

Sudhir Jain vs Sarla Mittal And Others on 4 August, 2023

Author: Neena Bansal Krishna

Bench: Neena Bansal Krishna

* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Pronounced on: 04th

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CS(OS) 777/2011 & IA 17692/2022

SUDHIR JAIN

R/o 2596, Oak Hills Drive,

Ann Arbor, Michigan 48103 USA

.....

Through: Mr. Neeraj Sharma, Ms. Archa

Lakhotia, Mr. Bikram Bhatta

and Ms. Prachi Jain, Advocates

versus

1.

SARLA MITTAL R/o 81 Sainik Farms, Mehrauli Badarpur Road, New Delhi

2. R. P. MITTAL R/o 81 Sainik Farms, Mehrauli Badarpur Road, New Delhi

3. KAUSHALYA JHINGRAN R/o K-9, Rajouri Garden, New Delhi

4. JYOTI KESRI R/o A2/9, Rana Pratap Marg, New Delhi Defendants Through: Mr. Adarsh Priyadarshi, Ms. Roopa Dayal and Ms. Shivleen, Advocates for R-1 & 2.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA J U D G M E N T

1. The plaintiff, who is of Indian origin but resident of US, has filed this suit through his authorized representative Mr. Ashu Jain, for recovery of Rs.11,50,00,000/- along with interest under Order XXXVII of Code of Civil Procedure (hereinafter referred to as "CPC, 1908").

2. The case of the plaintiff is that the defendant Nos. 1 and 2 were known to the plaintiff through a common friend/relative. In or around July 2006, the defendant No.2 Sh. R.P. Mittal requested for a short-term loan on his behalf and his wife Defendant No.1/Smt. Sarla Mittal ostensibly on their serious personal financial difficulty as they were unable to repay the bank loan and had risk of losing their assets. On their request of financial accommodation for 90 days, plaintiff agreed to give a loan of Rs.5,00,00,000/- with the agreed rate of interest @ 13% p.a. The

amount of Rs.5,00,00,000/- was given to the defendant in installments between the period of July 2006 to October 2006 subject to loan transaction and its term being documented and evidenced by a Loan Agreement.

3. The plaintiff accordingly paid the said principal loan amount of Rs.5,00,00,000/- to the borrowing defendant through Demand Drafts/Pay Orders made from his NRE Account No. 093010100167123 with the Axis Bank, New Delhi. The Loan Agreement was formally executed between the plaintiff and the borrowing defendant on 30.10.2006.

4. The defendant Nos.1 and 2 assured that as a potential security for the loan amount they had enforceable rights in 85, Central Avenue, Sainik Farms, Khanpur, New Delhi property (hereinafter referred to as "suit property") and alleged that they had entered into a Sale Agreement with defendant Nos. 3 and 4, though the Sale Deeds were not yet registered. They undertook to mortgage their rights in the said property in favour of the plaintiff to secure the repayment of loan by executing a registered Mortgage Deed. For this reason the Loan Agreement was also signed by defendant No.3 acting through defendant No.4 and as such defendant Nos.3 and 4 stood as guarantors for the repayment of loan by defendant No.1 and 2. The terms of the Loan Agreement were as follows: -

"WHEREAS A. The Borrower has approached the Lender for obtaining a loan for a sum of Rs. 5,00,00,000 (Rupees Live Crore only) for financing his personal requirements. B. As a security for repayment of the entire outstandings, the Borrower Punjab will deposit with the Lender, the original title deeds in respect of property admeasuring 1 Bigha 16 Biswas in Khasra No. 279/1 (1-10) and Khasra No. 297/1 (0-6) situated in Village Khanpur, Tehsil Mehrauli, New Delhi (also known as No. 85, Sainik Farms, Central Avenue, New Delhi ("Property"), which the Borrower represents is free from all encumbrances etc. . the Confirming Party confirms that all the Power of Attorneys are valid and subsisting.

C. As condition precedent to the Lender providing the aforesaid loan,- the Borrower, is entering into this Agreement to set forth, certain representations, warranties and covenants of the Borrower to the Lender and to record in writing other terms and conditions under which the Lender has agreed to provide the said loan to the Borrower.

2. Loan Facility The Lender agrees, subject to the fulfillment of the Pre- conditions to make available to the Borrower a loan aggregating to a sum of Rs. 5,00,00,000 (Rupees Five Crore only) for financing the Borrowers personal requirements (hereinafter referred to as the "Loan ").

3. Term The-Loan shall be for a period of one year from the date on which the funds pursuant to this Agreement are transferred to Borrower's bank account.

4. Interest Interest on the principal amount of the Loan shall accrue at the rate of 30 percent per annum and shall commence on the date on which the funds are transferred to:- Borrower's bank account pursuant to this Agreement and shall continue to accrue until the principal amount of the Loan along with interest accrued thereon is repaid in full.

5. Payment On the Maturity Date, Borrower, without any demand from the Lender, shall repay the principal amount of the Loan along with the interest accrued thereon. Payment shall be made in Indian Rupees, to Lender's designated Bank account and shall be paid in full without set-off or counterclaim.

6. Security As a security for repayment of the entire outstandings, the Borrower will deposit with the Lender, the original title deeds in respect of Property, which the Borrower represents is free from all encumbrances etc. The confirming Party confirms that all the Power of Attorneys are valid and subsisting. In case of non-payment of the loan alongwith the interest accrued thereon, the Lender shall have a right to enforce the security through Court of law to which the Confirming Party has no objection.

7. Undertakings Borrower undertakes and agrees that so long as Borrower remains under any actual or contingent liability to Lender hereunder, the Borrower will promptly notify Lender in writing on becoming aware of any Event of Default with full details of any steps which borrower is taking or considering taking in order to remedy or mitigate the effect of the Event of Default or otherwise in connections with it.

8. Events of Default In the event:

(a) Borrower fails to make any payment due hereunder within five Business Days from the Maturity Date, or

(b) Borrower fails to comply with any terms or conditions of this Agreement (other than a term or condition the breach of which would constitute an event of default under paragraph (a) above) and such failure (if capable of remedy) is not remedied within 14 days after notice of that failure has been given to Borrower by Lender; or

(c) The performance by Borrower or by lender of Borrower's or Lender's respective obligations under this Agreement; become illegal or unenforceable in whole or in part; or

(d) Borrower is unable to or admits inability to pay Borrower's debts as they fall due or Borrower becomes insolvent or Borrower threatens to cease to carry on Borrower's business or a material part thereof; of then, in any such case, at any time while the relevant event, circumstances or condition is continuing to affect the Borrower, the

Lender shall have the right, by notice in writing to Borrower, to declare that the Loan shall be terminated forthwith whereupon the same shall be terminated forthwith and to declare the Loan along with all interest accrued thereon in terms of this Agreement to be forthwith due and payable whereupon the same shall become so payable. The termination of this Agreement for any cause whatsoever shall not affect Lender's right to recover from Borrower any money due to Lender."

5. However, the borrowing defendant Nos. 1 and 2 failed to execute and register the Mortgage Deed in favour of the plaintiff. Nevertheless, on 01.11.2006, in furtherance of their intention to secure the loan amount against the property they placed the Title deeds of a larger property of which the said property formed a part thereof, with the plaintiff. In good faith, the borrowing defendant No.1 and 2 also handed over the transaction documents by which they had purchased the suit property from defendant Nos. 3 and 4.

6. On 01.11.2006, the defendants sent a confirmation to the plaintiff in writing about the principal loan amounting to Rs.5,00,00,000/- (Rupees Five Crores) having been received by the borrowing defendants which was to be repaid within twelve months. Since the entire principal amount stood paid vide last installment on 31.10.2006, the due date for re-payment of the loan and interest was on or before 31.10.2007. However, the borrowing defendants defaulted in repayment of loan and interest thereof. Despite several oral requests on telephone and during the visits to Delhi and through intermediary friends and relatives, defendants Nos.1 and 2 failed to repay the loan amount based on frivolous and baseless excuses.

7. The plaintiff started demanding repayment in writing through letters and emails commencing from December 2007, but to no avail. The aggregate amount of Rs.11,50,00,000/- is due as follows:

Particulars	Amount
Principal Amount	Rs.5,00,00,000
Interest @ 30% per annum from October 31, 2006 to February 28,	Rs.6,50,00,000
Total	Rs.11,50,00,000

8. The plaintiff thus, filed the Suit under Order XXXVII CPC for the recovery of the suit amount.

9. The defendants Nos.1, 2 and 4 contested the Leave to Defend which was allowed vide Order dated 14.03.2016.

10. Defendant Nos. 1, 2 and 4 in their Written Statement have taken the preliminary objection that the plaintiff is an affluent businessman and not an Indian resident. He, however, has business interests in India and keeps looking for investments. In 2006, he wanted to invest in a Hotel in India and evinced interest in the erstwhile Ashok Yatri Niwas of ITDC for investment. Since Hotel Queen Road Pvt. Ltd. purchased the erstwhile Ashok Yatri Niwas upon disinvestment of ITDC by the Government, the plaintiff invested Rs.5 Crores in the said Company using the defendant No.2's

Bank account for transfer of funds from USA to India in his absence here. This investment by the plaintiff is also reflected in the books of account of the Company. Since the present owners of the Hotel have refused to return the plaintiff's investment, he is looking for an alternative method of return of his investment. It is for this reason that a false and bogus suit has been filed by him.

11. The other preliminary objection taken is that the suit is barred by Limitation. The claim of the plaintiff is based on alleged Agreement dated 30.10.2006 which was to be honoured till 30.10.2007. The present suit has been filed in 2011, beyond the period of limitation as the period of three years calculated from the date of cause of action has expired and the suit is liable to be dismissed.

12. It is also claimed that the suit is barred by the provisions of Punjab Registration of Money Lenders Act, 1938 since the plaintiff is engaged in the business of money lending without having a license as a money lender.

13. It is further claimed that the alleged loan agreement has been written on a stamp paper of Rs.100/- only. It has not been executed on the required stamp paper in accordance with Section 33 read with Article 6 of Schedule I of the Indian Stamp Act, 1899 and the Loan Agreement is not admissible in evidence.

14. The other preliminary objection has been taken of the suit not being maintainable as the interest charged by the plaintiff on this alleged transaction is „substantially unfair“ and the interest is „excessive“ within the meaning of Section 3 of the Usurious Loans Act, 1918 read with Section 5 and 6 of the Punjab Relief of Indebtedness Act, 1934 as applicable to Delhi.

15. It is further asserted that it has been wrongly claimed that the defendant No.1 and 2 are the borrowers as the money allegedly was paid to defendant No.2 alone. The defendant No.1 is, therefore, not a borrower and the suit is liable to be dismissed against her.

16. Furthermore, defendant No.4 had signed the alleged Loan Agreement as a confirming party and not as a guarantor. As per the plaintiff's own showing, Clause 6 of the alleged Agreement can only be interpreted as an indemnity in the event of default by defendant No.2 to repay the security. The liability of defendant No.4 is not mutually exclusive but is limited to indemnify the plaintiff to the extent of the security alone. In the case of claims based on indemnity, the loss has to be proved first and thus, the suit for recovery per se is not maintainable against defendant No.4.

17. It is further claimed that the suit is premature in terms of Clause 8 of the alleged Loan Agreement which provided for a Notice in writing to be served upon the borrower to declare that the Loan Agreement stands terminated and only on termination was the loan to become payable. No Notice of Termination has ever been sent and hence, the suit is premature.

18. Further, the interest has been claimed in the nature of penalty which is not tenable.

19. The plaintiff has claimed a relief on the basis of alleged equitable mortgage of the property belonging to one of the defendants. Since the claim of the plaintiff is based on mortgaged property, an ordinary suit is not maintainable.

20. Moreover, the plaintiff by his conduct and omission has excused the defendants of their obligations under the alleged Loan Agreements in terms of Section 37 and 39 of the Indian Contract Act, 1872 and the suit is liable to be dismissed. It is further claimed that the plaintiff's stand is that the loan was payable on 27.03.2007 however, no steps have been taken for recovery of the loan amount after the expiry of the time period of repayment.

21. Also, the suit has not been properly instituted as Mr. Anshu Jain is neither competent nor authorized to institute the present suit on behalf of the plaintiff.

22. The suit is also claimed to be undervalued and the requisite court fee has not been paid.

23. On merits, it is denied that defendant No.1 and 2 who are husband and wife, are the borrowers of the alleged Loan amount. Moreover, defendant No.4 was not the authorized representative, or an agent of defendant No.3 as is claimed by the plaintiff. The alleged Power of Attorney dated 17.09.1997 is specifically denied in addition to claiming that it has not been stamped or registered in accordance with law.

24. The defendants have denied having executed any of the alleged documents including the Loan Agreement dated 30.10.2006 or having received any loan amount from the plaintiff as alleged. It is claimed that the plaintiff's suit is misconceived and is liable to be dismissed.

25. The Defendant No.3 in its written statement took the preliminary objection that the plaintiff has not disclosed any cause of action qua the answering defendant. The defendant No.3 has no legal right, title or interest in the residential property, land and building measuring one Bigha, 16 Biswas, measuring approximately 5445 yards in Khasra number 279/1 (1-

10) and Khasra number 279/1 (0-6) aka 85, Central Avenue, Sainik Farms, Khanpur, New Delhi since the property had been purchased by defendant No.1 and 2 from them and they had a clear title. In addition, the very fact that the plaintiff chose to extend the Loan transaction on the basis of title documents in the said property to defendant Nos. 1 and 2, clearly reflects that the plaintiff was satisfied about the title of defendant Nos. 1 and 2 over the said property. The documents clearly reflect that defendant No.3 had sold the said property and transferred her title therein. The purported Loan Agreement between the plaintiff and defendant No.1 and 2 refers to defendant No.3 merely as a confirming party and not as a guarantor. The defendant Nos. 1 and 2 have also reflected the suit property as "their property admeasuring..." in the letter dated 01.11.2006. It is ex-facie evident that the plaintiff was aware that defendant No.3 was neither in possession nor had any right, title or interest left in the property which stood transferred to defendant Nos. 1 and 2. Moreover, a bare perusal of the Loan Agreement would show that the answering defendant had not signed the document herself. The purported signatures of defendant No.4 on the loan agreement and the two letters dated 01.11.2006 are at best, merely in the capacity of a confirming party and not as a

guarantor. Although Power of Attorney had been executed by defendant No.3 while transferring her title in the said property, it is not denied by the plaintiff himself that the title of the property was transferred by defendant No.3. There is no duty cast upon confirming party to repay the loan amount in case of failure on the part of the borrowing party. Confirming party cannot object if the plaintiff seeks to enforce the security against the property in question. However, the confirming party cannot be proceeded against or held accountable for any default on the part of defendant Nos. 1 and 2 vis-à-vis the Loan Agreement. The plaintiff has wrongly claimed that defendant Nos. 3 and 4 stood as guarantors for the repayment of loan.

26. The defendant No.3 has further taken an objection that the suit is not properly instituted against the answering defendants and is not maintainable as per law. Shri Ashu Jain, the Special Power of Attorney holder of the plaintiff claims that he has been authorized to pursue the present suit, but the Power of Attorney authorizes him only to do all acts and deeds for recovery of money due to the plaintiff in respect of Loan Agreement dated 30.10.2006 and any other loan amount recoverable from Mr. R.P. Mittal and Mrs. Sarla Mittal jointly and severally. It is contended that the Power of Attorney does not authorize Shri Ashu Jain to take steps against any other person except defendant Nos. 1 and 2. Therefore, the suit deserves to be dismissed against defendant No.3 on this account as well.

27. It is further claimed that the suit is barred by limitation as the purported Loan Agreement is dated 30.10.2006 and the loan amount was disbursed on 31.10.2006 while the due date for repayment of loan amount was 31.10.2007. The period of limitation is three years for recovery suit, which expired on 30.10.2010. Since the suit has been filed on 28.03.2011 it is barred by limitation.

28. Furthermore, the plaintiff never made any demand for loan amount from defendant No.3 as a purported guarantor. He does not even state that he ever entered into any correspondence with the defendant No.3 in respect of the loan amount. He never demanded any repayment from defendant No.3 on account of failure of defendant No.1 and 2 to repay the loan amount. It is quite evident that defendant No.3 has no liability whatsoever and the suit is also premature against defendant No.3.

29. It is claimed that defendant No.3 is neither a necessary or proper party and her name is liable to be struck from the array of defendants.

30. On merits, all the averments made in the plaint are denied. It is reaffirmed that in view of the preliminary objections taken and considering that no cause of action was disclosed against the answering defendant, the suit is liable to be dismissed.

31. Issues on the pleadings were framed on 26.08.2016 as under: -

"(i) Whether the plaintiff had advanced a sum of Rs.5,00,00,000/- to the defendant no.2 by way of loan? OPP

(ii) Whether the defendant no.2 had acknowledged his liability to the plaintiff vide e-mails dated 11th August, 2007 and January, 2010 and if so to what effect? OPP

(iii) If the above issues are decided in favour of the plaintiff, whether the plaintiff, besides being entitled to recovery of the loan amount from the defendant no.2, is also entitled to recovery of the loan amount from the other defendants? OPP

(iv) If the above issues are decided in favour of the plaintiff, whether the plaintiff is entitled to any interest on the loan amount and if so at what rate and for what period? OPP

(v) Relief."

32. The plaintiff Shri Sudhir Jain in support of its claim appeared as PW1 and tendered his evidence by way of affidavit Ex.PW1/A and relied upon the documents Ex.PW1/1 to Ex.PW1/36.

33. PW2 Mr. Mukesh Kukreti corroborated the testimony of PW1 the plaintiff by his affidavit of evidence Ex.PW2/A.

34. The defendant Mr. R.P. Mittal appeared as DW1 and deposed about his defences in his affidavit of Evidence Ex.DW1/1.

35. The arguments were heard from both the parties and written submissions filed on behalf of all the defendants were perused.

36. Submissions heard. My issue wise findings are as under: -

Issue No. 1: -

Whether the plaintiff had advanced a sum of Rs.5,00,00,000/- to the defendant no.2 by way of loan? OPP

37. The plaintiff has deposed that in the month of July 2006, defendant No.2 Shri R.P. Mittal had contacted him for a personal loan and the plaintiff had agreed to advance him a loan of Rs.5 Crores. This is established not only from the testimony of PW1 Shri Sudhir Jain, but also from the emails dated 13.07.2006 and 17.07.2006 Ex.PW1/4 collectively, wherein defendant No.2 Shri R.P. Mittal had written that he needed funds and requested for a sum of R.10 Crores as loan. The plaintiff responded vide email dated 17.07.2006 Ex. PW1/4 (colly) agreeing to lend Rs. five crores in installments. Rs.2.6 crores as required, was to be delivered by 20.07.2006, Rs.1.2 Crore was be delivered in the two monthly installments in September and October, 2006. This offer of lending Rs.5 crores was acknowledged by the defendant No.2 Shri R.P. Mittal in his email dated 21.07.2006 Ex. PW1/4 (colly) addressed to the plaintiff. The plaintiff also had in return written an email dated 23.07.2006 Ex. PW1/4 (colly) to defendant No.2 wherein he had stated that he was trying to work out the best options and since he was not a bank lending money for interest rates and he had many US options available for new business and investments all yielding at least 50% with no currency rate fluctuation, devaluation, repatriation or double taxation issues, he was sure that his efforts to revise this hotel and fight the battle is not being done for a nominal interest rate gain. Therefore,

why should his financial contribution to his Hotel project be worth less and thus he sought a pay back of Rs.6.5 crores on the disbursed loan amount in a period of one year. It was also negotiated through various emails dated 25.07.2006 which are collectively Ex.PW1/5, email dated 27.07.2006 Ex.PW1/6 and email dated 30.07.2006 Ex.PW1/11 that as a surety, defendant No.2 would hand over his property bearing No.85, Sainik Farms by surrendering the original documents and title papers and by executing a Mortgage deed in favour of the plaintiff. These terms of loans which were being negotiated since July were concretized in the Loan Agreement dated 30.10.2006 Ex.PW1/25. The authenticity of the emails or of the Loan Agreement had been questioned by defendant No.2; however, no evidence has been led by him to disprove the same. Moreover, the Loan Agreement Ex.PW1/25 which is not disputed contains all the aforementioned terms of Loan. A total loan of Rs.5 crores was extended by the plaintiff in the following manner: -

(i)	By RTGS to Defendant No.2 dated July 28, 2006	: Rs.1,5
(ii)	By Funds Transferred to Defendant No.2 s account No.131010100259095 Dated August 22, 2006	: Rs.1,2
(iii)	By Demand Draft No.23332 favouring Defendant No.2 dated September 28, 2006 :	Rs.1,2
(iv)	By Funds Transferred to Defendant No.2 s Account No.131010100259095 dated October 31, 2006	: Rs.1,1
	TOTAL	: Rs.5,0

38. To further corroborate the disbursement of Loan, the plaintiff has also proved the Certificate from the Bank dated 22.12.2016 Ex.PW1/23 certifying that a total amount of Rs.5 Crores was transmitted to the account of defendant No.2. The plaintiff has also proved his Bank Statement Ex.PW1/22 corroborating the transfer of the installment amount totaling to Rs.5 Crores in the account of defendant No.2.

39. Defendant No.1 Smt. Sarla Mittal has asserted that she is not concerned with the transaction and cannot be held liable or responsible for return of the Loan Amount. However, the Loan Agreement Ex.PW1/25 not only stipulates that the borrowers are defendant No.1 and defendant No.2 but also bear their signatures and she cannot now wriggle out by claiming that the Loan consideration was credited to the account of defendant No.2. Once an offer of loan has been accepted by defendant No. 1 and 2 as borrowers by virtue of Loan Agreement Ex.PW1/25, Defendant No.1 cannot deny being a borrower merely because defendant no. 2 was the one who carried out the negotiations. Under the Indian law, the Contract Act recognizes the Doctrine of Privity of Contract and not Privity of

Consideration. Even if the consideration for the contract has been credited to the account of Defendant No.2, the persons who expressly enter into the Contract, cannot deny their liability. The loan Agreement read with the emails and the Bank Statement proves that the loan of Rs.5 crores had been extended to defendant No.1 and 2. The defendant No. 1 and 2 are held to be the joint borrowers of the loan of Rs.5 Crores.

40. The defendant No.2 has sought to avoid his liability under the Loan Agreement by setting a plea that the payment of Rs.5 crores made by the plaintiff was not intended for use by the defendant but had been transmitted to his account for investment by the plaintiff in Hotel Queen Road Pvt. Ltd. The defendant permitted the plaintiff to use his bank account as plaintiff was a foreign national and was not entitled to invest directly in India. The Hotel Queen Road Pvt. Ltd. had purchased the erstwhile Ashok Yatri Niwas upon disinvestment of ITDC by the Government. Even today this amount has been reflected as an investment by the plaintiff in the books of account of Hotel Queen Road Pvt. Ltd. Since the present owners of the Hotel have refused to return this investment of the plaintiff, he has filed this suit as an alternate to recover his amount though against the wrong person.

41. Interestingly, it is admitted by the defendant No. 2 in his emails dated 05.01.2010 and 06.01.2010 which are Ex.PW1/33 and Ex.PW1/34 respectively, that the money received in his account was invested in Hotel project by Hotel Queen Road Pvt. Ltd. for purchase of Ashok Yatri Niwas upon its disinvestment. It was for the defendant to have proved that it had no interest in Hotel Queen Road Pvt. Ltd, or that the investment was made by the plaintiff himself for the purchase of Ashok Yatri Niwas through the Bank account of the defendant.

42. Pertinently, a reference be made to e-mail dated 13.07.2006 Ex. PW1/4 (colly) from the defendant No.2 to the plaintiff and email dated 23.07.2006 Ex. PW1/4 (colly) from the plaintiff to the defendant No.2 which reads as under: -

"Email dated 13.07.2006 "dear sudhirjee, I am writing to you regarding funds needed for hotel project .we have already sent you attachment of hotel pictures and profile some days back but no confirmation whether you received the same or not. we are in final stages and need about rs 10 crores to complete and make hotel operational by end of this year 2006. Is it possible for you to arrange through your sources privately or through any institutional means. We can pledge 3 plots of land at 85 sainik farms, 32E sainik farms and 151 sainik farms having combined valuation of about 13 crores. We need the funds for at least one year preferably more and pl indicate what will be the interest rate chargeable if the above is possible. This has no connection with our dispute with ashok mittal. funds can be lent to me as a loan in my personal name and documents can be prepared mortgaging the properties to you or your associates.

We look to you for help and pi do reply to me YES OR NO as we will respect your decision .Amount can be less also if funding of above amount is not to your liking but we have extreme emergency as we have to pay at least rs 2.5 crores in this month of July 2006 itself, we have to pay the bank to whom we have repaid about 12 crores till

date but if we do not pay then it will be NON PERFORMING ASSET and we may even lose the n property to the bank.

regards r p mittal Email dated 23.07.2006 "Dear Mr. Mittal If your other options are better, go with them. I am only trying to help as best as I can.

I am not a bank loaning money for interest rates. Perhaps some day I will do that when I am old and tired (retired). Right now all of us want to make investments in the best options available to us|. I have many US options available for new business and investments all yielding at least 50% with no currency rate fluctuations, devaluation, repatriation or double taxation issues. Property options in India are also easily yielding from 50% (Gurgaon) to 400% (Sanctioned IT Parks in Secundrabad and Dehra Dun), I am sure your efforts to revise this hotel and fight the battle is not being done for a nominal interest rate gain. Why should my financial Contribution to your hotel project be worth less? That said, and since this is a family matter, I will agree to increase the payback period to one (1) year and to a reduced return. What that means is that at the end of one year, 6.5 crores can be returned and the deal cancelled. If money cannot be returned, the sale deal automatically goes through; the property has to be vacated for sale (Stamp Duty to be paid by ultimate buyer). Any sale price over 7.0 crores will be shared with Sapna and Sumaj, amount and percentage at my discretion. Should you still want to go through with the transaction, I am trusting that you will provide me with complete, proper and legal paperwork associated with this transaction. I will have the paperwork executed through a Legal Power of Attorney in India."

43. Nothing further needs to be discussed in the face of these e-mails which explicitly state that the Defendant No.2 needed money on behalf of his Company to make investment in his Hotel project. The e-mails completely falsify the defence of the defendants.

44. The defendant tried to explain it by asserting that it was a direct investment by the plaintiff. However, no evidence whatsoever has been led by the defendant to prove his defence. The defendant No.2 had claimed that this investment is reflected in the name of plaintiff in his Bank accounts. These bank accounts are firstly the documents of the defendant No.2 and secondly do not find any place on the court record and are not proved.

45. The defendants Nos. 1 and 2 have no explanation for having received the money from the plaintiff in his account except as a loan which is also proved by the various emails discussed above.

46. It is thus held that defendant Nos.1 and 2 had taken a loan of Rs.5 crores from the plaintiff, which has not been repaid.

47. The issues are decided accordingly in favour of the plaintiff and against the defendant Nos. 1 and 2.

Issue No.2: -

Whether the defendant No.2 had acknowledged his liability to the plaintiff vide e-mails dated 11th August, 2007 and January, 2010 and if so to what effect? OPP

48. A preliminary objection has been taken on behalf of the defendants that the present suit is barred by limitation. The loan amount was taken in July 2006, while the suit has been filed in the year January, 2011, which is beyond the period of three years and, therefore, it is barred by limitation. The question which thus arises is whether there was any acknowledgement of liability by the defendants vide e-mails dated 11th August, 2007 and January, 2010 thereby giving a fresh lease of limitation.

49. In the first instance, the objection taken by the defendants may appear attractive since the loan was disbursed in installments, the last date of payment of which was in October, 2007. However, vide his email dated 11.08.2007 Ex.PW1/28, the defendant No.2 proposed a plan for the repayment of the loan by selling a plot of 2800 yards at F 126 Sainik Farms, New Delhi („F 126 property) which was in the name of Sapna Jain. He further asked for an extension of time for the repayment till March 2008 and offered to deposit the papers of the F 126 property with the plaintiff as further security.

50. Moreover, when the plaintiff wrote consistent emails to the defendant No.2 in 2009 to which the defendant No.2 had responded vide email dated 29.04.2009 Ex.PW1/31 assuring that though there has been an inordinate delay, he has been working seriously to get the loan amount repaid at the earliest and hopes to respond by the next month with a clear payment schedule. Similar assertions were made by the defendant No.2 vide his email dated 24.06.2009 Ex PW1/31, whereby he assured the plaintiff that he will remit the money as soon as possible and explained that it was due to circumstances beyond his control that he has not been able to keep his commitments. Again, in the email dated 05.01.2010 Ex.PW1/33, the defendant No.2 sought further extension period for at least six months for vacating the Sainik Farm property and for repayment of the full and final amount of the loan taken by him. These acknowledgments made by the defendant No.2 from time-to-time within a period of three years of disbursement of loan amounts to acknowledgement of debt in terms of Section 18 of the Limitation Act, thereby extending the period of limitation.

51. A reference may also be made to Section 25(3) of the Contract Act, 1872 which provides as under:
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"Section 25(3) (3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract.

Explanation 1.--Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.--An Agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a)....

(e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract. (e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

.....

52. The admissions made by the defendant about the outstanding liability amounts to a fresh Contract in terms of Section 25(3) of the Indian Contract Act, 1872 entitling the plaintiff to the recovery of the loan amount.

53. In the case of R. Madesh vs. M. Rathinam 2015 SCC OnLine Mad 3094, the court extrapolated on the interplay between the law on limitation and a promise to pay. It held that the acknowledgement of liability though made after a period of limitation, creates a new cause of action providing a fresh start to the limitation period i.e., from the date of promise, a new limitation period commences.

54. A reference may also be made to Kapaleeswarar Temple vs. T. Tirunavukarasu AIR 1975 Mad 164, wherein it was observed that a debt may have become time-barred, but when the debtor admits his liability beyond the period of limitation, it creates a fresh obligation in favour of the creditor and would amount to a fresh contract which can certainly be made a basis for action for recovering the amount promised and acknowledged therein by the debtor.

55. In the emails as stated above, the defendant not only admitted his liability but also sought for extension thereby promising to repay the loan which formed a new promise to pay in terms of Section 25(3) of the Indian Contract Act. The suit of the plaintiff is thus, within limitation.

56. The issue is decided in favour of the plaintiff and against the defendant.

Issue No.3: -

If the above issues are decided in favour of the plaintiff, whether the plaintiff, besides being entitled to recovery of the loan amount from the defendant no.2, is also entitled to recovery of the loan amount from the other defendants? OPP

57. As has been discussed in Issue Nos.1 and 2, the defendant No.1 along with defendant No.2 were the joint borrowers and have a liability to return the loan amount.

58. The defendant Nos. 3 and 4 have denied any liability to pay the loan under the Loan Agreement. The Loan Agreement Ex. PW1/25 was also signed by defendant No.3 Kaushalya Jhingran through her Attorney Holder defendant No.4 Jyoti Kesri. The defendant No.4 merely being the Attorney Holder of defendant No.3 cannot be held to be in any way responsible for refund of the loan amount.

59. The question now arises is in respect of the liability of defendant No.3 and whether she had signed the agreement as a confirming party. The evidence and the emails reflect that property No.85 was owned by her and she had sold the same to defendant Nos. 1 and 2. However, there was no Sale Deed executed, as the transaction had fructified on the basis of Agreement to Sell and other documents. The defendant Nos. 1 and 2 had agreed to hand over the title documents and to enter into a registered Mortgage Deed in respect of property 85, Sainik Farms as security for refund of the loan amount. Defendant No.3 had merely signed as a confirming party whereby she had affirmed that she had no right or title in the property having sold it to Defendant Nos. 1 and 2 through Agreement to Sell and she had no objection to defendant Nos. 1 and 2 agreeing to mortgage the property bearing No.85, Sainik Farms with the plaintiff in order to secure the loan amount.

60. A Confirming Party is a concept under a tripartite Contract. The sole intention is for the third party to confirm the transaction whereby meaning that this third Confirming Party has no objection to the transfer of her property in the name of the lender, owner or the borrower.

61. In the present case, the confirming party was not bound by the terms of the Contract in the sense that there was no liability fixed under the Contract. The act of the confirming party signing the Loan Agreement implies that it consented to the property being provided has a security for the loan amount. There was no liability fastened or undertaken by defendant No.3 who was merely recording her "No Objection" to the mortgage of the property, of which she was the erstwhile owner, by defendant No.1 and 2 in favour of the plaintiff. There being no liability to repay the loan, defendant No.3 cannot be held responsible for refund of the loan amount.

62. It is, therefore, concluded that neither defendant No. 3 Kaushalya Jhingran nor defendant No. 4 Jyoti Kesri have any liability to refund the loan amount.

63. Issue No. 3 is decided accordingly in favour of Defendant Nos.3 and 4.

Issue No.4: -

If the above issues are decided in favour of the plaintiff, whether the plaintiff is entitled to any interest on the loan amount and if so at what rate and for what period?
OPP

64. In the Loan Agreement Ex. PW1/25, which was preceded by the various emails as already discussed above, the defendant had agreed to pay the interest @ 30% per annum from the date the

amount was transferred to the account of the borrower till such time the loan was repaid.

65. A preliminary objection has been taken by the defendant that the present suit is barred as per Section 3 of the Usurious Loans Act, 1918 as the interest is excessive and unfair in nature.

66. Section 3 of Usurious Loans Act, 1918 (Act No.10 of 1918), reads as under :-

"Section 3 Re-opening of transactions (1) Notwithstanding anything in the Usury Laws Repeal Act, 1855 (28 of 1855), where, in any suit to which this Act applies, whether heard ex parte or otherwise, the Court has reason to believe,

(a) that the interest is excessive; and

(b) that the transaction was, as between the parties thereto, substantially unfair, the Court may exercise all or any of the following powers, namely, may,

(i) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest;

(ii) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, re-open any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof;

(iii) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just:

Provided that, in the exercise of these powers, the Court shall not--

(i) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than 1[twelve] years from the date of the transaction;

(ii) do anything which affects any decree of a Court.

Explanation.--In the case of a suit brought on a series of transactions the expression "the transaction"

means, for the purposes of proviso (i), the first of such transactions.

(2) (a) In this section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.

(b) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated, and the total advantage which may reasonably be taken to have been expected from the transaction.

(c) In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor.

(d) In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known, or must be taken to have been known, to the creditor.

Explanation.--Interest may of itself be sufficient evidence that the transaction was substantially unfair. (3) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan ²[or for the redemption of any such security].

(4) Nothing in this section shall affect the rights of any transferee for value who satisfies the Court that the transfer to him was bona fide, and that he had at the time of such transfer no notice of any fact which would have entitled the debtor as against the lender to relief under this section. For the purposes of this sub-section, the word "notice" shall have the same meaning as is ascribed to it in section 4 of the Transfer of Property Act, 1882 (4 of 1882).

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court."

67. The section provides that if the court finds that the transaction in respect of the interest was substantially unfair, it may revise the interest rate as provided therein. In the present suit, it is not that the entire loan transaction becomes unfair but the same is liable to be decided by the courts by enquiry. The loan transaction per se cannot be avoided by reference to Usurious Loans Act, 1918.

68. Now, the aspect before the consideration of this court is whether the interest claimed is excessive and if the same can be granted.

69. The excessive nature of interest as stated under Section 3 of the Usurious Loans Act, 1918 was explained by the Apex Court in the case of Baidyanath Mandal and Others vs Gajadhar Marwari and Others (1953) 1 SCC 772. It was observed that there were two requirements under Section 3, viz. (i) the interest is excessive and (ii) the transaction was unfair. In cases where the interest stipulated under the contract was higher than the rate of interest prevalent on the date of transaction, mere providing of the interest which is excessive in a transaction, was sufficient evidence to hold that the transaction was sufficiently unfair.

70. In the case of Geetu Lakhpat and Ors. Vs. Jaipal 2011 (105) AIC 936 this Court took into account the provisions of the Usurious Loans Act, 1918 and also the economic scenario and prevailing market rate of interest to arrive at the conclusion that the contractual interest of 2% per month was exorbitant and usurious and instead granted interest @ 7-1/2% p.a.

71. It is quite evident in the present case as well that the rate of interest stipulated is excessive within the meaning of the Usurious Loans Act, 1918 as the prevailing rate of interest at the time the transaction was in the range of 6-8% p.a.. There is no evidence led by the plaintiff to justify such an excessive rate of interest and there is no basis for claiming an interest of 30% per annum on the loan amount and the same is hereby declined. Taking into account the prevailing market rates of interest at the time the transaction was entered into, the simple interest @ 6% per annum is granted from the date of disbursement of loan till the date of institution of the suit.

72. Further, the court must examine whether pendente lite and future interest can be granted to the plaintiff.

73. In the case of Y.P. Ganesan vs T.N. Civil Supplies Corpn Ltd. (2006) 1 CTC 277 (Mad) it was observed that interest is generally not awarded by way of damages unless there is a stipulation to that effect in the Agreement.

However, when money is wrongfully withheld, interest can be claimed despite there being no Agreement for the same. In such a scenario, the plaintiff was entitled to interest at the rate of 6% p.a.

74. In the present case, the parties had not agreed to provision of interest by way of damages. However, it is clear that the money has not been repaid by the defendant. Considering the nature of transaction which was a friendly loan, and the general Bank rates of interest, the plaintiff is granted pendente lite and future interest @ 6% per annum from the date of institution of the suit till the date of payment by the defendant Nos. 1 and 2.

75. The issue is decided accordingly.

Preliminary Objections taken by Defendant Nos. 1 and 2

76. Though preliminary objections have been taken on behalf of defendant No.1 and 2, no specific issues were framed thereunder. The Apex court in the case of S vs Kalyan, A 1971 SC 2018 observed

that the plea of maintainability of the suit is essentially a legal plea and if the suit is not maintainable on the face of it then the fact that no issues were framed to that effect is of little consequence.

77. Since the objections raised pertain to inherent jurisdiction of this Court and the maintainability of the suit, the same are being discussed hereunder: -

Objection No. 1: -

Whether the suit is barred by Section 3 of the Punjab Registration of Money Lenders Act, 1938 as applicable to Delhi?

78. The preliminary objection has been taken that the plaintiff is engaged in the business of money lending in India as he had extended a loan of Rs.5,00,00,000/- to the defendant without the requisite license as a money lender and therefore, the present suit is barred under the Punjab Registration of Money Lending Act, 1938.

79. The case of the plaintiff is that the defendant was known to him through friends and relatives. It is nowhere established that loan that was not extended by the plaintiff to the defendant as a friend but because he was in the business of money lending.

80. In the present case, no evidence whatsoever has been led by the defendant to show that the plaintiff has been lending money to other persons pursuant to his business of a money lender. Merely because the plaintiff had given a friendly loan (may be) twice, to the defendant would not make him a money lender as defined under the Punjab Registration of Money Lender s Act, 1938.

81. It may be pertinent to refer to the e-mail dated 23.07.2006 Ex.PW1/4 (colly) which shows that the defendant and plaintiff are relatives and it is due to that reason that he also agrees to increase the payback period to one year. Further, the email from the plaintiff specifically mentions that he is not in the business of money lending and that he was only extending help to the defendant.

82. The defendant has not been able to show from the evidence or documents that the plaintiff is in the business of money lending; rather it is evinced that the plaintiff had given the loan to the defendant being a friend/relative. The defendant has also not brought any evidence that plaintiff had been giving loan to different persons as a business to earn money/ interest. Since the defendant has failed to establish that the plaintiff is in the business of money lending, the provisions of Punjab Registration of Money Lending Act, 1938 are not attracted.

83. Thus, the court finds no merit in the objection which is answered in favour of the plaintiff and against the defendant.

Objection No.2:-

Whether the suit is not maintainable as per Section 37 and 39 of the Indian Contract Act 1872?

84. A preliminary objection has been by the defendant that the suit is not maintainable in terms of Section 37 and 39 of the Indian Contract Act, 1872.

85. Section 37 of the Indian Contract Act, 1872 provides for obligation of the parties to the contract. It postulates that parties to the contract must perform their respective promises unless such performance is dispensed with or excused under the provisions of this Act.

86. Section 39 of the Indian Contract Act, 1872 gives the effect of refusal of a party to perform promise wholly. It specifies that if a party refuses or is disabled from performing his part or promise in its entirety, the promisee may put the same to an end, unless he has signified, by words or conduct, his acquiescence in its continuance.

87. As already discussed above, while extending the loan to the defendant it was specifically stipulated that the Agreement shall be honoured and the repayment of loan shall be made within twelve months i.e. up to October 2007. The time frame to return the money, thus ended in October 2007. The defendant had sought several extensions of time for repayment of loan from the plaintiff and there is nothing to reflect that plaintiff ever acquiesced or accepted the non-performance of the contract by the defendant. Rather, it is reflected from all the emails that the plaintiff was persistent and insistent throughout the year and after the expiry of twelve months for the return of loan money as per their Agreement, which the defendant failed to pay despite seeking extension of time again and again.

88. Before concluding, one may also avert to the contradictory stands of the defendant; while on one hand he has claimed that the suit is barred by limitation since the Loan Agreement was entered into in October 2006, on the other hand the defendant is asserting that the contract continues as there was no termination of Contract. In either case, no abandonment of Contract can be attributed to the plaintiff.

89. Neither Section 37 nor Section 39 of the Indian Contract Act comes to the rescue of the defendant in the light of the specific conduct of the plaintiff who after the expiry of date for repayment of loan had persisted in making repeated requested for return of money. The filing of the suit for recovery itself reflects his intention of not assenting to a never-ending extension of time for the repayment of loan and seeking recovery of his Loan amount.

90. The second objection taken on behalf of the defendant holds no merit and is decided against him.

91. Accordingly, the preliminary objections are decided in favour of the plaintiff and against the defendant.

Relief

92. In view of the discussion above, the suit of the plaintiff is decreed for a sum of Rs.5 crores towards the loan amount along with interest (including pendente lite and future interest) @ 6% per annum from the date of disbursement of loan till the date of payment to be paid by defendant Nos.1 and 2.

93. While considering the entire defence of the defendant wherein the facts were admitted and documented, the defendant has successfully used all tactics to drag the trial for about eleven years, this Court cannot but observe that such dilatory tactics adopted by the defendant to delay the repayment needs to be deprecated in strongest words to uphold the majesty of Law and to save it from becoming a haven for unscrupulous litigators. Accordingly, the plaintiff is also awarded the costs of the suit.

94. Decree sheet be prepared accordingly.

95. Pending application is also disposed of.

(NEENA BANSAL KRISHNA) JUDGE AUGUST 04, 2023 AT/VA/nk