

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

+ **RFA Nos. 823/2006 & 74/2007**

% **7th December, 2018**

RFA No. 823/2006

SANJAY MITTAL

..... Appellant

Through: Mr. R.M. Bagai, Adv.
(Mobile No.9560853366).

versus

SUNIL JAIN

..... Respondent

Through: None.

AND

RFA No.74/2007

SUNIL JAIN

..... Appellant

Through: None.

versus

SANJAY MITTAL

..... Respondent

Through: Mr. R.M. Bagai, Adv.
(Mobile No.9560853366).

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

RFA No. 823/2006

1. This Regular First Appeal under Section 96 of the Code of the Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit

impugning the Judgment of the trial court dated 20.11.2006 by which the trial court has only partially decreed the suit for recovery of money filed by the appellant/plaintiff against the respondent/defendant. The appellant/plaintiff claims a total amount of Rs. 7,63,000/-. This amount of Rs. 7,63,000/- comprised of two principal amounts, one of Rs. 2,00,000/- given as loan to respondent/defendant by the appellant/plaintiff on 20.07.2002, and another principal amount of Rs. 3,00,000/- given as loan on 03.05.2003, with the remaining amount being towards interest at the contractual rate of 2 % per month. The suit has been decreed only for an amount of Rs. 3,00,000/- with interest.

2. The facts of the case are that the appellant/plaintiff filed the subject suit pleading that he had granted firstly a loan of Rs. 2,00,000/- to the respondent/defendant on 20.07.2002, and in token of receipt of which the respondent/defendant had executed the receipt Ex. P3. Another loan of Rs. 3,00,000/- was said to have been given by the appellant/plaintiff to the respondent/defendant on 03.05.2003 to evidence which, another receipt was executed by the respondent/defendant which is Ex. P2. The appellant/plaintiff claimed

that to repay the loan, a cheque of Rs. 3,00,000/-, in part payment, was issued by the respondent/defendant on 20.09.2004, and this cheque was dishonoured on presentation. The subject suit was, therefore, filed for recovery of principal loan amount of Rs. 5,00,000/- and contractual rate of interest of 2% per month.

3. The respondent/defendant contested the suit and pleaded that he had not taken a loan of Rs. 5,00,000/- but, in fact, he had taken a loan of Rs. 3,00,000/- only. It was pleaded that the first time the loan was taken for Rs. 2,00,000/- and the second time when the loan was taken the loan was taken for Rs. 1,00,000/-. Accordingly, it was contended by the respondent/defendant that a total amount of Rs. 3,00,000/- only was taken as a loan and it was further explained that at the time of taking the second loan of Rs. 1,00,000/-, a receipt of Rs. 3,00,000/- was executed because the appellant/plaintiff claimed to the respondent/defendant that he had lost the first receipt executed for the earlier loan of Rs. 2,00,000/-. The respondent/defendant, therefore, claimed that the cheque which was issued for Rs. 3,00,000/- was to be in full and final settlement of the entire loan amount received of Rs. 3,00,000/-, and that the respondent/defendant is ready to pay this

amount of Rs. 3,00,000/- to the appellant/plaintiff in full and final satisfaction of all the claims of the appellant/plaintiff towards the principal loan amount of Rs. 3,00,000/-.

4. I may note that during pendency of the suit, an amount of Rs. 3,00,000/- has been paid by the respondent/defendant to the appellant/plaintiff and, therefore, the issue is with regard to the return of balance amount of Rs. 2,00,000/-, with interest on the total amount of Rs. 5,00,000/-, payable by the respondent/defendant to the appellant/plaintiff.

5. Trial court has rejected the case of the appellant/plaintiff that a total loan of Rs. 5,00,000/- was given by firstly holding that if interest was not paid by the respondent/defendant to the appellant/plaintiff under both the loans, then why no notice was served by the appellant/plaintiff on the respondent/defendant and more particularly why was this interest amount payable for the first loan of Rs. 2,00,000/- on 20.07.2002 not mentioned at the time of taking of the second loan of Rs. 3,00,000/- on 03.05.2003. The trial court has further reasoned that why the appellant/plaintiff accepted a cheque for Rs. 3,00,000/- instead of the total amount of Rs. 5,00,000/-, by

rejecting the contention of the appellant/plaintiff that the cheque of Rs. 3,00,000/- was dishonoured and the same was only as part payment. Trial court has also held that though the appellant/plaintiff is said to have issued a notice to the respondent/defendant but this Notice dated 08.10.2004 was not filed and proved and this raises an adverse inference against the appellant/plaintiff. The relevant observations of the trial court are contained in paras 11 to 16 of the impugned judgment, and these paras read as under:-

“11. The 1st disputed question is did the defendant pay interest on the said loan amount at the agreed rate to the plaintiff or not. The plaintiff in the plaint has claimed interest on the loan amount at the agreed rate for the entire period meaning thereby that no money on this count was paid by the defendant to him. The defendant in preliminary objection and submission no.3 of the written statement claims that amount of interest was being paid to the plaintiff on a monthly basis. So burden of proof was on the plaintiff to prove that no money on this score was paid to him by the defendant. I have before me the oral conflicting statements of the parties on this aspect of the matter. Had the defendant not been paying interest to the plaintiff as claimed for by him since 20.07.2002 on the 1st loan amount of Rs.2.00 lacs, this fact should have at least found a mention in Ex.P-2. Also, if there would have been any lapse of the part of the defendant in this regard, plaintiff would not have advanced him any further loan on 03.05.2003. Further in case of non-payment of interest by the defendant, on the said loan amount, the plaintiff would have definitely got issued at lease a notice to him on that score. So on the basis of preponderance of probabilities it appears to me that the defendant might have been paying interest at the agreed rate to the plaintiff. It is well known that when there is a choice only between oral statements, the party on whom the onus lay must fail. (Refer **Badari Dass Vs. AGFR 1986 RLR 26**). So relying on the judgment in the case of **Badri Dass (Supra)**, I have no hesitation in holding that the plaintiff must fail in this regard.

12. The other important point that arises for consideration is what was the loan amount that was advanced by the plaintiff to the defendant on 03.05.2003. Was it Rs.3.00 lacs as mentioned in Ex.P-2 and as claimed for by the plaintiff or was it Rs.1.00 lacs as claimed for by the defendant? According to the defendant on 03.05.2003 plaintiff had told him that receipt dated 20.07.2002 pertaining to earlier loan amount of Rs.2.00 lacs had been misplaced and therefore at the time of advancement of loan amount of Rs.1.00 lac on 03.05.2003, receipt Ex.P2 for the entire loan amount of Rs.3.00 lacs was issued. Further according to him, at that time plaintiff had demanded a cheque Ex.P-1 for the full loan amount of Rs.3.00 lacs which was given by him. As against this Ld. Counsel for the plaintiff has vehemently argued that on 03.05.2003 a sum of Rs.3.00 lacs had been advanced to the defendant and to buttress this argument reliance has been placed on the receipt dated 03.05.2003 Ex.P-2. It is significant to note that the plaintiff neither in the plaint nor in his affidavit Ex.PW-1/1 has specified the date when cheque Ex.P-1 had been given to him by the defendant. For the 1st time, during the course of cross-examination of the defendant, a suggestion was put to him to the effect that cheque Ex.P-1 had been given by him to the plaintiff on 20.09.2004 which was claimed by him to be wrong. So from this suggestion case of the plaintiff appears to be that the cheque Ex.P1 had been given by the defendant to him i.e. the plaintiff on 20.09.2004. It is further the case of the plaintiff that defendant had undertaken to pay balance amount and interest in October, 2004. As per admitted case of the plaintiff after dishonour of the said cheque Ex.P1 he got issued a notice dated 08.10.2004 to the defendant. Plaintiff has not produced on record the said notice dated 08.10.2004 or a copy thereof. The case of the plaintiff before this Court now that the cheque Ex.P.1 had been given on 20.09.2004 by the defendant and that defendant had further undertaken to pay balance loan amount of Rs.2.00 lacs along with interest in October, 2004, would have definitely found a mention therein. This notice would have definitely thrown some light on the controversy in question. For this lapse of the plaintiff, I draw an adverse inference against him to the effect that had the same been produced on record, it would have falsified his version in this regard. In this regard a reference may be made to a judgment of the Apex Court reported as **Gopal Kishanji Vs. Mohd. Haji, AIR 1968 S.C. 1413.**

13. There is yet another important fact which casts a doubt on the version of the plaintiff and supports the defence of the

defendant. At this stage conduct of the plaintiff assumes significance. As per plaintiff's own case defendant had given the cheque Ex.P1 to him on 20.09.2004. The defendant denies this and claims that it was given on 03.05.2003 for securing the entire loan amount of Rs.3.00 lacs i.e. Rs.2.00 lacs paid on 20.07.2002 and Rs.1.00 lac paid on 03.05.2003. For the sake of argument, presuming the case of the plaintiff to be true, as on 20.09.2004 at the time of delivery of cheque Ex.P1, to him, Rs.2.00 lacs towards balance loan amount along with interest amounting to approximately Rs.2.00 lacs was still outstanding which was agreed to be paid in October, 2004.

14. Admittedly, for the 1st time, before filing the present suit, notice dated 19.02.2005 Ex.PW-1/C was got issued by the plaintiff to the defendant. If the balance loan amount of Rs.2.00 lacs and an equivalent interest amount had actually remained unpaid, the plaintiff would not have remained quiet for so long. So on the basis of preponderance of probabilities, it appears to me that on 03.05.2003 plaintiff had paid only Rs.1.00 lac to the defendant and for securing the entire loan amount of Rs.3.00 lacs, defendant had issued Ex.P-1, a post dated cheque and receipt Ex.P-2 and that is why no immediate action was taken by the plaintiff and for recovery of balance loan amount and interest, amounting to Rs.4.00 lacs except necessary action pertaining to dishonour of the cheque Ex.P1.

15. It is also significant to note that as per plaintiff's own admitted case, sum of Rs.3.00 lacs allegedly paid by him to the defendant had been given to him by his brother in law Rajesh Aggarwal. The said Sh. Aggarwal was also not been examined as a witness by the plaintiff.

16. So I hold that total loan advanced by the plaintiff to the defendant was Rs.3.00 lacs only. On 27.09.2006 in exercise of my powers Under Order 12 Rule 6 C.P.C. on the basis of admissions, a judgment for a sum of Rs.3.00 lacs was passed in favour of the plaintiff and against the defendant. The said amount stood paid by the defendant to the plaintiff on 08.11.2006. It appears to me that after dishonour of Ex.P1 and commencement of disputes between the parties, the defendant would not have paid any interest to the plaintiff. Therefore, I allow interest at the agreed rate of 2% p.m. on the said amount of Rs.3.00 lacs w.e.f. Sept, 2004 till October, 2006. Plaintiff shall also be entitled to grant of costs. The suit of the plaintiff stands decreed in terms of the aforesaid findings. The aforesaid issues, stand answered in terms of my findings above."

6. I am afraid that the trial court has fallen into a grave error in holding that the appellant/plaintiff had only advanced a loan of Rs. 3,00,000/- and not a total loan of Rs. 5,00,000/- to the respondent/defendant. It is seen that the appellant/plaintiff has filed and proved on the record two receipts Ex. P3 and Ex. P2 which specifically mentioned the amounts of Rs. 2,00,000/- and Rs. 3,00,000/-. More importantly, it is not mentioned in the second receipt, Ex. P2 dated 03.05.2003 that the total loan amount was of Rs. 3,00,000/- and all that is mentioned is that an amount of Rs. 3,00,000/- has been received. Therefore, the trial court has completely misread, Ex. P2 as reflecting receipt of a total loan of Rs. 3,00,000/-. Also, it is relevant to note that the case of the appellant/plaintiff was that the cheque for Rs. 3,00,000/- which was dishonoured was dated 20.09.2004, whereas the case of the respondent/defendant was that the cheque was given at the time of taking the second loan on 03.05.2003, and if the cheque was issued in May, 2003, and not in September, 2004 as was the case of the appellant/plaintiff, then it was very easy for the respondent/defendant to have proved that the cheque was of May, 2003 by filing the counter foils of the respondent's/defendant's

cheque book which would have shown running cheque numbers thereby showing that the subject cheque was in fact issued with respect to the transactions in May, 2003, however, the respondent/defendant deliberately did not file the counter foils of his cheque book which contained the dishonoured cheque of Rs. 3,00,000/-. It is, therefore, held that the trial court has erred in holding that the dishonoured cheque of Rs. 3,00,000/- was given at the time of taking second loan of Rs. 2,00,000/- totaling to a loan amount of only Rs. 3,00,000/-.

7. Another important aspect is that the trial court has erred in holding that the cheque of Rs. 3,00,000/- shows that the total amount of loan received was of Rs. 3,00,000/- inasmuch as it is not improbable, but it is perfectly plausible and possible, that the respondent/defendant would have issued the cheque of Rs. 3,00,000/- only towards part payment of the total loan amount of Rs. 5,00,000/-. Surely, a creditor such as the appellant/plaintiff can take a cheque for part payment, and merely because the cheque is of an amount of Rs. 3,00,000/-, it could not have been held by the trial court that the

cheque was not towards part payment but was for repayment of the total loan amount of Rs. 3,00,000/-.

8. In my opinion, however, the appellant/plaintiff is not entitled to interest @ 2% per month. This rate of interest is usurious and against the public policy. It has been held by the Division Bench of this Court in the case of *Pt. Munshi Ram & Associates (P) Ltd. v. DDA, 2010 SCC Online Del 2444* that higher rates of interest which are against public policy can be struck down by the court by finding such rates of interest to be against public policy. Any contract which is against the public policy is void as per Section 23 of the Indian Contract Act, 1872. In my opinion, therefore, appellant/plaintiff is entitled to interest only @ 9% per annum simple.

9. In view of the aforesaid discussion, this appeal is allowed. Suit of the appellant/plaintiff is decreed for a sum of Rs. 5,00,000/-. Interest @ 9% per annum simple will be payable on the amount of Rs. 2,00,000/- from 20.07.2002 and interest @ 9% per annum simple on Rs. 3,00,000/- will be payable from 03.05.2003. The same rate of interest will continue *pendente lite* and future till payment. However, since the respondent/defendant has paid an amount of Rs. 3,00,000/-

during the pendency of the suit, as on the date this payment is made, this amount will be reduced from the total amount payable to the appellant/plaintiff on this date towards principal and interest, after taking the amount of Rs. 3,00,000/- first towards interest and then towards principal. Parties are left to bear their own costs. The trial court record be sent back.

RFA No.74/2007

10. This appeal will stand disposed of in terms of the judgment given in ***RFA No. 823/2006*** inasmuch as this appeal is only for reduction of rate of interest granted by the trial court by its impugned judgment, and the rate of interest has already been reduced as per the reasoning and conclusion given while deciding ***RFA No.823/2006***.

11. The appeal is, accordingly, disposed of.

DECEMBER 07, 2018
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VALMIKI J. MEHTA, J