an amount of 8,000/- USD (equivalent to Rs.3,60,000/- at the then prevailing rate of Rs.45/- per USD).

6. According to the appellant, at the request of the respondent no. 1, out of the amount of Rs.22,16,850/-, an amount of Rs.6 lakhs was paid in favour of one Harish Salgaonkar and Rs.6,16,850/- in favour of Mapusa Bank. This is not the end of the story. After availing the aforesaid loan amount, the respondent no. 1 again represented the appellant that she proposes to go to UK to undergo a specialised course in Travel and Tourism and one Mr. Gomes had assured to provide all assistance to her in getting admission to the said course. The respondent no. 1 represented to the appellant that in order to facilitate her to obtain visa, the respondent no. 1 had to satisfy the Authorities that she had at her disposal an amount of Rs.40 lakhs or assets worth Rs.40 lakhs and therefore, further requested the appellant to pay Rs.40 lakhs,

which she promised to return on acquiring the visa. Accordingly, the appellant advanced a total sum of Rs.53,81,500/-, which comprised of Rs.20,50,000/- (comprising of four Demand Drafts) in favour of the respondent no. 1 and an amount of Rs.6 lakhs by transfer to the Account of the respondent no. 1 with Canara Bank and further an amount of 60,700 USD (equivalent to Rs.27,31,500/- (at the then prevailing rate of Rs.45/- per USD) by Draft in favour of the respondent no. 1.

7. The respondent no. 1 again represented the appellant that she required an additional amount of Rs.12 lakhs and accordingly, the appellant obliged the respondent no. 1 by advancing Rs.12,02,644/- by two Demand Drafts, which were encashed by the respondent no. 1.

8. In short, according to the appellant from August 2002 to September, 2005, the respondent no. 1 had obtained "friendly loan" from the appellant to the tune of Rs.98,40,994/-. The respondent no. 1 although, had assured to return the same, had failed to do so. In October 2005, the respondent no. 1 represented the appellant that she had sent a Draft of Rs.40 lakhs through Bank of Goa, Vasco. However, no such draft was

received by the appellant ever. Subsequently, the respondent no. 1 represented to the appellant that she had found a buyer for her flat at Porvorim.

9. The appellant again at the request of the respondent no. 1 advanced her another friendly loan of Rs.40 lakhs in December 2005. This amount has been repaid to the appellant, so also, yet another short term loan of Rs.60 lakhs, which the appellant advanced in February, 2006, has also been repaid by the respondent no. 1.

10. As the respondent no. 1 failed to repay the amount of the "friendly loan" advanced from August 2002 to September 2005, the appellant sent a notice to the respondent no. 1 on 03.03.2006, which was neither replied nor complied with. Hence, the appellant sent another notice dated 31.03.2006. The respondent no. 1 sent a reply dated 10.04.2006, denying that the amount was paid, as and by way of loan or that she was required to return the same. In such circumstances, the appellant filed the aforesaid suit for recovery of an amount of Rs.98,40,994/- alongwith interest at the rate of 18% per annum with quarterly rests.

11. The respondent no. 1 filed written statement and resisted the claim. It was denied that the respondent no. 1 had requested any friendly loan from the appellant for any purpose whatsoever. It is submitted that the appellant on his own volition gifted various amounts to the respondent no. 1, which the appellant confirmed in writing at least on two occasions i.e. in August, 2002 and April, 2004. The appellant on his own volition was sending an amount of 500/- USD per month from 2004 to the respondent no. 1, besides the amount gifted in lump sum. The letters and the greeting cards sent by the appellant to the respondent no. 1 would confirm that it was by way of gift. According to the respondent no. 1, the letters and the greeting cards are, "eloquent proof", of the reason of the gift, by the appellant to the respondent no. 1.

12. On the basis of the rival pleadings, the learned Trial Court framed the following issues:-

1. Whether plaintiff proves that he is entitled to recover a total sum of Rs.98,40,994/- (Rupees ninety eight lakhs forty thousand nine hundred and ninety four only) from the defendants alongwith interest at the rate of 18% per annum with quarterly rest from the date of respective acquisition of loans till it is paid fully ?
2. Whether defendant no. 1 proves that the plaintiff had gifted the said amount of Rs.98,40,994/- (Rupees ninety eight lakhs forty thousand nine hundred and ninety four only) to defendant no. 1 of his own volition ?

Additional Issue:

1. Whether the plaintiff proves that he had given to the defendant no. 1 a loan of Rs.98,40,994/- ?

13. The parties went to trial, in which the appellant examined himself (PW-1), while the respondent no. 1 examined herself (DW-1) and seven other witnesses, who are Bank Officers. The parties also produced certain documents.

None of these witnesses have been cross examined on behalf of the respondents and even otherwise, as the receipt of the various amounts is not disputed by the respondent no. 1, it would not be necessary to advert to the evidence of PW-1 to PW-7.

14. The learned Trial Court answered issue no. 1 and the additional issue no. 1 in the negative, while the issue no. 2 in the affirmative. In the face of the findings as above, the learned Trial Court proceeded to dismiss the suit. Feeling aggrieved the appellant is before this Court.

15. I have heard Shri Shirodkar, the learned Counsel for the appellant and Shri Lawande, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have gone through the record, the evidence led and

the impugned judgment.

16. It is submitted by Shri Shirodkar, the learned Counsel for the appellant that the various amounts were advanced by way of a friendly loan and not as a gift, as claimed by the respondent no. 1. It is submitted that in para 34 of the impugned judgment, the learned Trial Court has rightly observed that the question which falls for determination was whether, the amount which was advanced, was by way of friendly loan or gift. It is submitted that the learned Trial Court was in error in holding that the amount advanced was by way of a gift. It is submitted that the various letters written by the appellant to the respondent no. 1, on which the learned Trial Court has placed reliance, were written by the appellant on the say and asking of the respondent no. 1. It is contended that the respondent no. 1 had asked the appellant to write such letters in order to "make someone else jealous". It is submitted that the Gift Certificates (Exhibits-D/61 and D/64) dated 14.08.2002 and 28.04.2004 respectively, were again issued on the say of the respondent no. 1 as she wanted the said Certificates for Income Tax purpose. The learned Counsel has referred to letters at Exhibit-92 and at Exhibit-X, written by the respondent no. 1, in order to submit that the amount was paid and the

letters were written on the say and asking of the respondent no.

1. The learned Counsel has pointed out that in the notice reply (Exhibit-60), the respondent no. 1 has not set up any defence of the amounts being advanced by way of a gift. It is thus submitted that the said defence is by way of an after thought, which cannot be accepted.

17. It is next submitted that even assuming that the amounts were advanced as gift, the same would be invalid and *non est* in law, on account of the consideration of the gift (as would be eloquent from the contents of the letters), would be immoral and the gift being conditional. He therefore submits that the Appeal be allowed and the suit be decreed as prayed.

18. On the contrary, it is submitted by Shri Lawande, the learned Counsel for the respondents that the claim about the gift being invalid or *non est* on account of it being conditional or the consideration being for an immoral purpose, was neither raised before the learned Trial Court nor it is raised in the appeal memo. He therefore submits that the contention cannot be considered. It is next submitted that the appellant has admitted to have written the various letters, which are exhibited and on which, reliance has rightly been placed by the

learned Trial Court. It is submitted that there is no evidence on record to show that the respondent no. 1, had asked the appellant to write the letters "to make someone else jealous". It is submitted that there is no evidence to show that the respondent no. 1 had asked the appellant to write such letters and on the contrary the contents of the letters would establish that the appellant was sending money to the respondent no. 1, out of his own volition and/or by way of gift. The learned Counsel has pointed out that neither any letter nor a SMS, allegedly sent by the respondent no. 1 to the appellant has been produced or proved before the learned Trial Court.

19. As to issue nos. 1 and 2 and the additional issue no. 1:

All these issues can be taken up together for consideration. The entire dispute revolves on the question whether, the various amounts advanced by the appellant to the respondent no. 1 (which is not in dispute), was by way of a friendly loan (as claimed by the appellant) or by way of gift (as claimed by the respondent no. 1). In order to decide the said question, the oral evidence has to be considered in the context of the documentary evidence produced on record, including the letters written by the appellant to the respondent no. 1 and the two Gift Certificates. The respondent no. 1 had issued a notice

reply (Exhibit-60) dated 10.04.2006, in which she has denied that the amount was paid by way of loan. She has specifically claimed that she is not required to return the amount. Thus, although, it is not specifically claimed, in the notice reply that the various amounts were advanced by way of gift, there is overwhelming evidence forthcoming from the letters written by the appellant that the advance was not by way of a loan. Thus, the mere absence of a recital in the notice reply that the amount was advanced as a gift, may not be decisive.

20. A reference at this stage may be made to the two letters i.e. letter dated 05.09.2002 (Exhibit-D/62) and letter dated 27.07.2004 (Exhibit-D/65) and the two Gift Certificates (Exhibit-D/61 and Exhibit-D/64). The appellant has not disputed that he has written the letters and had issued the two Gift Certificates. The two Gift Certificates would make it clear that, the appellant had gifted the amount to the respondent no. 1. The letter dated 05.09.2002 (Exhibit-D/62) would make the position further explicit. The said letter does not show that the respondent no. 1 had asked the appellant to issue the Gift Certificates. On the contrary, it only shows that in a telephonic conversation on 03.09.2002, the respondent no. 1 had said that she would be required to pay tax on the amount and therefore,

it was the appellant who on his own accord spoke to his Income Tax Consultant, who advised the appellant that the amount is not taxable, as the same is gifted by the appellant to the respondent no. 1 from his NRE Account. It can thus be seen that the appellant voluntarily issued the Gift Certificates. The further part of the letter only shows the real intention of the appellant in giving the amount to the respondent no. 1, claiming that he was in love with her. The contents of the letter dated 27.07.2004 (Exhibit-D/65) are verging on lasciviousness. The said letter shows that the appellant had enclosed two cheques of 500/- USD each, out of which, one cheque was for the respondent no. 1 to purchase a ring.

21. The contention that the letters were written on the say of the respondent no. 1 as she wanted “to make someone else jealous” is too vague and improbable to be accepted. The letters at Exhibit-92 and the one marked as 'X', written by the respondent no. 1 also do not show that respondent no. 1 had asked the appellant to write the letters, with a view to make some one else jealous.

22. I have carefully gone through the impugned judgment and I find that the learned Trial Court has rightly

come to the conclusion that the appellant has failed to establish that the amount was advanced by way of a friendly loan.

23. Coming to the submission that the alleged gifts would otherwise be illegal and *non est* on account of the consideration being immoral, the said contention is neither raised before the Trial Court nor is a ground made in the appeal memo and for this reason alone, the same cannot be accepted. Be that as it may, even assuming that the gifts would become *non est* and inoperative, on account of the consideration being immoral, the same cannot turn the advance into a loan. It is trite that the Court would neither enforce nor extend its assistance in respect of an agreement, the object and the purpose of which is immoral and is against public policy. The case made out in the plaint and the evidence on record is replete to show that the appellant continued to advance the amount although, according to him, the respondent no. 1 failed to keep up with her promise to repay the amount advanced earlier. It is further significant to note that in none of the letters written by the appellant, there is even a whisper about the amount being advanced by way of a friendly loan or seeking its return. This would be indicative of the fact that the advance was not by way of a loan, but, by way of a gift in all probability,

for the consideration, which can be gathered from the letters written by the appellant to the respondent no. 1 and more particularly, the letters at Exhibit-D/62 and Exhibit-D-65. The appellant sought recovery of the amount only after the marriage of the respondent no. 1 with respondent no. 2.

24. In view of the above, the issue no. 1 and the additional issue no. 1 are answered in the negative and the issue no. 2 in the affirmative. The Appeal is without any merit and is accordingly dismissed, with no order as to costs. Decree be drawn accordingly.

C. V. BHADANG, J.

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