

(2011) 03 DEL CK 0429

Delhi High Court**Case No:** Regular Second Appeal No. 185 of 2005

Shri Jagdish Kumar

APPELLANT

Vs

Shri Subhash Chander Sachdeva

RESPONDENT

Date of Decision: March 17, 2011**Acts Referred:**

- Limitation Act, 1963 - Article 113, 27, 10

Hon'ble Judges: Indermeet Kaur, J**Bench:** Single Bench**Advocate:** R.N. Jha, for the Appellant; S.C. Singhal, for the Respondent**Final Decision:** Dismissed

Judgement

Indermeet Kaur, J.

This appeal has impugned the judgment and decree 07.05.2005 which had reversed the findings of the trial Judge. Trial Judge vide judgment and decree dated 30.04.2003 had dismissed the suit of the Plaintiff. The impugned judgment had decreed it.

2. This is a dispute between two brothers. The Plaintiff Subhash Chandra had filed the present suit for recovery of Rs. 2,23,255/-. His allegation was that his brother i.e. Defendant Jagdish Kumar along with Shanti Devi had taken funds in trust from the Plaintiff to purchase a flat i.e. flat No. A-10, Sector 9, Rohini, Delhi. A sum of Rs. 1,03,000/- had thus been entrusted to the Defendant and was duly transferred from the bank account of the Plaintiff. Further sums were again entrusted to the Defendant for being paid to the HDFC and Sahyog Cooperative Group Housing Society, Parwana Vihar, Rohini, Delhi. Total of this was Rs. 42,140/- of which Rs. 38,640/- was the amount paid to the HDFC and Rs. 3,500/- was the amount paid to the Society. Thus a total of Rs. 1,45,140/- had been entrusted to the Defendant. The Defendant had purchased the aforementioned flat out of funds of the Plaintiff. The Plaintiff has a lien over the said flat; the Defendant had agreed to repay the

entrusted amount to the Plaintiff. Part payments of Rs. 85/- and Rs. 100/- was in fact made by the Shanti Devi on 17.07.1994 and 17.04.1997; balance of Rs. 1,44,955/- was yet payable. The Defendant had surreptitiously sold his flat for an amount of Rs. 3,20,000/-; the sale consideration was pocketed; half of it was paid to Shanti Devi and the remaining half amount was usurped by the Defendant without paying back the entrusted amount to the Plaintiff. The Plaintiff is entitled to the refund of this aforesaid amount along with interest @ 18% per annum. The Plaintiff before filing the suit had also served a legal notice dated 15.09.1999 reiterating his claim.

3. The Defendant in his written statement had taken certain preliminary objections. On merits, he denied that he had taken any money from the Plaintiff. Contention was that the statement of account relied upon by the Plaintiff was a forged document; no amount was entrusted or paid by the Plaintiff to the Defendant.

4. On the pleadings of the parties, the trial Judge had framed three issues. Oral and documentary evidence was led. On the basis of said evidence, the suit of the Plaintiff was dismissed. Trial Judge returned a finding that the statement of accounts Ex. PW-4/A1 to Ex. PW-4/A7 does not show that the payments had been made by the Plaintiff on behalf of the Defendant or on behalf of Shanti Devi; amount was not recoverable. On the question of limitation also, the suit was dismissed. The findings of the trial Judge on the issue of limitation was returned as follows:

Since Plaintiff claims to have been given the amount of Rs. 1,03,000/- to the Defendant as loan or entrustment, as warned by the Plaintiff, the Plaintiff was required to initiate the proceedings for recovery of said amount within three years from the date when the loan was given or endorsement was made. The last installment of loan was made on 04.07.1987. Even as per Ex. PW-5/1 i.e. statement of account produced by Sehyog Co-operative Group Housing Society Ltd., the last payment was made on 27.11.1989. The Plaintiffs claim in respect of Rs. 1,03,000/- clearly barred by limitation. In order to bring the case within the period of limitation, the Plaintiff has shown that a sum of Rs. 85/- and Rs. 100/- were received from Shanti Devi on 17.07.1994 and 17.04.1997. However, the said payments even if taken to extend period of limitation for Plaintiffs claim cannot be construed as acknowledgment by the Defendant of his loan as the payments in question have been made by Smt. Shanti Devi. The Plaintiff is, thus, not entitled to the suit amount or any interest thereupon. Both these issues are decided against the Plaintiff.

5. In appeal, the first appellate court had reversed the findings of the trial Judge. Suit was decreed. It was held to be within time. On merits, the Court after a reappraisal of the oral and documentary evidence was of the view that the Plaintiff was entitled to recover the aforesaid amount from the Defendant. The impugned judgment had noted that the Defendant had admitted that the payments were made by the Plaintiff to the Society and to the HDFC, the Plaintiff was entitled to a decree. The Court had also reversed the findings on limitation; on the question of limitation, it was held that the suit was well within time. This finding was returned

as follows:

On the question of limitation, I am not in agreement with Ld. Counsel for Appellant that the money was paid in trust so by virtue of Section 10 of Limitation Act, 1963, the suit cannot be said to be barred by time. Although it is alleged in the plaint that money was paid in trust and the Plaintiff had lien over the suit flat as the Defendant was to return and refund the entrusted amount of Rs. 1,45,140/-. But this plea in my view have not force to attract Section 10 of the Limitation Act, 1963. The totality of the facts and circumstances of the case show that the money which is stated to be paid in trust by the Appellant/Plaintiff in the plaint to the Respondent/Defendant was simply a loan transaction and the amount was paid for purchase of flat to Defendant and Smt. Shanti Devi and was payable to the Appellant/Plaintiff at the time of sale of the suit flat. Both the parties are residing in Yamuna Vihar in Trans Yamuna colony. It appears that the flat in question was to be sold by the Defendant and Smt. Shanti Devi and after the payment was to be made by the Appellant/Plaintiff. Thus, though Section 10 of the Limitation Act, 1963 in my view does not apply to the facts and circumstances of this case still the suit cannot be said to be barred by time as the amount alleged to be paid by the Appellant/Plaintiff to Respondent/Defendant was returnable by Defendant on sale of the suit flat. The suit flat was sold in the year 1997 and the suit was filed before Ld. District Judge, Delhi on 24.12.1999. Therefore the period of limitation should commence from the date of the sale of suit flat and the suit cannot be said to be barred by time. Article 27 of the Limitation Act which deals with the compensation of breach of promise or to do anything at specified time, prescribes period of limitation of 3 years which is to commence from the time specified arrives or contingencies happen. In any case even if we take residuary Article 113 of schedule of the Limitation Act, 1963 when no specific article of schedule of the said Act is applicable on account of payment made by Appellant/Plaintiff on condition of the repayment by Respondent/Defendant on sale of the suit property, right to sue accrued to Appellant/Plaintiff only when the suit flat is sold and amount paid by Plaintiff is not repaid. Therefore, by virtue of residuary Article 113 of schedule of the Limitation Act, 1963, the suit of the Plaintiff cannot be said to be barred by time, the same being filed within prescribed period of 3 years from the date of sale transaction of the suit flat.

6. This is a second appeal. It was admitted and on 17.07.2007, the following substantial question of law was framed:

Whether the suit filed by the Respondent Plaintiff was barred by limitation, if so to what effect?

7. This is the only question which is required to be answered by the Court. On behalf of the Appellant, it has been urged that the finding in the impugned judgment is perverse; suit was clearly barred by time; transaction related to the period of 1986-1987; suit was filed on 24.12.1999; it was clearly time barred. The impugned judgment is liable to be set aside on this count.

8. The Respondent has countered this submission. It is pointed out that no issue of limitation has been framed and this has been raised only for the first time in the first appellate court. It is pointed out the suit was within limitation.
9. The impugned judgment had noted that this statement of account proved by the Plaintiff was in accordance with law. The Plaintiff in fact had made the payments under two heads. Ex.PW-2/A was the statement of account of the State Bank of Bikaner and Jaipur proved by PW-2 evidencing that various amounts as noted herein were transferred from the account of the Plaintiff to the account of the Defendant; further that monthly installments were paid to the HDFC against the loan taken by the Defendant; this loan was being repaid by the Plaintiff. PW-4 was a summoned witness from the HDFC Bank. He had proved the statement of accounts Ex. PW-4/A1 to Ex.PW-4/A7. These documents evidence that the loan was being repaid by the Plaintiff in monthly installments (EMI's) of Rs. 371/-; they were paid in the account of the Defendant and Shanti Devi. The last installment paid was on 11.08.1998. DW-1 in his deposition had admitted that the account with the Naraina Branch of the State Bank of Bikaner and Jaipur had been opened by his brother; DW-1 used to pay cash to the Plaintiff and the Plaintiff in turn used to pay the installments through cheque to the HDFC and to the society. These cash payments had not been proved by the Defendant. DW-1 had also admitted that he had no such documentary evidence to substantiate this averment. This admission of DW-1 had strongly weighed before the first appellate court. It was thus established that the loan amount was being repaid to the HDFC Bank from the account of the Plaintiff. The flat was admittedly purchased out of these funds in the joint names of the Defendant and Smt. Shanti Devi. They were joint beneficiaries. Last Instalments on their behalf was paid by the Plaintiff on 11.08.1988. Suit filed on 24.02.1999 was within time.
10. The second head of the claim of the Plaintiff was the sum of Rs. 1,03,000/- which he had paid as a loan to the Defendant. A positive fact finding was returned that money was transferred from the Plaintiff's bank account to the bank account of the Defendant wherefrom this flat was purchased. This flat was thereafter sold by the Defendant and Smt. Shanti Devi jointly for a consideration of Rs. 3,20,000/-. The Defendant was liable to return this money to the Plaintiff. The plaint had clearly averred that the Plaintiff has a lien over the flat; cause of action had accrued in favour of the Plaintiff when this flat was sold surreptitiously by the Defendant and Smt. Shanti Devi and the money had been pocketed by them without refunding the amount payable to the Plaintiff. This flat was sold in 1997. Suit had been filed on 24.02.1999; cause of action had arisen on the sale of the flat. Under Article 113 of the first Schedule of the Limitation Act, 1963 which is the residuary article, a suit can be filed within 3 years from the date of the accrual of the cause of action. The impugned judgment had rightly returned a finding that the suit was filed within three years from the said date.

11. There is no perversity in the impugned judgment. Substantial question of law is answered accordingly. Appeal is dismissed.