2024:DHC:2165-DB

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:19.03.2024

\+ **RFA(COMM) 288/2023, CM APPL.63407/2023 CM APPL. 63440/2023**

KULBHUSHAN SACHDEV .....Appellant

versus

ICICI BANK LIMITED & ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Ashwani Garg and Mr. SameerGarg, Advs.

For the Respondent : Dr. Hemant Gupta, Mr. Shivang Jain,Ms. Payal Gupta, Ms. NitikaaGupthaand Ms. Alpana Singh, Advs. for R-1.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MS JUSTICE TARA VITASTA GANJU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant (defendant no.2 in the suit) has filed the present appeal impugning the judgment and decree dated 04.08.2023 (hereafter *the impugned judgment*) delivered by the learned Commercial Court decreeing an amount of ₹3,44,854/- along with simple interest at the rate of 9% per annum from the date of filing of

the suit (that is, from 03.07.2021) till the realization of the said amount. Additionally, the learned Commercial Court had also awarded costs in favour of respondent no.1 (plaintiff in the suit and hereafter referred to as *the Bank*).

2. The Bank had instituted the said suit [CS(COMM) No.2157/2021] seeking recovery of ₹3,44,854/- along with *pendente lite* and future interest at the rate of 24% per annum. The Bank claimed that respondent no.2 (defendant no.1 in the suit and hereafter the Company) had approached it for grant of a loan of a sum of ₹6,23,000/- for purchasing a vehicle – Maruti Swift Dzire VDI. It claimed that the Company had executed a Credit Facility Application as well as Car Loan Agreement for availing the said loan. The said loan was granted and was secured by the vehicle purchased by the Company. The said loan along with interest was required to be repaid in 68 (sixty-eight) equated monthly installments (*EMIs*) of ₹13,008/- each with one EMI to be paid in advance.

3. The Bank did not take any steps for pre-institution mediation and filed the suit along with an urgent application for appointment of a receiver ex-parte. Although, the said application was allowed, the Bank did not recover the vehicle. The appellant was not arrayed as a defendant in the suit as originally filed. However, the Bank filed an application under Order I Rule 10 of the Code of Civil Procedure, 1908 seeking to implead the appellant as defendant no.2 in the suit on the ground that he was a co-applicant along with the Company for

availing the auto loan. The learned Commercial Court issued notice of the impleadment application on 12.07.2022. The said application for impleadment was not contested and accordingly, it was allowed by an order dated 02.12.2022. By the said order, the appellant was also granted time to file his Written Statement. Thereafter, the amended memo of parties filed by the Bank was also taken on record. However, neither the appellant nor the Company filed their written statements and were proceeded against *ex parte*. Absent any contest, the learned Commercial Court accepted the Bank's claim and passed the impugned judgment and decree.

SUBMISSIONS

4. The learned counsel appearing for the appellant has assailed the impugned judgment on several fronts. First, he submitted that ICICI Bank could not proceed against the appellant as it had taken no steps to recover the vehicle from the Company. He submitted that the proceedings under the Insolvency & Bankruptcy Code, 2016 in respect of the company had been initiated before the National Company Law Tribunal (*NCLT*) and an Interim Resolution Professional (*IRP*) had been appointed. Therefore, the Bank was required to make its claim before the IRP or the learned NCLT. Second, he submitted that the appellant was a guarantor and was not responsible for the liability of the Company, which is under the CIRP (Corporate Insolvency Resolution Process). He submitted that the statement of accounts filed by the Bank indicated that it had already recovered a sum of

₹7,48,583/-. The said account also indicated that the total recoverable amount was ₹8,52,350/- and therefore at best the Bank could recover the remaining amount after adjustment of the amount of ₹7,48,583/-. Lastly, he submitted that the suit against the appellant was barred by limitation. He submitted that the Company had defaulted in payment of EMI on 03.04.2019, as stated in the plaint, therefore, the cause of action for filing the suit arose on the said date. However, the application for impleading the appellant was moved before the learned Commercial Court on 12.07.2022, which was beyond the period of three years from the date of cause of action.

5. The learned counsel appearing for the Bank countered the aforesaid submissions. He pointed out that the appellant was not a guarantor but a co-borrower. He also submitted that the Loan Recall Notice was issued on 20.02.2021 and therefore, the suit was within the period of limitation. He also referred to the orders passed by the Supreme Court in Suo Motu Writ Petition (C) No.3 of 2020 in *Re: Cognizance for Extension of Limitation* and submitted that in paragraph 2.1 of the order dated 08.03.2021, the Supreme Court had directed that in computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. He submitted that even if it is accepted that the period of limitation for filing the suit against the appellant commenced on 03.04.2019, the application for impleadment on 12.07.2022 would be within the period of limitation of three years after excluding the period from 15.03.2020 till 14.03.2021.

REASONS & CONCLUSION

6. The first question to be examined is whether the suit filed by the Bank against the appellant was barred by limitation. It is relevant to refer to paragraph 18 of the plaint which sets out the Bank's case regarding its cause of action. The said paragraph is set out below:

> "18. That the cause of action accrued when the agreement dated **03.04.2017** was executed in-between plaintiff and Defendant(s) for purchase of the vehicle and the loan amount was disbursed for the purchase of the vehicle. The cause of action accrued in favour of the plaintiff and against the defendant(s) when the defendant(s) started defaulting in the payment of Equated Monthly Installments on or around **03.04.2019.** It also accrued on all such dates when the cheques / ECS of the defendant(s) got bounced as more particularly mentioned in the Statement of Account filed alongwith the present plaint. The cause of action further arose when the officials of the plaintiff verbally, telephonically, personal visits as well as by way of written letters/notice i.e. Loan Recall Notice dated **20.02.2021** requested the defendant(s) to make the payment of outstanding amount but Defendant(s) has not replied to the same. As the defendant(s) have neither made the payment of outstanding amount nor handed over the possession of the hypothecated vehicle, the cause of action is still continuing."

7. It is not disputed that the loan availed was to be repaid in 68 EMIs. Thus, the repayment of the loan was to be made in five years and eight months. The Bank claimed that the Company had paid 35 EMIs. The Loan Recall Notice dated 20.02.2021 was issued during the stipulated repayment period. According to the Bank, the Company and the appellant had failed and neglected to repay the loan pursuant to the

said demand. Thus, the cause of action for filing the suit was required to be reckoned from the said date.

8. We are unable to accept that the period of limitation would commence from the date of the first default in payment of an EMI. At best, the claims in respect of EMIs that fell due three years prior to the date of filing the application to implead the appellant may be barred by limitation. In any view of the matter, the suit filed by the Bank was within limitation in view of the order dated 08.03.2021 passed by the Supreme Court in Suo Motu Writ Petition (C) No.3 of 2020 in *Re: Cognizance for Extension of Limitation*. Paragraph 2.1 of the said order is set out below:

> "2.1 In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021."

9. The contention that excess amount is claimed by the Bank is also not established by the documents available on record. More importantly, there is no averment in the appeal to the effect that the amounts claimed by the Bank were not payable because the loan had been substantially repaid. This submission was advanced orally by the learned counsel for the appellant without any pleadings to support it. The learned counsel for the appellant advanced the said contention being inspired by the statement of account filed by the Bank along with its plaint. He referred to the statement of account (which is at

page 158 of the present appeal) and submitted that the same indicates that the Bank had received a sum of ₹7,48,583/- and therefore, the loan had been substantially repaid. However, we are unable to accept that the statement of account could be read in the manner as contended by the learned counsel for the appellant. The statement of account indicates that even the cheques for the EMIs which were not honoured have been credited. The statement also indicates contra entries. However, the opening page of the said Statement of account setting out the particulars of the account indicates that the amount financed was ₹6,23,000/-; and as on 31.05.2021 – which is the date of the said statement – instalments overdue amounted to ₹1,03,767/-. After adding other overdue and approved charges of ₹17,625/- and ₹3,828/-, a net amount of ₹1,25,220/- is reflected as receivable on account of instalments due as on that date. The statement of account also indicates the amount of future instalments that would fall due as ₹2,36,213.80/19. It reflects the total amount repaid as ₹4,55,577/-, which includes the principal amount of ₹3,30,209/- and interest of ₹1,25,368/-. Contrary to the submissions made on behalf of the appellant, the said statement supports the Bank's claim as set out in its plaint.

10. The learned counsel for the appellant had also contended that if the Bank had recovered the vehicle, the value of the same would have been sufficient to discharge its liability. Therefore, the value of the car must be reduced from the amount claimed. We are unable to accept this contention as well. It is not disputed that the Bank has not

recovered the vehicle. The fact that the bank was secured by hypothecation of the vehicle does not disentitle it to claim the amount outstanding from the borrowers. A borrower cannot avoid its liability on the ground that the lender has not enforced its security interest. The contention that a creditor is required to enforce its security before proceeding to recover the claim, is without merit.

11. The documents filed along with the plaint establish that the appellant was not a guarantor but a co-applicant. He had also filed a separate loan application. The credit facility application is also signed by the appellant on behalf of the Company and separately as a co-applicant.

12. In view of the above, we find no merit in the appeal, the same is accordingly dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

MARCH 19, 2024
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