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

Reserved on : 19th April, 2018

Date of Decision: 4th July, 2018

+ **RFA 94/2011 & CM APPL.4097/2015 (Delay)**

JAGMOHAN BEHL

..... Appellant

Through: Mr. D. K. Rustagi & Mr. Vikrant
Yadav, Advocates (M-9899682997).

versus

COL KS GUPTA & ANR.

..... Respondents

Through: Mr. N. Prabhakar & Mr. Dhruv
Sharma, Advocates (M-8587030456).

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. In this appeal preferred against the judgment dated 12th October, 2010 the Appellant/Defendant (*hereinafter 'Defendant'*) challenges the decree passed by the Trial Court in favour of the Plaintiffs decreeing the suit for recovery in the following terms.

"In view of the above findings, suit is decreed in favour of the plaintiffs and against the defendant for an amount of Rs.14,27,000/- with interest @ 12% w.e.f. 01.01.03 till the realization of decretal amount. Decree sheet be prepared accordingly. File be consigned to R/R after due compliance."

2. The suit for recovery was filed by the Respondents/Plaintiffs (*hereinafter 'Plaintiffs'*) Colonel Retired K.S. Gupta and his wife Smt. Sharda Gupta for a sum of Rs.14,27,000/- against the Defendant. It is the case of the Plaintiffs that the Defendant was an exporter of garments with a

garment factory located in Kotla, New Delhi. He had approached the Plaintiffs for a loan for supporting his business, accordingly, the Plaintiffs had given a loan of Rs.7,50,000/- to the Defendant between the period of 1st August, 1989 to 1st November, 1989 to be paid back with interest @ 12% per annum which was to be split in four instalments in a year payable on quarterly basis. Thus, the Defendant had to pay 12% interest on Rs.7,50,000/- i.e. Rs.90,000/- per annum in four equal instalments after each quarter. The amount of Rs.7,50,000/- was given on the following dates.

	<i>Date</i>	<i>Amount</i>	<i>Mode of payment</i>
(a)	1.8.1989	75,000.00	By Cheque No.533862 dt.1.8.1989 of Oriental Bank of Commerce, Saket, New Delhi A/c No.6206 of the Plaintiff No.1
(b)	1.8.1989	75,000.00	By Cheque No.958203 dt.1.8.1989 of Oriental Bank of Commerce, Saket, New Delhi Account No.5026 of plaintiffs.
(c)	30.9.1989	4,37,000.00	By Cheque No.848833 dt.30.9.1989 of Oriental Bank of Commerce, Saket, New Delhi Account No.3007 (now Computerised as 17007) of Plaintiff No.1.
(d)	30.9.1989	13,000.00	By Cheque No.958206 dt.30.9.1989 of Oriental Bank of Commerce, Saket, New Delhi Account No.5026 of plaintiffs.
(e)	1.11.1989	1,50,000.00	By Cheque No.958209 dt.1.11.1989 of Oriental Bank of Commerce, Saket, New Delhi Account No.5026 of plaintiffs.
	<i>Total</i>	<i>7,50,000.00</i>	

3. According to the Plaintiffs, the Defendant used to pay the interest on

the loan mainly in cash though on two occasions two cheques dated 7th August, 1990 were issued for some part of the interest. Apart from these two cheque payments, till 31st December, 1992, the entire interest amount was paid in cash. Apart from the said amounts, various other amounts of interests were paid in cash between 25th February, 1995 to November, 2001. Though these amounts were paid in cash, a large amount of interest remained outstanding. Despite several reminders the principal amount and the remainder of the interest amount was not being paid. Accordingly, the Plaintiff got notice dated 9th September, 2002 issued to the Defendant. No response was received to the said notice. The Plaintiff then filed the present suit under Order XXXVII CPC.

4. Vide order dated 30th October, 2004, the Defendant was granted unconditional leave to defend. Thereafter, the Defendant filed his written statement. The basic contention of the Defendant is that the cash receipts which were the basis of the suit, are not admissible in evidence since the Defendant did not admit the payment of interest by cash. The last amount paid by cheque being in 1993 and the suit having been filed in 2003, the same is barred by limitation. The Defendant categorically stated in his written statement that after 1993, no payment was made by him. The averment, that no receipt was given and no cash payment was made, was rebutted by the Plaintiffs in his replication by stating that one of the typographical errors in the name of Plaintiff No.2 in the cash receipt, was in fact, corrected by the Defendant by his own hand writing and was initialled by him as well. This showed that the Defendant was paying interest in cash and was receiving receipts for the same.

5. The suit thereafter proceeded for trial. The Plaintiff No.2 Mr. K.S.

Gupta appeared as PW-1 and exhibited the following documents.

Ex.PW-1/1 to Ex.PW-1/5	Original receipts showing giving of the loan by the Plaintiffs to the Defendant. In all these receipts, the name of Plaintiff No.2 was typed as Mrs. Sharla Gupta which has been changed by hand to Mrs. Sharda Gupta. According to PW-1, the correction was so made by the Defendant himself.
Ex.PW-1/6 to Ex.PW-1/8	Savings bank's passbooks of Oriental Bank of Commerce, joint accounts of the Plaintiffs.
Ex.PW-1/9	Deposit slip dated 16 th August, 1990 showing deposit of sum of Rs.9,000/-.
Ex.PW-1/10	Deposit slip dated 3 rd July, 1993 showing deposit of Rs.50,000/-
Ex.PW-1/11	Bank memo dated 12 th July, 1993 showing return of the cheque for Rs.50,000/-.
Ex.PW-1/12	Notice issued under Order XII Rule 8 CPC calling upon the Defendant to produce the original receipts dated 21 st February, 1995 for a sum of Rs.1 Lakh, dated April, 1997 for Rs.10,000/-, 1 st November, 1999 for Rs.50,000/-, 16 th May, 2000 for Rs.20,000/- and November 2001 for Rs.12,000/-.
Ex.PW-1/14 - Ex.PW-1/18	Carbon copies of these receipts mentioned herein above.
Ex.PW-1/19 &Ex.PW-1/20	Legal notice dated 9 th September, 2002 along with speed post receipt.
Ex.PW-1/22 &Ex.PW-1/23	Reminder dated 28 th September, 2002 along with the speed post receipt.
Ex.PW-1/24	Statement of account.

6. In his cross examination, PW-1 stated that the correction made in the

receipts Ex.PW-1/1 to Ex.PW-1/5 was by the Defendant himself. PW-1 stated that the Defendant paid interest till the end of 1992 in entirety. However, thereafter the payment became irregular. He also stated that *“I issued receipts when I received interest in cash. Receipts were issued in duplicate.”*. He stated clearly that the receipts which are placed on record do not bear the signature of the Defendant though they are the carbon copies of the receipts which were issued in original to the Defendant.

7. The Defendant Jagmohan Behl appeared as DW-1 and he filed three affidavits in evidence dated 7th September, 2009, 13th September, 2007 and 15th February, 2007. He alleged that cash receipts from 26th February, 1995 to November, 2001 i.e. Ex.PW-1/14 to Ex.PW-1/18 are manipulated and manufactured. He claimed that Ex.PW-1/1 to Ex.PW-1/5 have alterations and additions and do not have the revenue stamp and, therefore, are not admissible in evidence. He denied the factum of taking a loan. He further stated that business of the firm J.B. International of which he was the proprietor was closed in the year 1990-91, so no income tax returns or sales tax returns were to be filed. He thus only filed his personal income tax returns.

8. In his cross examination, DW-1 admitted his signature in Ex.PW-1/1 to Ex.PW-1/5. He also stated that *“I had taken some money from plaintiff no.1 but I do not remember how much money I had taken from him. I had signed Ex.PW1/1 to Ex.PW1/5 to acknowledge the receipt of the money that I had received from the plaintiff no.1. I returned a part of this money”*. He claimed that he had not brought or filed any documents showing the payment which he had made and he also did not remember whether he repaid the money in cash or by cheque. He also admitted that he had paid the

interest to the Plaintiffs till 1993 and he also claimed that he did not remember if he has taken Rs.7,50,000/- from the Plaintiffs. He categorically denied that he paid any amount from 1995 to 2000. He claimed that he did not remember where he was living in 1990. He claimed that he was receiving rent of Rs.40,000/- per month from State Bank of Indore as a tenant but the same is being adjusted towards loan taken from the bank. He admitted the documents filed with the list of documents dated 29th January, 2007 which contained his income tax returns for the AYs - 1998 to 1999, 1999-2000, 2000-01, 2001-02, 2002-03, 2003-04, 2004-05 and 2005-06.

9. It is relevant to point out that the Plaintiffs had filed an application under Order XI Rules 12 & 14 CPC seeking discovery on oath income tax returns and copies of the sales tax returns etc. of the Defendant firm namely J. B. International. According to the Plaintiffs, the Defendant acknowledged the loan and payment of interest in his income tax returns and production of the same would prove the case of the Plaintiffs. Vide order dated 26th April, 2007, the Trial Court notes as under:

“I have perused copies of these returns which have been filed on 29.01.2007. The form 2A of income tax return for various years have been filed. The statement of computation of taxable income for the year 1998-99, 1999-2000, 2000-01 etc. have also been perused wherein interest paid to State Bank of Indore has been mentioned. It has been mentioned with this “as per bank statement enclosed” but no such bank statement has been filed. In the year 1998-99 the interest paid was Rs.2,96,965/- for 1999-2000 it was Rs.2,79,936/-, for 2000-01 it was Rs.2,56,762/-, for 2001-02 it was Rs.2,38,881/-, for 2002-03 it was Rs.2,12,821/-, 2003-04 it was Rs.1,81,566/-, 2004-

05 it was Rs.1,49,381/-, 2005-06 it was Rs.1,31,216/- etc. From all this it is clear that details regarding interest paid to bank has to be part of the income tax returns/statement of computation of taxable income.”

10. The Trial Court then comes to the conclusion that the Defendant had taken a contradictory stand. On the one hand, in his reply to the application, the Defendant had claimed that no returns were being filed in the name of J.B. International but were being filed in his personal name. However, in another part of the reply, the Defendant claimed that J.B. International has not registered with the sales or income tax department. The Court, therefore, ordered as under:

“10. In these circumstances, in view of the contradictory stand taken by the defendant the defendant has to face the adverse inference for the statutory returns which are mandatory for the defendant to file with the Government Departments whether Income Tax or Sales Tax Department etc in case defendant fails to discover on oath these documents which have been specifically mentioned in para-5 of the application under disposal. As on date the defendant has only filed photocopies of the returns as discussed above along with application u/s 151 CPC dated 29.01.2007. Sales Tax/Income Tax returns for M/s J.B. International have not been filed. Regarding the income tax return of Sh. Jagmohan Behl defendant is directed to file/produce the details regarding interest paid to the bank mentioned in statement of computation of taxable income. Bank statement has been mentioned as enclosed but no such copy has been filed. Copy of the bank statement be also filed / produced on oath along with complete income tax

returns of these years mentioned in para-5 of the application under disposal.

11. In my considered view these documents are necessary to be produced by defendant within a fortnight in order to arrive at just decision and for deciding real matter in controversy between the parties. Parties shall bear their own cost. Application stands disposed off."

11. A perusal of the documents on record along with the orders passed on 26th April, 2007 in the application for discovery shows that the Defendant is clearly avoiding production of the computation of taxable income attached to his income tax returns. Those would clearly show the details of the interest amounts shown by the Defendant in his Returns as having been paid by him. Since the same are not produced, adverse inference would have to be drawn in respect of the income tax returns.

12. The documents on record i.e. Ex.PW-1/1 to Ex.PW-1/5, passbook of the bank, deposit slips clearly show that the loan had indeed been extended by the Plaintiffs to the Defendant and the Defendant had made payment of interest on various dates. Even the Defendant admits to have taken a loan, though grudgingly, and further claims that he has repaid the same, without any evidence to prove the same. He also admits that he paid interest on various occasions. Thus far there can be no dispute.

13. Coming to the question as to whether any interest was paid by the Defendant between 25th February, 1995 and November, 2001, as reflected in Ex.PW-1/14 to Ex.PW-1/18, a perusal of these receipts which are carbon copies shows that some are written in hand and are signed by the Plaintiffs. The paper, the manner of writing, the perforation of the stapler etc. clearly show that these carbon copies would have been attached to the originals,

which were thereafter removed and separated. In the application under Order XI Rules 12 & 14 CPC the Plaintiffs called upon the Defendant to produce the original receipts which were not produced. In fact, the Defendant went to the extent of filing an application seeking that the said documents be de-exhibited. On this, the Trial Court passed the order dated 28th July, 2008, which reads as under:

“15. Therefore even if the documents have been marked as exhibits, if it has not been proved as per law, it can be looked into. Therefore, I am of the considered view that at this stage, it is not necessary for the court to de-exhibit these documents. That can be considered at the final stage of the case. Keeping in view the facts that in order to impart substantial justice, these documents be kept as it is as defendant is having ample opportunity where the cross examination of PW1 has yet to open. Therefore, there is no need to take off the record and expunge the exhibits exhibited in the affidavit of PW1 Col. Retd. K.S.Gupta.”

14. The Court has perused the carbon copies of the receipts as there was no reason to believe that they are either tampered, manipulated or forged. Specific dates when the same have been executed, the amount mentioned therein along with the dates and the other surrounding circumstances namely the loan which was given and payment of interest by cash by the Defendant on several occasions leaves no doubt that these receipts are genuine. The Plaintiff has taken pains to preserve the carbon copies and the originals would have been obviously issued to the Defendant along with the Plaintiff's signature. But the Defendant has chosen not to produce the same.

Under the provisions of the Evidence Act, 1872, the person holding the primary evidence having not produced the same, despite notice being served, the secondary evidence viz., the Carbon copies are admissible in evidence as held by the Supreme Court in ***Ashok Dulichand v. Madhavlal Dube & Anr (1973) 4 SCC 664***. The Defendant cannot merely deny saying that the receipts were never issued. If such a stand is taken, as has been done in the present case, the Court has to consider all the surrounding facts and circumstances as also evaluate the carbon copies to establish their genuineness. A perusal of the carbon copies on record and the contradictory pleas taken by the Defendant clearly leads this Court to the conclusion that the carbon copies are genuine. The last payment of interest as per these carbon copies of receipts is November, 2001 to the tune of Rs.12,000/-.

15. This Court has arrived at this conclusion on the basis of the documents as also the lack of truthfulness and credibility in the Defendant's pleadings and evidence. In the cross-examination, it is evident that the Defendant accepts that he had taken the loan but he repeatedly claims "*I do not remember*" on most questions/suggestions. The phrase "*I do not remember*" has been used umpteen times in the entire cross examination which makes it clear that the Defendant is not coming clean with the Court. In his affidavit, the Defendant tried to wriggle out of the factum of loan having been taken by him which established completely dishonesty. Thus, it is held that the Plaintiffs have been able to establish the giving of the loan and the various payments made by the Defendant.

16. The last payment being in November, 2001, the question is as to whether the suit was filed within limitation. Section 14 of the Limitation Act, 1963 clear and the same reads as under:

“14. Exclusion of time of proceeding bona fide in court without jurisdiction. (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.”

The payment of interest on the loan even as of November, 2001 is clear acknowledgment of the existence of the loan. The written statement does not deny in response to the paragraph 6 of the plaint that no receipt was executed. In paragraph 6 the Plaintiffs had set out all the details of the receipts. In the Written statement except pleading *“All other entries in cash*

are written false, baseless and are mere fabrication. The said entries are fictitious and are made to some how bring the suit within limitation, though the suit is hopelessly time-barred.” there is nothing else.

17. The non-filing of the income tax returns has to be held against the Defendant. In ***Rajesh Kumari v. Prem Chand Jain, AIR 1998 Del 80*** a learned Single Judge of this Court held as under:

“On the language of Section 19 above said, it is clear that the payment may be made either against the principal or on account of interest. In either case, the payment will be on account of the debt which is all that the provision requires. It is also settled that this provision is to be interpreted liberally so as to save the suits from being barred by limitation so long as its benefit can reasonably be extended to assist a claim, otherwise legal sustainable”

18. The Defendant relied upon the judgment of the Supreme Court in ***Syndicate Bank v. Channaveerappa Beleri and Ors (2006) 11 SCC 506*** which interpreted the meaning of word “on demand”. As per the said judgment under Articles 21 & 22 of the Limitation Act cause of action for filing the suit in respect of the loan, which is payable on demand is different from that for a loan where money is deposited under an agreement. The Supreme Court held as under:

“In the context of Article 21, the meaning and effect of those words is “always payable” or payable from the moment when the loan is made, whereas in the context of Article 22, the meaning is “payable when actually a demand for payment is made”

19. Accord to Mr. Rustagi, even if it is taken that interest was paid on

November, 2001, the same does not constitute written acknowledgment as per Section 14 of the Act. A receipt issued for payment of interest does not constitute acknowledgment or extent limitation as the said receipt merely constitutes an entry by the Plaintiffs and does not bear the signature of the Defendant. Since there is no signature of the Defendant on the receipt, there is no acknowledgment in November, 2001 and hence the suit is beyond limitation. He relies on ***Chanradhar Goswami v. Gauhati Bank Ltd. (1967) 1 SCR 898***. The relevant portion of the said judgment reads as under:

“Then we come to the question of limitation. The suit is clearly within time insofar as the liability for sale under the mortgage deed is concerned as it was filed within 12 years of the execution of the mortgage (see Art. 138 of the Limitation Act of 1908). As to the personal liability under this deed, that is beyond time as the suit was filed more than six years after the execution of the mortgage (see Art. 116 ibid). Nor does the entry of payment of Rs.100/- in the accounts help the bank in this behalf. That entry is of no value under s.19 or s.20 of the Limitation Act for neither a writing signed by the appellants nor an acknowledgement of payment in the handwriting of the appellants or in a writing signed by them has been proved. Nor does this Art.85 of the Limitation Act of 1908 help the bank.”

20. In Articles 21 & 22 of the Limitation Act, Article 21 prescribes the period of limitation prescribed as three years and in case of money lent under an agreement it shall be payable on demand. Paragraph 3 of the plaint reads as under:

“That between the period 1.8.1989 to 1.11.1989 the Defendant took the loan of Rs.7,50,000/- from

both the plaintiffs, repayable on demand by plaintiffs. The annual interest @ 12% per annum was to be split in four installments in a year and payable on quarterly basis.”

21. Thus, as per the Plaintiffs, the loan was to be repaid on demand. A perusal of the evidence shows that the Defendant paid interest both by way of cash and cheque. In his cross examination, he took the stand that he had taken some money from the Plaintiffs but he could not remember how much money was taken. He also could not remember how much he had paid back or showed any document to show the said payments. Thus, the Plaintiff made the first demand by way of legal notice dated 9th September, 2002. Thus, the period of limitation would run from this date. As per the judgment cited by the Defendant, when demand specifically provides for the period for making payment, then the right to sue accrues upon the said period expiring. In the present case, Ex.PW-1/19 legal notice dated 9th September, 2002, specifically called upon the Defendant to repay within two weeks. The said notice reads as under:

“5. That I on behalf of my clients, call upon you to take immediate necessary steps in right earnest to perform your legal liability and to make payments to my clients of the outstanding amount of more than Rupees Twelve lakh covered as per details above, within two weeks of the receipt of this legal notice together with interest @ 12% per annum upto the date of actual payment.”

The Plaintiffs thus made the demand and gave the Defendant two weeks’ time to make the payment. Upon expiry of the said period, the right to sue accrued. Thus, the suit is within the limitation.

22. Apart from the issue of limitation, no other issue is pressed in this appeal. The factum of taking of loan is clearly proved. Payment of interest on various occasions has also been proved and execution of the receipts shows that even as on November, 2001 the Defendant had been making payments. Cross examination of the Defendant proves that his evidence lacks credibility. His income tax returns showed the payment of interest but computation has not been filed. Thus, adverse inference has to be drawn. In view of the above-mentioned facts and circumstances, no interference in the Trial Court judgment is called for. Decree passed by the Trial Court is upheld. The Defendant is directed to pay the decretal amount within a period of four weeks failing which the Plaintiff is permitted to execute the decree. In view of the conduct of the Defendant of having been denied the legitimate dues of the Plaintiffs, for so many years, costs of Rs.50,000/- shall be liable to be paid by the Defendant to the Plaintiffs.

23. Appeal is dismissed. All pending applications are disposed of.

**PRATHIBA M. SINGH
JUDGE**

JULY 04, 2018/dk