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

\+ **RFA No.232/2006**

% ***12th September, 2018***

PUNJAB NATIONAL BANK

..... Appellant

Through: Mr. Roshan Lal Goel, Advocate with Ms. Anju Gupta, Advocate (M. No.9654169406).

versus

M/S KUMAR ENTERPRISES & ORS.

..... Respondents

Through:

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/plaintiff/bank impugning the *ex-parte* Judgment of the Trial Court dated 18.01.2006 by which the trial court decreed the suit for recovery of the amount of Rs.4,15,002/-, as prayed for, and further granted simple interest @ 9% per annum *pendente lite* and future interest to the

appellant/plaintiff/bank. The trial court did not pass an order granting relief of sale of the mortgaged property, as prayed for.

2. It is noted that the impugned judgment and decree is an *ex-parte* judgment and decree. The trial court has held that the appellant/plaintiff/bank has proved the factum of grant of loan and the signing of the guarantee letter by the respondent no.2/defendant no.2. The trial court has also proved and exhibited the original Sale Deed dated 04.11.1999 of the property, deposited with the appellant/plaintiff/bank, as equitable mortgage being Ex.PW2/14. The relevant para of the judgment of the trial court is para 3 and this para 3 reads as under:-

> "3. In support of its case plaintiff produced PW-1 Sh. Gopal Agrawal who filed his affidavit dated 17.1.2006 and further relied upon the documents Ex.PW1/1 and Ex.PW1/2. The witness has reiterated the facts pleaded in the plaint. The witness has proved the legal notice dated 4.12.2004 along with courier and UPC receipts as Ex.PW1/1 and Statement of Account as Ex.PW1/2. The other witness produced by the plaintiff is PW-2 Sh. M.L. Kaim who filed his affidavit dated 17.1.2006 and also relied upon the documents Ex.PW2/1 to Ex.PW2/14. I have gone through the documents. The original loan application is Ex.PW2/1, term loan agreement dated 13.12.2001 is Ex.PW2/2, irrevocable letter of authority dated 13.12.2001 is Ex.PW2/3, general undertaking dated 13.12.2001 is Ex.PW2/4, declaration/affidavit dated 13.12.2001 is Ex.PW2/5, original quotation of Mega Soft System and Services dated 1.11.2001 is Ex.PW2/6, original receipt of payment of Rs.1,42,000/- dated

> 20.12.2001 issued by Mega Soft System and Services is Ex.PW2/7, original quotation on IT Systems & Solutions dated 10.11.2001 is Ex.PW2/8, letter dated 7.10.2002 issued by defendant no.2 as Ex.PW2/9, guarantee agreement is Ex.PW2/10, debit vouchers dated 13.12.2001 and 19.12.2001 are Ex.PW2/11, debit vouchers dated 24.12.2001 are Ex.PW2/12, credit vouchers dated 13.12.2001, 24.12.2001 and 19.12.2001 are Ex.PW2/13 and sale deed dated 4.11.1999 is Ex.PW2/14."

3. No doubt the suit was not properly titled as one under Order XXXIV CPC, however, the relief clause in the plaint clearly shows that the appellant/plaintiff/bank prayed for directing foreclosure and sale of the mortgaged property being K-83, Shyam Nagar, Vishnu Garden, New Delhi having an area of 200 sq yds. The mortgaged property is owned by respondent no.2/defendant no.2, Sh. Anil Kumar Sharma. Therefore, the trial court should have, in fact, passed a preliminary decree under Order XXXIV Rule 4 CPC. In my opinion, the appellant/plaintiff/bank would have succeeded even if a review application was filed before the trial court; however, the appellant/plaintiff/bank has chosen to file this appeal.

4. In view of the aforesaid discussion, this appeal is allowed to the limited extent that while the impugned judgment and decree will stand and the *pendente lite* and future interest granted by the impugned judgment need not be varied, as it is the discretion of the

court, under Section 34 CPC, to grant a particular rate of interest, as per the facts and circumstances of the case. However, the impugned judgment and decree which is passed will now be treated as a preliminary decree under Order XXXIV Rule 4 CPC and in case of non-payment of the amount, within the time prescribed by law, the concerned civil court will be entitled to pass a final decree under Order XXXIV CPC, directing for sale of the mortgaged property to recover the amount decreed. Appellant will also be entitled to costs of this appeal. Decree sheet be prepared.

5. Appeal is accordingly partially allowed and disposed of as stated above.

SEPTEMBER 12, 2018 **VALMIKI J. MEHTA, J**
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