

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

Date of Reserve : 05.08.2010

Date of decision: 25.10.2010

+ **I.A. No.5733/2010 & CS (OS) 1356/1999**

SMT. SUDESH MADHOK Plaintiff
Through: Mr. P.D. Gupta, Advocate.

versus

M/S PAAM ANTIBIOTICS LTD. & ANR. EA+ Defendants
Through: Mr. Vikas Dhawan with
Ms. Poli Kataki, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes.
2. To be referred to Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

MR. JUSTICE S.RAVINDRA BHAT, J

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1. The plaintiff contends that it resides at W-93, Greater Kailash-II, New Delhi. The defendant no.1 is a public limited company having its registered office at 18, Bhargava lane, Civil Lines, Delhi and its corporate office at 13, Alipur Road, Exchange Store Building, Civil Lines, Delhi. The second defendant is also a public limited company having its registered office at 26, Bhargava Lane, Nitya Nand Marg, Civil Lines, New Delhi.

2. The suit contends that in the month of June, 1996, the first defendant represented to the plaintiff that about its urgent need of finances; since the plaintiff was in a position to lend, the defendant requested her to advance the money. The plaintiff therefore, advanced a sum of Rs. 50

lakhs to the first defendant by cheque no. 670544 for Rs.50 lakhs drawn of Bank of America, New Delhi. As an acknowledgement of having received the said sum of Rs.50 lakhs, the first defendant executed and delivered a receipt and at the same time issued a demand promissory note dated 08.07.1996 (to the plaintiff), thereby promising to pay her on demand the said amount along with the interest @15 per cent per annum. The first defendant issued three cheques bearing nos. 721371, 721372 and 731373 for a total sum of Rs.52,33,877.00 in favour of the plaintiff.

3. The suit alleges that the cheques, on presentation for negotiation and crediting the proceeds thereof in the account of plaintiff were dishonored. When the plaintiff apprised the first defendant of the dishonor of the said cheques, it (the first defendant) delivered five other cheques, bearing nos.531589, 531590, 531591, 531592 and 531593 for Rs. 10 lakh each totaling Rs.50 lakhs drawn on Punjab National Bank, Civil Lines, New Delhi. These cheques were drawn by second defendant to and in favour of the plaintiff. By way of additional security for the repayment of the aforesaid amount, the first defendant pledged its 2,50,000 shares of second the defendant held by and duly registered in the name of M/S Pushkar Trading Company Limited with the plaintiff.

4. The plaintiff alleges that till date the defendants have neither paid the principal amount nor interest accrued upon it, however they have issued the certificates of tax deducted at source for Rs.36,986 to the plaintiff. When the defendant failed to make the payments agreed, despite passage of an unduly long time, the plaintiff presented the said cheques for payment in March, 1998. The cheques, however, were received back by her as dishonored from the banker of second defendant by cheque returning memos - all dated 10.03.1998 with the remark "Payment Stopped by drawer".

5. The first defendant, in the written statement, alleges that the plaintiff advanced the loan for Rs.2.20 crores to the second defendant. The defendants were closely held family owned companies. The second defendant was in need of funds and approached the plaintiff for the loan for Rs.2.20 crores; the plaintiff, while advancing the amount, further agreed that the amount would be used and availed of by second defendant alone who would be liable alone to repay it. Even though the initial cheques were paid by the first defendant to the plaintiff so as to complete

the formalities and/or to satisfy the requirements of corporate norms between the parties concerned, it was agreed that the cheques issued (by the first defendant) would not be encashed and second defendant would subsequently replace them (the cheques), as the amount of Rs. 50 lakhs out of the total disbursements of Rs.2.20 crores was made to the second defendant. The defendants say that the amount of Rs.50 lakhs was transferred to the account of second defendant according to the terms agreed by plaintiff and with the knowledge, consent and approval of the plaintiff.

6. The written statement further alleges that the second defendant issued cheques bearing no.531589, 531590, 531591, 531592, 531593 all dated 07.03.1998 for Rs. 10 lakhs each, drawn on Punjab National bank, civil lines, New Delhi in favour of the plaintiff. Apart from the said cheques, shares of second defendant company listed in the stock exchange were also handed over to the plaintiff, according to the previous understanding of the parties. The plaintiff could sell the said shares in case of non-payment of the amounts. The second defendant also issued TDS certificates towards payment of interest on the amount of Rs.50 lakhs in favour of plaintiff. The said TDS certificates were duly accepted and appropriated by the plaintiff. The first defendant alleges that the suit is based on falsehood.

7. The plaintiff alleges, in her application, that the materials on record, including the admitted documents, are such that the court can exercise its discretion under Order XII, Rule 6, CPC and decree the suit. The court had, during the course of proceedings, required the presence of the first defendant's director, who had deposed in support of the written statement, and recorded his statement on oath. The main issue for consideration in the present suit is whether the first defendant is liable to pay the loan amount of Rs.50 lakhs as alleged by the plaintiff and if there exists any oral agreement between the parties

8. The plaintiff submits that the said loan was given to and was utilized by first defendant stands admitted by way of issuance of TDS certificate by the said defendant under its covering letter (filed by the plaintiff in original) marked as Ex.P-17. The utilization of the amount of loan, payment of interest thereon by the first defendant and deduction of tax at source upon the said amount of interest by the first defendant further stands admitted (by the said defendant) by virtue of its own documents placed on Pages 9 and 10 of the list of documents filed by it, which are a

certificate issued by its Chartered Accountant and the relevant extracts of its ledger/ books of accounts.

9. The plaintiff argues that the loan of a sum of Rs.50 lakhs by the cheques dated 04.07.1996 to the first defendant is admitted; the execution of receipt (Ex.P-1) and promissory note (Ex.P-2) both dated 08.07.1996 are admitted by the first defendant. Further, the crediting of the amounts to the first defendant's account are also admitted facts. The entire defense of the first defendant, to deny its liability and to say that the second defendant is liable for repayment, is based on an oral agreement between the plaintiff, first defendant and the second defendant. The defense, thus, sought to be set up is absolutely contrary to the admittedly executed written documents, which is not permissible by virtue of Section 92, Indian Evidence Act, 1872. The plaintiff further submits that the first defendant's written statement is without verification or an affidavit in support thereof.

10. The first defendant argues that the decree claimed, on alleged admission, cannot be granted, and the parties are to be afforded the opportunity to lead evidence. It is submitted that once the plaintiff accepted cheques from the second defendant, there was an implicit admission that the terms of the contract were varied. The first defendant, in the written statement, in fact, explicitly states that the parties all along intended that the second defendant had to return the amount. It is argued that the court has to see all the materials. Some of the documents on record point to the fact that even though the amount was initially credited to the first defendant's account, it was later transferred to the second defendant, which had in turn issued the cheques to the plaintiff. The first defendant also argues that the plaintiff had elected to proceed against the second defendant for alleged offence under the Negotiable Instrument Act, where the allegations were that the second defendant did not return the amounts advanced. The pleadings in that criminal complaint are a matter of record. In these circumstances, there is no unambiguous admission, as mandated by Order XII, Rule 6, CPC, warranting a decree. The court, it is argued, therefore, should desist from accepting the plaintiff's plea in this regard, and decreeing the suit; instead, the application for decree on admissions should be dismissed.

11. Order XII Rule 6 was enacted to allow the expeditious grant of decree, to a plaintiff, in a suit where the defendant makes any admission in the pleadings "or otherwise", orally or in writing. The plaintiff, in such case, can request the court to decree the suit, in whole or in part, to

the extent of the admission, and need not wait for completion of the trial. The object of the provision is to curtail the period for determination of disputes and to see that a decree on admission is passed without any unnecessary hindrance. The expression 'admission' comprehends admissions by a party in pleadings or otherwise, orally or in writing. The provisions are to be liberally construed. The Court should, in all cases where it wishes to draw a decree on admissions, be satisfied that all the elements which constitute admission are present, before issuing a decree. An admission to enable the plaintiff, to relief, should be unambiguous, clear and unconditional. The judgment of the Supreme Court, in *Uttam Singh Duggal & Co. v. Union Bank of India & Ors.*, AIR 2000 SC 2740 clarifies and restates the law on the point, and states that :

"As to the object of the Order 12 Rule 6, we need not say anything more than what the Legislature itself has said when the said provision came to be amended. In the objects and reasons set out while amending the said rule, it is stated that 'where a claim is admitted, the Court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled.' We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed. The next contention canvassed is that the resolutions or minutes of meeting of the Board of Directors, resolution passed thereon and the letter sending the said resolution to the respondent bank cannot amount to a pleading or come within the scope of the rule as such statements are not made in the course of the pleadings or otherwise. When a statement is made to a party and such statement is brought before the Court showing admission of liability by an application filed under Order 12 Rule 6 and the other side has sufficient opportunity to explain the said admission and if such explanation is not accepted by the Court, we do not think the trial Court is helpless in refusing to pass a decree. We have adverted to the basis of the claim and the manner in which the trial Court has dealt with the same. When the trial Judge states that the statement made in the proceedings of the Board of Directors meeting and the letter sent as well as the pleadings when read together, leads to unambiguous and clear admission with only the extent to which the admission is made is in dispute. And the Court had a duty to decide the same and grant a decree. We think this approach is unexceptionable."

12. A court, considering whether to decree a claim, under Order XII Rule 6, has to see the written statement as a whole; the order cannot also be claimed as a matter of course, since it is discretionary, and the court has to base its exercise of discretion on sound principles. The

Supreme Court, in a recent judgment reported as *M/s Jeevan Diesels & Electricals Ltd –vs- M/s Jasbir Singh Chadha (HUF) & Anr* (decision dated 7-5-2010 in CA No. 4344/2010) relied on several older decisions, including *Gilbert vs. Smith* reported in 1875-76 (2) Ch. D 686; *Koramall Ramballav vs. Mongilal Dalimchand* reported in 23 CWN (1918-19) 1017, reiterated the previous observations in *Uttam Singh*. The court also relied on the observations in *Gilbert* to the following effect:

"if there was anything clearly admitted upon which something ought to be done, the plaintiff might come to the Court at once to have that thing done, without any further delay or expense"

13. In this case, the second defendant has not filed the written statement. Before analyzing the various contentions, and materials, it would be necessary to extract the first defendant's version, in regard to the advance given, found in the written statement. It is in the following terms:

"..(ii) The plaintiff agreed to advance a loan of Rs.2.20 crores to the Defendant No. 2, however, keeping in view the financial position of Defendant No. 2, it was agreed between the plaintiff and Defendant No. 2 that the loan would be advanced to Defendant No. 2 through the family owned companies and/or businesses. It was further agreed between the plaintiff and defendant No. 2 that the said loan, which would be apportioned between the family owned companies/business would be used and availed of by Defendant No. 2 and Defendant No. 2 alone would be liable to repay the same.

.....

(iv) Even though, initially cheques were given by Defendant No. 1 in favour of the plaintiff so as to complete the statutory formalities and/or satisfy the requirements of corporate norms and/ or audit, however, it was clearly understood and agreed between the parties concerned that the cheques issued by Defendant No. 1 to the Plaintiff would not be encashed and Defendant No. 2 would subsequently replace the said cheques as the amount of Rs.50,00,000/- out of the total disbursement of Rs.2.20 crores was made for the use of Defendant No. 2.

(vi) Thereafter, the amount of Rs.50,00,000/- was further transferred to the account of Defendant No. 2 as per the agreement between the plaintiff and Defendant No. 2 and with the knowledge, consent and approval of the plaintiff.

(vii) The Defendant No. 2 issued cheques bearing Nos. 531589, 531590, 531591, 531592 and 531593 for Rs.10 lakh each drawn on Punjab National Bank, Civil Lines, New Delhi. The said cheques were issued in discharge of the amount of Rs.50,00,000/- which is also the subject matter of the present suit.

(vii) Apart from the said cheques, shares of Defendant No. 2 company listed on the stock exchange were also handed over by Defendant No. 2 to the plaintiff as per the understanding between the Plaintiff and Defendant No. 2, the Defendant No. 2 could sell the said shares in the event the payments were not made by the Defendant No. 2;"

14. The documents in this case may briefly be mentioned. Ex. PW-1 is a receipt issued by the first defendant, acknowledging that the amount of Rs. 50,00,000/- was paid to it by the plaintiff; Ex. PW-2 is the demand promissory note, dated 8-7-96, issued in favour of the plaintiff, by the first defendant, agreeing to repay the amount, with 15% p.a. as interest. Ex. PW-3 to Ex. PW-7 are cheques issued by the first defendant dated 7-3-1998, each for Rs.10 lakh; Exhibits PW-8 to 10 are the cheque return memos issued to the plaintiff, advising that the said cheques were dishonoured for insufficient funds. Ex. PW-17 and 18 are the letters by the first defendant, enclosing a Tax Deduction Certificate, to the plaintiff, for Rs. 36,986/- in respect of the amount of Rs.3,69,863/- debited as interest payable to the plaintiff. The first defendant has filed its ledger extract; it reveals that the sum of Rs. 50 lakhs was encashed in July, 1996; a cheque for Rs.332, 877/- towards interest payable (to the plaintiff) was debited on 31-12-1996; curiously, the cheque was shown as cancelled by another entry; the total balance credited to the plaintiff, as on 31-3-1997, was Rs.56,65,754/-. In another entry, the amount of Rs.533,2877/- was shown as transferred to the second defendant's account, from the plaintiff's account. The first defendant has also shown journal vouchers, as Ex. DW-6; they disclose the various amounts paid by the plaintiff. DW-7 are Annual Reports of the first defendant. DW-9 is a letter by the second defendant (produced by the first defendant) giving reasons why there was a delay in paying the amount, and interest. DW-11 (Collectively) is the criminal complaint filed by the plaintiff against the second defendant. Ex. DW-6 is a Chartered accountant's certificate, which says that having verified the first defendant's books, it was found that they contained the following entries:

<i>S. No.</i>	<i>Date</i>	<i>Particulars & Narration</i>	<i>Debit (Rs.)</i>	<i>Credit (Rs.)</i>
1.	08.07.96	PNB A/c No. 4391 Sudesh Madhok (Being cheque No. 670544 of 4.7.1996)	50,00,000/-	50,00,000/-
2.	09.07.96	Paam Pharmaceuticals (P) Ltd. PNB A/c No. 4391 (To cheque No. 065063 issued towards a/c)	10,00,000/-	10,00,000/-

3.	09.07.96	Paam Pharmaceuticals (P) Ltd. PNB A/c No. 4391 (To cheque No. 065062 issued towards a/c)	47,00,000/-	47,00,000/-
4.	31.12.96	Interest A/c Sudesh Madhok TDS on Interest A/c (Being interest on 50.00 lacs @ 15% PA for 180 days paid to Sudesh Madhok)	3,69,863/-	3,69,863/-
5.	31.12.96	Sudesh Madhok PNB A/c No. CA 11712/4) (To cheque No. 721373 Issued to Sudesh Madhok towards interest on Rs. 50 lacs @ 15 % PA for 180 days less TDS)	3,32,877/-	3,32,877/-
6.	31.12.96	PNB A/c No. CA 11712/4 Sudesh Madhok (To cheque No. 721372 Issued to Sudesh Madhok towards interest on Rs. 50 lacs @ 15 % PA for 180 days less TDS)	3,32,877/-	3,32,877/-
7.	01.01.97	Sudesh Madhok Paam Pharmaceuticals (D) Ltd. (Being amount Trf from Sudesh Madhok account)	53,32,877/-	53,32,877/-

15. From the above discussion, the following facts stand established:

- (1) The plaintiff paid Rs.50 lakhs to the first defendant, in July, 1996;
- (2) The first defendant acknowledged receiving the amount, and executed a receipt, as well as a demand promissory note;
- (3) The first defendant issued a cheque for payment of interest, at the agreed rate, in December, 1996.

(4) A TDS certificate was issued to the plaintiff, for the interest payment made, and tax was deducted, as of December, 1996. The letter enclosing the certificate was issued in April, 1997.

(5) The first defendant's ledger extracts and journal extracts disclose that the plaintiff's account was credited with the principal amount of Rs.50 lakhs, and also the interest at 15 % for the proportionate period, less tax deducted.

(6) The first defendant says that the second defendant is a group concern, owned by the same family.

16. In contrast to the above, the first defendant alleges that the parties – including the second defendant had agreed that the amount was to be enjoyed by the latter; in support it relies on extracts of a chartered accountant's certificate, which show that the amount was transferred to the second defendant, and also the relevant ledger extract. The first defendant is also relying on a letter by the second defendant to the plaintiff explaining the difficulty in repaying the amount, and assuring that the principal and interest would be paid. Reliance is also placed on the five cheques issued by the second defendant and presented by the plaintiff, in March, 1998, which were returned dishonoured.

17. Shri Mukesh Bhargava, a director of the first defendant, was examined on oath in court, on 27th July, 2010. He deposed that the sum was advanced by the plaintiff to the first defendant. However, he expressed ignorance about any agreement between the plaintiff and the first defendant, that the second defendant was to repay the amount. According to him, the division of shareholding between the first two defendants took place in September, 1997. He was shown Para (ii) of the written statement, (which was signed by him, though not verified in accordance with the code). On a query about the agreement between the plaintiff, second defendant and the first defendant, he was unable to answer whether he was familiar with the agreement. He later said that he was not aware about such agreement. He clarified that the basis of the averments in the written statement were verbal discussion with other directors of Paam Pharmaceuticals (Delhi) Ltd.

18. It is apparent from the above analysis that the payment of amount, appropriation, payment of interest, deduction of tax, issuance of certificate, disclosure of the loan amount, till 31-3-1997 are all a matter of record; they are first defendant's clear admissions. The slender thread which its entire defense – and the opposition to a summary judgment – hangs on the

issuance of cheques by the second defendant, and their dishonor; the plaintiff having proceeded to file a criminal complaint, and a letter by second defendant to the plaintiff assuring repayment.

19. The kingpin of the defense, in the case, is about the existence of an oral agreement between the parties, whereby the second defendant is supposed to have agreed to repay the amounts advanced by the plaintiff, to the first defendant, and transferred to it. The existence of this oral agreement, is not only premised on tenuous grounds, since no date is specified, nor are any material particulars, what is significant is that both defendants are corporate bodies. Who represented them, where, and what were the terms of the agreement, when were the amounts to be transferred to the second defendant, and when were they to be repaid to the plaintiff, are not even averred. While an oral contract may be inferred from circumstances, the pleadings must clarify, with specificity what are the material terms, who completed the bargain, when and where. The pleadings are bereft of any such particulars. Therefore, the first defendant has relied on vague averments. The second, and perhaps fatal infirmity to the case set up is that the allegation of an oral agreement, is not even spoken to or supported by the first defendant's director, who has signed the written statement. He mentions about awareness from alleged discussions, without again mentioning who was aware of such details. The court is of the opinion, therefore, that the defense about existence of an oral agreement whereby the second defendant was to repay amounts paid to the first defendant, is unbelievable, and untenable.

20. Sections 91 and 92 of the Indian Evidence Act, 1872 state that:-

“91. Evidence of terms of contracts, grant and other dispositions of property reduced to form of document - When the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained.

Exception 1. - When a public officer is required by law to be appointed in writing, and when it is shown that any particular person had acted as such officer, the writing by which he is appointed need not be proved.

Exception 2. - Wills admitted to probate in India may be proved by the probate.

Explanation 1. - This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2. - Where there are more originals than one, one original only need be proved.

Explanation 3. - The statement, in any document whatever of a fact other than the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact.

Illustrations

(a) If a contract be contained in several letter, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts, in writing with B, for the delivery of indigo upon certain terms. The contract mentioned the fact that B had paid A the price of other in contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

92. Exclusion of evidence or oral agreement - *When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying adding to, or subtracting from, its term:*

Proviso (1) - Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want for due execution, want of capacity in any contracting party, want or failure of consideration, or a mistake in fact or law.

Proviso (2) - The existence of any separate oral agreements to matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether; r not his proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3) - The existence of any separate oral agreement, constituting, a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4) - The existence of any separate oral agreement, constituting, a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property, is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5) - Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6) - Any fact may be proved which shows in what manner the language of a document is related to existing facts."

21. In *Bai Hira Devi & Others Vs. The Official Assignee of Bombay* (1958 SCR 1384) it was stated with reference to section 91 and 92, Indian Evidence Act, 1872 that:

"The principal point which arises in this appeal is whether the appellants were entitled to lead oral evidence with a view to show the real nature of the impugned transaction. In deciding this question, it would be necessary to consider the true scope and effect of ss. 91 and 92 of the Evidence Act.

Chapter VI of the Evidence Act which begins with s. 91 deals with the exclusion of oral by documentary evidence. Section 91 provides that, "when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary As, evidence is admissible under the provisions hereinbefore contained." The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is sometimes described as the "best evidence rule ". The best evidence about the contents of a document is the document itself and it is the production of the document that is required by s. 91 in proof of its contents. In a sense, the rule enunciated by s. 91 can be said to be an

exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of the document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act. Section 92 excludes the evidence of oral agreements and it applies to cases where the terms of contracts, grants or other dispositions of property have been proved by the production of the relevant documents themselves under s. 91; in other words' it is after the document has been produced to prove its terms under s. 91 that the provisions of s. 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. The application of this rule is limited to cases as between parties to the instrument or their representatives in interest. There are six provisos to this section with which we are not concerned in the present appeal. It would be noticed that ss. 91 and 92 in effect supplement each other. Section 91 would be frustrated without the aid of s. 92 and s. 92 would be inoperative without the aid of s. 91. Since s. 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved."

22. In a later judgment, *Roop Kumar Vs. Mohan Thedani* (AIR 2003 SC 2418), the Supreme Court held that:-

"Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known some times as the "best evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that of all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it (See Thayer's Preliminary Law on Evidence p.397 and p.398; Phipson Evidence 7th Edn. P.546; Wigmore's Evidence p.2406) It has been best described by Wigmore stating that the rule is in no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process - the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise, any rule of law whatever might reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a

matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence p. 648)”

23. The Supreme Court, earlier in *Smt. Gangabai v. Smt. Chhabubai* (AIR 1982 SC 20) and *Ishwar Dass Jain (dead) thr.Lrs. v. Sohan Lal (dead) by Lrs.*(AIR 2000 SC 426) with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

24. In this case, Ex.P-1 and Ex.P-2 that neither the receipt (Ex.p-1) and promissory note (Ex.P-2) mentions any agreement between the plaintiff and second defendant. The first Defendant has failed to disclose the date of oral agreement between the parties. Its director who deposed to the written statement, is not aware of existence of such an agreement. Therefore, the defense is contrary to the admittedly executed written documents. Such defense is not permissible under section 92, Indian Evidence Act, 1872.

25. Ex. P-17 established that the first defendant issued TDS certificates showing deduction under Form.16A. The certificate of the chartered accountants in Ex.DW-6 dated 12.01.2005 clearly shows that defendant has debited the loan amount of Rs.50 lakhs and its interest of Rs.3,32,877 to the plaintiffs account. This clearly indicates that first defendant admitted to the utilization of the said loan. The first defendant has submitted its ledger extracts which clearly establish the transfer of Rs.50 lakhs to its account by cheque no.670544 dated 04.07.1996. This shows that the money was with it for 6months. As far as the circumstance that the second defendant issued cheques, which the plaintiff accepted, and sought encashment of, but proceeded to seek remedies through a criminal complaint are concerned, in the absence of any agreement – tripartite, between all parties, or between the first and second defendant, transferring the former’s liability vis-à-vis the plaintiff to the second defendant (with the plaintiff’s consent), such fact

cannot amount to estoppel by the plaintiff in asserting its legal rights to recover the amounts from the first defendant.

26. In the light of the above discussion, the court is of the opinion that the materials and pleadings are sufficient to draw a decree on admissions against the first defendant, for the suit claim. It is clarified that in the event the plaintiff secures the decretal amount, it shall not press the criminal proceedings against the second defendant. The suit is decreed in terms of relief clause (a) for the sum of Rs.71,30,822 with *pendent lite* and future interest at 15% per annum, against the first defendant. The said defendant shall also pay costs, and counsel's fee, quantified at Rs.75,000/-

**S. RAVINDRA BHAT
(JUDGE)**

OCTOBER 25, 2010