

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

+ **RFA No. 510/2011**

% **23rd November, 2011**

CROMPTON GREAVES LTD Appellant
Through : Mr. Sanjeev Sagar, Advocate.

versus

M/s PUNIANI INDUSTRIAL CORP. & ANR Respondents
Through : None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. Trial Court record has been received. I have heard learned counsel for the appellant and have also perused the record.
2. Challenge by means of this Regular First Appeal (RFA) filed under Section 96 Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 28th May, 2011 dismissing the suit against defendant No.3.

3. By this appeal, it is pleaded that the suit filed by the appellant/plaintiff for recovery of ₹5,00,000/- with interest be also decreed against defendant No.3.

4. The brief facts of the case are that the appellant/plaintiff filed a suit for recovery under Order XXXVII CPC against three defendants. An application for leave to defend was filed by the defendants and which application was allowed by granting leave to contest, subject to deposit of ₹1,00,000/- in the Court.

5. Defendant Nos. 1 and 2 did not comply with the order, and hence, the suit was decreed against them. Defendant No. 3 complied with the order and he was, therefore, allowed to defend the suit. Thereafter, the position which emerged was that the suit was decreed against defendant Nos. 1 and 2 and the suit was, therefore, tried qua the defendant No. 3.

6. The facts of the case are that appellant/plaintiff filed a suit against defendant No.1 /partnership firm on the basis of cheques which were dishonoured. The cheques were given in discharge of the liability of the goods purchased by the defendant No.1/partnership firm. Defendant No. 3 laid out a defence that the cheques, on the basis of which the suit was filed, are of May, 1994 (suit being filed on 27th September, 1997) and to the knowledge of the plaintiff/appellant, defendant No.3 had already ceased to be a partner of the partnership firm in the year 1993 itself. It was the case of defendant No. 3 that defendant No. 1/firm was dissolved on 30th June, 1993 and the dissolution deed was prepared whereafter all the assets and liabilities

of the firm were taken over by the existing partnership firm/defendant No. 1 and it was agreed that defendant No. 3 shall not be liable, in any manner, with respect to the affairs of the partnership firm.

7. The only issue before the trial Court thus was as to whether defendant No. 3 was a partner in the firm when the said cheques were issued and as to whether the appellant/plaintiff knew that defendant No. 3 was not a partner in the partnership firm when the cheques were issued.

8. The trial Court held that defendant No. 3 was not a partner in the partnership firm when the cheques of year 1994 were issued and this was known to be plaintiff. To arrive at this finding, the Trial Court has referred to the fact that the appellant/plaintiff itself when it filed the complaint under Section 138 of the Negotiable Instruments Act, 1881 on the basis of dishonoured cheques, filed the complaint only against defendant Nos. 1 and 2 and not the defendant No.3. It was, therefore, held by the trial Court that the appellant/plaintiff knew that defendant No. 3 was not a partner of the firm when the cheques were issued.

9. I have gone through the affidavit by way of evidence which was filed on behalf of appellant/plaintiff in the trial Court and I do not find therein any positive deposition made by Sh. Mansoor Zainvi, who deposed on behalf of the appellant/plaintiff, that the defendant No. 3 did not inform the appellant/plaintiff that he was no longer the partner of the firm since 1993. Infact, the affidavit by way of evidence which was filed on behalf of the appellant/plaintiff basically goes on to aver liability only against defendant

Nos. 1 and 2.

10. This, I say, is by a reference to paras 4 and 5 of the affidavit by way of evidence filed on behalf of the appellant/plaintiff, where the reference is only to defendant Nos. 1 and 2. The said portion reads as under:-

“4. I state that respondent No. 1 through respondent No.2 had purchased goods from the petitioner company from time to time. I further state that a sum of Rs.19,99,656.09/- was payable by the respondents. I further state that respondent No.2 for himself and on behalf of respondent No.1 acknowledged liability on 22nd November, 1991 in writing by making an endorsement dated 22nd November, 1991 on copy of letter dated 15.11.1991. I further state that the respondent previously acknowledged their liability in writing by signing the copy of letter dated 26th November, 1990. I further state that the respondent received the letter dated 22nd November, 1991 wherein the amount of Rs.19,99,656.09/- which was due from the respondent was mentioned. I further state that the no reply received to the said letter. I further state that the respondents have not disputed their liability to pay at any stage.

5. I state that the respondent no. 2 for himself and on behalf of respondent no.1 has been promising to make payment from time to time but had expressed difficulty on account of financial problems.”

11. Learned counsel for the appellant argued that there was a mistake in not making defendant No. 3 a party to the complaint under Section 138 of the Negotiable Instruments Act, 1881, however when a query was put to learned counsel that whether any evidence was led on behalf of the

appellant/plaintiff that defendant No. 3 was not made a party to the complaint under Section 138 of the Negotiable Instruments Act, 1881 because of the mistake of the Advocate of the appellant or the appellant itself, however, the appellant/plaintiff has failed to show any evidence or even the statement in the affidavit by way of evidence that defendant No. 3 was not made a party to the complaint under Section 138 of the Negotiable Instruments Act, 1881 because of the mistake of the appellant or its counsel.

12. The trial Court has dealt with relevant issue in para 13 of the impugned judgment and which reads as under:-

“13. ISSUE No.2:-

Whether the defendant no.3 ceased to be a partner in defendant no.1 on the relevant date when the cause of action arose and is not financially liable bound by the plaintiff's claim? OPD.

The onus to prove this issue has been placed upon the defendant.

It is the defence of the defendant no.3 that the defendant no.1 firm was a partnership firm upto 30.06.1993 when the same was dissolved and a proper dissolution deed was prepared and duly acted upon. Further he left the partnership in the year 1993 and had no concern with the defendant no.1 at all and even in the alleged transaction, the defendant no.3 was neither a party nor a signatory to the cheques and as such suit of the plaintiff deserves dismissal.

On the other hand as per plaintiff, the defendant no.1 was a partnership firm at the relevant time when the

cheques were issued and defendants no.2 & 3 were its partners. The defendant no.1 through defendant no.2 had purchased goods from the plaintiff company from time to time and a sum of Rs.19,99,565.09p was payable by the defendants. The defendant no.2 for himself and on behalf of defendant no.1 acknowledged the liability by making an endorsement dated 22.11.1991 on copy of letter dated 15.11.1991. Further the defendants have not disputed their liability to pay at any stage.

In his examination-in-chief, defendant no.3 has reiterated his claim that the defendant no.1 firm was a partnership firm of which the defendants no.2 & 3 were Partners but the said Partnership Firm was dissolved vide Dissolution Deed dated 30.06.1993 whereby all the assets and liabilities were taken over by defendant no.2 and the defendant no.3 was allowed to leave the said firm. However, the defendant no.3 has been failed to prove the said document on record in accordance with the law i.e. by getting the original of said Dissolution Deed produced on record. Though he has filed the photocopy of the said Dissolution Deed dated 30.06.1993 and in the circumstances when neither the original one produced nor the same has been proved on record as per law, it can not be read in evidence. But by the document of the plaintiff Mark C which is the complaint U/s 138 of N.I. Act filed by the plaintiff against the defendants no.1 & 2 before the Court of Ld. M.M., Delhi and also relied upon by the defendant no.3, it is clear that the plaintiff has the grievance only against the defendants no.1 & 2 and the act of plaintiff of not impleading the defendant no.3 as an accused in the said complaint indicates that it was in the knowledge of the plaintiff that the defendant no.3 was no more the partner of the defendant no.1 and therefore there was no grievance against defendant no.3. Even in its said complaint the plaintiff has categorically stated that ***“both the accused (defendants no.1 & 2 herein) with a view to discharge the whole of the legally enforceable debt and liability arising out of purchase of the goods***

vide their letter dated 17.04.1994 issued the following cheques:-

(i).Cheque No.763133 dated 17.05.1994 drawn on Punjab and Sind Bank, Chandni Chowk Branch, Delhi for Rs.5,00,000/-.

(ii).Cheque No.763134 dated 16.05.1994 drawn on Punjab and Sind Bank, Chandni Chowk Branch, Delhi for Rs.5,00,000/-.

(iii).Cheque No.763136 dated 17.05.1994 drawn on Punjab and Sind Bank, Chandni Chowk Branch, Delhi for Rs.5,00,000/-.

(iv).Cheque No.763137 dtd 17.05.94 drawn on Punjab and Sind Bank, Chandni Chowk Branch, Delhi for Rs.4,99,565.09ps.”

The aforesaid mentioning of the plaintiff in its complaint has clearly established that the cheques in question were issued by the defendant no.2 on behalf of defendant no.1 and not by the defendant no.3. As such defendant no.3 cannot be held liable towards the claim of the plaintiff. Issue stands decided accordingly.”

13. I agree with the aforesaid findings and conclusion of the trial Court. A civil case is decided on balance of probabilities and balance of probabilities shows, as per the factual position which has emerged on record, that the appellant/plaintiff knew and accepted that defendant No. 3 was not a partner of the partnership firm/defendant No. 1 when the cheques were issued in the year 1994. Therefore, the liability of the defendant No.1/ partnership firm could not be the liability of the defendant No. 3 who had retired from the partnership in the year 1993 and when the subject cheques

were only issued in 1994.

I4. In view of the above, there is no merit in the appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

NOVEMBER 23, 2011/^{AK}