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

% Judgment delivered on: 09.10.2024

+ CS(OS) 592/2021 & I.A. 14868-69/2021, 13665/2022, 9367/2023

MS. SHEFALI KOULPlaintiff

Through: Mr. Naman Joshi, Ms. Ritika Vohra
and Mr. Amber Tickoo, Advs.

versus

MOHD RAFIQ MIR & ORS.Defendants

Through: Mr. Susheel Tomar, Mr. Vishnu Kant
and Ms. Shailja Singh, Advs. for
defendants

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J. (ORAL)

1. The present suit has been filed by the plaintiff under Order XXXVII of the Code of Civil Procedure, 1908 against the defendants herein for recovery of Rs.5,71,25,501.68/- (Rupees Five Crores Seventy One Lakhs Twenty Five Thousand Five Hundred and One Rupees Sixty Eight Paise Only) along with *pendente lite* interest @12% per month. Further, decree of arrears of rent of Rs.39,000/- per month along with an interest @12% per month computed from October 2021 till the disposal of the present suit as has been prayed.

2. The brief facts leading to the filing of present suit are that the plaintiff is a family friend of defendant nos. 1 to 4 who are brothers and partners in



defendant no.5 firm. Between the years 2016 to 2020, the defendants had approached the plaintiff for grant of loan on multiple occasions. It is alleged in the plaint that the defendants were supposed to return the said amount to the plaintiff by March 2019, however, the same was never done.

3. Owing to the intervention of a family friend, defendant no.3 decided to settle the accounts with the plaintiff *vide* Undertaking dated 10.01.2020 whereby the debt due to the plaintiff was acknowledged and Promissory Note of Rs. 1.50 crores was furnished. It was further agreed that the defendants would pay to the plaintiff an interest amount to the tune of Rs.23 lacs and the defendants would pay further interest on the principal amount @12% per month in case of delay in payment. Ten post-dated cheques of Rs.15 lacs each were issued by the defendant no.5 firm in favour of the plaintiff. However, the said cheques were dishonoured.

4. Pursuant to this, the plaintiff filed a suit bearing CS No.274/2020 for recovery of Rs.1.73 crores before the learned Additional District Judge, South District, Saket Court, New Delhi. The plaintiff had also instituted criminal proceedings against the defendants. Consequently, the defendants were arrested and thereafter, it was proposed by them to the plaintiff that they would enter into a Memorandum of Understanding to settle all the disputes. An amount of Rs. 40 lakhs was paid on 12.10.2020 by the defendants. They also acknowledged their liability of Rs.3,01,47,136/- *vide* Promissory Note dated 21.10.2020.

5. Accordingly, the parties herein entered into a Memorandum of Understanding on 26.10.2020 (hereinafter referred to as 'the MoU') to settle the disputes for a final amount of Rs.3,41,47,136/-. Furthermore, the MoU



stipulated *inter alia* that the defendants would be liable to pay an interest @12% per month in case of default in the repayment and also pay house rent of the plaintiff to the tune of Rs.39,000/- per month till all the dues are cleared. In such circumstances, eleven post-dated cheques were issued by the defendants in favour of the plaintiff which were later dishonoured again.

6. Subsequent to the crystallisation of the defendants' obligations *vide* Memorandum of Understanding dated 26.10.2020, an application under Order VI Rule 17 CPC was filed by the plaintiff in CS No.274/2020 seeking to amend the plaint in accordance with the said Memorandum of Understanding, thereby bringing the suit under the purview of Order XXXVII and revise the recovery amount to Rs.4,69,82,587/-. The said application was allowed and the plaint was returned *vide* order dated 20.09.2021 owing to the suit exceeding the pecuniary jurisdiction of the learned Additional District Judge. Thus, the present suit under Order XXXVII was filed and summons were issued *vide* order dated 16.11.2021.

7. The defendants entered appearance for the first time on 21.02.2022 and an application (i.e. I.A. 13665/2022) seeking leave to defend was filed by them, however, the same was returned under objection. The said application remained under objection for two dates. Subsequently, the said application seeking leave to defend was re-filed along with an application (i.e. I.A. 13666/2022) seeking condonation of delay of 78 days in re-filing the application for leave to defend. *Vide* order dated 05.01.2023, the application (I.A. 13666/2022) seeking condonation of delay in re-filing was dismissed for non-prosecution.

8. Subsequently, defendants filed another application being I.A.



9366/2023 seeking restoration of the application i.e. I.A. 13666/2022 whereby condonation of delay in refiling the leave to defend application was sought. Since there was delay in filing the said application (IA 9366/2023), another application being I.A. 9367/2023 was also filed seeking condonation of delay of 95 days in filing I.A. 9366/2023. This Court issued notice in I.A. 9366/2023, however, again none appeared for the defendants on 09.10.2023 or 13.05.2024 when the I.A. 9366/2023 was listed for hearing. Accordingly, the said application (I.A. 9366/2023) was also dismissed in default for non-prosecution.

9. Today, again the learned counsel for the defendants has appeared and has prayed for time to take steps to seek restoration of the application i.e. I.A. 9366/2023.

10. To be noted that when summons were issued in the suit by this Court *vide* order dated 16.11.2021, the defendants were also directed to place on record an affidavit disclosing their assets along with memo of appearance. However, this direction was not complied with by the defendants. Accordingly, *vide* order dated 26.07.2024, on the prayer of the learned counsel for the defendants, further four weeks time was granted to comply with the directions contained in the order dated 16.11.2021.

11. On being queried by the Court, the learned counsel fairly states that directions contained in order dated 16.11.2021 have also not been complied with yet.

12. In above factual backdrop, the learned counsel for the plaintiff submits that the plaintiff is entitled to judgment forthwith as there is no application seeking leave to defend on record.



13. At this stage, it is apposite to extract the sub-rule 6(a) of Rule 3 of Order XXXVII of CPC which reads as under:-

*“(6) At the hearing of such summons for judgment,–
(a) if the defendant has not applied for leave to defend,
or if such application has been made and is refused, the
plaintiff shall be entitled to judgment forthwith; or”*

14. On a plain reading of the above quoted sub-rule, it is clear that when the defendants have not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith.

15. As noted above, the defendants had first entered appearance on 21.02.2022 and the leave to defend application was filed on 19.02.2022. However, the Registry placed the said application under objection and the defendants refiled a rectified copy of the said application after a delay of 78 days. The refiling was accompanied by an application (I.A.13666/2022) seeking condonation of delay in refiling on the ground that the erstwhile counsel for the defendants who had filed the application seeking leave to defend had not been responding and the new counsel could not collect the case file from the erstwhile counsel due to his office being shut during vacations. The said application (IA 13666/2022) was dismissed for non-prosecution on 05.01.2023.

16. Again, after a delay of 95 days, the defendants preferred the restoration application (I.A. 9366/2023) along with an application seeking condonation of delay in filing the said restoration application. Reasons for non-prosecution of I.A. 13666/2024 in the said restoration application has been attributed to the new counsel of the defendants and the fact that



defendant no.1 was in Jammu & Kashmir while the defendants no.2 to 4 were in Judicial Custody. It is also stated in the said application that the erstwhile counsel had been re-engaged by the defendants. The grounds for delay in filing the restoration application are limited to the fact that the defendants were unaware of the order dated 05.01.2023.

17. A perusal of the order sheets in the present case shows that again no one appeared on behalf of the defendants for two subsequent dates after notice was issued in the restoration application (I.A. 9366/2023) which resulted in dismissal of the said application as well, on 13.05.2024.

18. Intriguingly, despite lapse of almost 05 months since the passing of the order dated 13.05.2024 *vide* which the said application (I.A. 9366/2023) was dismissed in default, no steps have been taken by the defendants seeking restoration of the same. However, today the learned counsel for the defendants has again sought further time to file an application seeking restoration of the application for restoration.

19. The object underlying the suit filed under Order XXXVII is expeditious disposal of certain classes of economic suits as specified in sub-rule (2) of Rule 1 of Order XXXVII and to avoid unnecessarily extending the litigation process by the defendant in cases where speedy judgments are appropriate.

20. As seen above, although the application for leave to defend was filed way back in February, 2022, however, the conduct of the defendants as well as their counsel has been such that no effective hearing has been conducted in the present case till date let alone the application for leave to defend having come on record. Despite multiple opportunities, the defendants have



not been pursuing their own applications with due diligence and the grounds offered for condonation of delay in refiling an application for leave to defendant, as well as, delay in filing restoration application do not reveal sufficient cause to excuse the delay.

21. The non-compliance of the direction to the defendants to file an affidavit disclosing their list of assets as directed *vide* order dated 16.11.2021, also shows the lackadaisical approach of the defendants as well as their counsel.

22. The conduct of the defendants appears to be careless and dilatory which has resulted in unnecessary delay in the present suit. As noted above, the defendants have failed to show any sufficient cause for the delay other than the perfunctory attitude adopted by them. I see no reason to allow the suit to languish further.

23. In view of the above, I.A. 9367/2023 seeking condonation of delay in filing the restoration application i.e. I.A. 9366/2023 stands dismissed. I.A. 9366/2023, already stood dismissed *vide* order dated 13.05.2024. Likewise, I.A. 13666/2022 stood dismissed *vide* order dated 05.01.2023. Since the delay of 78 days in refiling the application of leave to defend has not been condoned, therefore, the I.A. 13665/2022 seeking leave to defend cannot be taken on record and hence, the same is dismissed.

24. Therefore, in absence of an application seeking leave to defend on behalf of the defendants, the plaintiff is entitled to judgment forthwith under Order XXXVII Rule 3(6) of the Code of Civil Procedure, 1908.

25. The next question which confronts this Court is with regard to the extent of money decree to be passed in the facts and circumstances of the



present case. It has become imperative to address this question as the plaintiff has claimed exorbitant pre-suit, *pendente-lite* and future interest @ 12% per month.

26. The plaintiff has sought recovery of Rs.5,71,25,501.68/- (Rupees Five Crores Seventy One Lakhs Twenty Five Thousand Five Hundred and One Rupees Sixty Eight Paise Only) along with *pendente lite* interest @12% per month, as well as, arrears of rent of Rs.39,000/- per month along with an interest @12% per month computed from October 2021 till the disposal of the present suit.

27. The plaintiff has filed a table showing calculation of the amounts due to her from the defendants. The total amount of Rs. 5,71,25,501.68/- sought by the plaintiff includes the principal amount of Rs. 3,01,47,136/-, Rs. 5,81,000/- against the drafting and litigation fees as agreed in the MoU, rent of Rs. 39,000/- per month starting from November 2020 till September 2021 and interest @ 12% per month accrued on the said amounts till filing of the present suit.

28. The law with regard to the award of pre-suit, *pendente lite* and future interest has been settled by the Hon'ble Supreme Court in *Central Bank of India v. Ravindra & Ors.*, (2002) 1 SCC 367. In respect of pre-suit interest, it has been held that if there is a stipulation for the rate of interest, the court must allow that rate up to the date of the suit subject to exceptions *inter alia* if the rate is penal, the court must award at such rate as it deems reasonable and even if the rate is not penal, the court may reduce it if the interest is excessive and the transaction was substantially unfair. However, for the *pendente-lite* and future interest, the court has a discretion to award or not to



award the interest and the rate at which to award. The relevant extract from the said decision reads as under:

“38. However “penal interest” has to be distinguished from “interest”. Penal interest is an extraordinary liability incurred by a debtor on account of his being a wrongdoer by having committed the wrong of not making the payment when it should have been made, in favour of the person wronged and it is neither related with nor limited to the damages suffered. Thus, while liability to pay interest is founded on the doctrine of compensation, penal interest is a penalty founded on the doctrine of penal action. Penal interest can be charged only once for one period of default and therefore cannot be permitted to be capitalised.

*39. Mulla on the Code of Civil Procedure (1995 Edn.) sets out three divisions of interest as dealt in Section 34 CPC. The division is according to the period for which interest is allowed by the court, namely,— (1) interest accrued due prior to the institution of the suit on the principal sum adjudged; (2) additional interest on the principal sum adjudged, from the date of the suit to the date of the decree, at such rate as the court deems reasonable; (3) further interest on the principal sum adjudged, from the date of the decree to the date of the payment or to such earlier date as the court thinks fit, at a rate not exceeding 6 per cent per annum. **Popularly the three interests are called pre-suit interest, interest pendente lite and interest post-decree or future interest. Interest for the period anterior to institution of suit is not a matter of procedure; interest pendente lite is not a matter of substantive law (see Secy., Irrigation Deptt., Govt. of Orissa v. G.C. Roy SCC para 44-iv). Pre-suit interest is referable to substantive law and can be subdivided into two sub-heads: (i) where there is a stipulation for the payment of interest at a fixed rate; and (ii) where there is no such stipulation. If there is a stipulation for the rate of interest, the court must allow that rate up to the date of the suit subject to three exceptions: (i) any provision of law applicable to moneylending transactions, or usury laws or any***



other debt law governing the parties and having an overriding effect on any stipulation for payment of interest voluntarily entered into between the parties; (ii) if the rate is penal, the court must award at such rate as it deems reasonable; (iii) even if the rate is not penal the court may reduce it if the interest is excessive and the transaction was substantially unfair. If there is no express stipulation for payment of interest the plaintiff is not entitled to interest except on proof of mercantile usage, statutory right to interest, or an implied agreement. Interest from the date of suit to the date of decree is in the discretion of the court. Interest from the date of the decree to the date of payment or any other earlier date appointed by the court is again in the discretion of the court — to award or not to award as also the rate at which to award. These principles are well established and are not disputed by learned counsel for the parties. We have stated the same only by way of introduction to the main controversy before us which has a colour little different and somewhat complex. The learned counsel appearing before us are agreed that pre-suit interest is a matter of substantive law and a voluntary stipulation entered into between the parties for payment of interest would bind the parties as also the court excepting in any case out of the three exceptions set out hereinbefore.”

(emphasis supplied)

29. On a perusal of the terms of the MoU as well as the plaint, it is evident that the settlement arrived at between the defendants and the plaintiff in the month of October 2020 is in the backdrop of the arrest of the defendants in the criminal proceedings initiated by the plaintiff against the defendants. It is set out in clause 4 of the MoU that grant of bail to the defendants would not be objected to by the plaintiff in furtherance of the settlement, however, in case of default of repayment/non-fulfillment of the MoU, bail shall be cancelled. The clause 4 of the MoU is reproduced as under:



“4. The FIRST PARTY has no objection if the SECOND PARTY may be granted bail in Crime Number 312/2020 registered at P.S. Naujhil Mathura, however in case of default repayment of non-fulfilment of the present MOU, the bail shall be cancelled.”

30. Furthermore, the fact that the agreement was entered into by the defendants for obtaining consent of the plaintiff for their bail has also been pleaded by the plaintiff in her plaint. The relevant para of the plaint is as under:

“13. The Plaintiff had also instituted criminal proceedings against the Defendants during the month of August 2020. The Defendants were subsequently arrested and in order to deceive the Plaintiff one more time, they assured the Plaintiff that all the dues would be cleared and proposed to enter into a Memorandum of Understanding to obtain the Plaintiff's consent for bail.”

31. In the above factual backdrop, this Court is of the opinion that the Memorandum of Understanding dated 26.10.2020 has been entered into by the defendants at the time when the plaintiff was in a dominating position and had an unfair advantage over the defendants with regard to their bail. There is no challenge to the MoU dated 26.10.2020 nor it has been set aside. However, in the considered opinion of this Court, the interest @ 12% per month as stipulated in the MoU is excessive and exorbitant and the transaction is substantially unfair. Therefore, on the strength of the decision of the Hon'ble Supreme Court in *Central Bank of India (supra)*, this Court deems it appropriate to reduce the pre-suit interest @ 6% per annum. In the facts and circumstances of the case, the plaintiff is also held entitled to *pendente-lite* and future interest @ 6% per annum.



32. Further, a conjoint reading of the Clauses 2 and 11 of the MoU reveals that interest is not stipulated for the monthly rent of Rs.39,000/-, the interest is chargeable only on the principal loan amount. The said clauses are reproduced as under:

“2. The SECOND PARTY has also agreed to settle the dispute for amount of Rupees Three Crore Forty One Lacs, Forty seven thousand, One Hundred and Thirty Six Rupees only. The SECOND PARTY had agreed to pay the interest @12% per month in case of default repayments.

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11. The Second party has also agreed to pay First party's house rent 39,000/- every month till the time they will not clear all payment to First party”

33. Accordingly, the suit of the plaintiff is decreed for a principal sum of Rs. 3,07,28,136/- as noted above, along with interest of 6% per annum from the date of the Memorandum of Understanding, i.e. 26.10.2020 till realization of the entire amount. Furthermore, the plaintiff is also held entitled to receive arrears of rent of Rs.39,000/- per month from the month of November 2020 till October 2024 calculated without interest. Ordered accordingly.

34. The suit stands disposed of.

35. Decree sheet be drawn in above terms.

VIKAS MAHAJAN, J

OCTOBER 9, 2024/dss