* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **RFA No.26/2017**

% ***12th October, 2018***

DHANLAXMI BANK LTD.

..... Appellant

Through: Mr. Gaurav Gupta, Advocate (M. No.9871396480).

versus

AGGARSAIN JEWELLERS PVT. LTD. & 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 plaintiff/bank impugning the Judgment of the Trial Court dated 19.10.2016 by which the trial court has dismissed the suit filed by the appellant/plaintiff for recovery of Rs. 5,04,843.65/- alongwith interest.

2. At the outset, it may be noted that there were three defendants in the suit, and they were proceeded *exparte*, and therefore, there is neither any pleading nor any evidence led by the defendants.

3. The facts of the case are that the appellant/plaintiff granted a loan to the respondent no.2/defendant no.2, who was carrying on the business in the name of his proprietorship firm. The respondent no. 2/defendant no. 2 was granted an 'Express Business Loan' of Rs. 15,01,000/- and for this purpose the respondent no .2/defendant no. 2 executed the necessary documents being the Agreement dated 08.08.2011, Demand Promissory Note and Demand Promissory Note Delivery Letter both dated 08.08.2011 etc. The sole proprietorship concern of the respondent no. 2/defendant no. 2 became a Private Limited Company and this company was sued as the defendant no.1 in the suit inasmuch as the respondent no.1/defendant no.1/company vide its Resolution dated 15.11.2013 took over the loan granted to the respondent no. 2/defendant no. 2.

4. The appellant/plaintiff led evidence and proved its case and documents, as stated in para 4 of the impugned judgment, and this para 4 reads as under:-

> "(4) In order to discharge the onus, the plaintiff bank examined Sh. R. Sathyanarayanan, Branch Manager as PW1 who in his examination-in-chief by way of affidavit **Ex.PW1/A** corroborated what has been earlier stated in the plaint in toto. He has relied upon the documents i.e. the copy of board of Resolution in favour of Sh. R. Sathyanarayanan, Branch Manager dated 27.09.2012 which is **Ex.PW1/1** (mentioned as Ex.PW1/A in the affidavit); Express Business Loan Application Form dated 20.07.2011 which is **Ex.PW1/2 (colly., running into four pages)** (mentioned as Ex.PW1/B in the affidavit); copy of Master Credit Agreement dated 08.08.2011 which is **Ex.PW1/3 (colly, running into 34 pages)** (mentioned as Ex.PW1/C in the affidavit); copy of Demand Promissory Note and Demand Promissory note Delivery Letter dated 08.08.2011 executed by defendant no.2 in favour of plaintiff bank which is **Ex.PW1/4 (colly, two pages)** (mentioned as Ex.PW1/D(colly.) in the affidavit); copy of cheque submission form executed by defendant no.2 in favour of plaintiff bank which is **Ex.PW1/5** (mentioned as Ex.PW1/E in the affidavit); copy of Memorandum & Articles of Association of Defendant no.1 and Board Resolution dated 15.11.2013 which is **Ex.PW1/6 (Colly, running into 11 pages)** (mentioned as Ex.PW1/F (colly.) in the affidavit); copy of recall notice dated 31.07.2014 along with postal receipts is **Ex.PW1/7** (mentioned as Ex.PW1/G (colly.) in the affidavit); certificate under Section 2(a) of Banker's Book Evidence, certified copy of statement of accounts, Simulation Report and repayment schedule which is **Ex.PW1/8 (colly, running into 11 pages)** (mentioned as Ex.PW1/H (colly) in the affidavit). The entire testimony of the witness has gone unrebutted and uncontroverted and the defendant did not appear."

5. The trial court, in my opinion, has wrongly dismissed the suit by giving three reasons, firstly, by holding that the suit is time barred, secondly, holding that the statement of account filed by the appellant/plaintiff is not certified under the Bankers' Books Evidence Act, 1891, and thirdly that the address of the defendants as shown in the plaint are not the correct addresses of the respondents/defendants

who had shifted from the addresses as found in terms of the record of the legal notices sent by the appellant/plaintiff.

6. In my opinion, the trial court has completely erred in dismissing the suit. The suit is very much within limitation because the loan was granted on 08.08.2011. The Agreement of the respondent no. 1/defendant no.1/company to take over the loan, and hence, it becoming liable for the loan arose when the Agreement has been executed on 15.11.2013 and this Agreement-Cum-Resolution has been proved and exhibited as Ex.PW1/6(colly). The suit, therefore, against the respondent no.1/defendant no.1 could have been filed till 15.11.2016 and the subject suit has admittedly been filed on 03.02.2015. The suit was, therefore, very much within limitation as against the respondent no.1/defendant no.1, and hence, the trial court has acted illegally in dismissing the suit as time barred.

7. Even on the aspect of the appellant/plaintiff not filing the Bankers' Books Evidence Act Certificate, the same is clearly against the record of the trial court inasmuch as the appellant/plaintiff filed and proved on record the certificate under the Bankers' Books Evidence Act and the same has been proved as Ex.PW1/8(colly)

alongwith relevant statement of account. I fail to understand as to how the trial court could have held that the statement of account is not certified under the Bankers' Books Evidence Act.

8. Lastly, it is held that the trial court wrongly dismissed the suit by holding that the addresses of the respondents/defendants are not those as stated in the plaint because the appellant/plaintiff knew that the defendants have shifted from the addresses, inasmuch as, the respondents/defendants have been served by publication, which as per law is sufficient service, especially when the respondents/defendants are not available at their last known addresses.

9. It is however noted and clarified that since the amount due has been taken over as liability of the respondent no. 1/defendant no.1 and the respondent no.1/defendant no. 1 being a company, the decree which will be passed in this case will only be against the respondent no.1/defendant no.1, and not as against the respondent nos.2 and 3/defendant nos.2 and 3 who are only the shareholders or directors. The liability of a company is not the liability of its directors or shareholders.

9. The impugned Judgment dated 19.10.2016 is set aside. The suit of the appellant/plaintiff is decreed against the respondent no.1/defendant no.1 for a sum of Rs. 5,04,843/- alongwith *pendente lite* and future interest @ 9% per annum simple till payment. The appellant/plaintiff will be entitled to costs of the suit. Decree sheet be prepared. Trial court record be sent back.

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