

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

+ **RFA No.583/2011**

% **10th May, 2012**

RAJNISH SHARMA

..... Appellant

Through: Mr. Prem B. Kshetri, Advocate with
Mr. Anil Kumar Singh, Advocate.

VERSUS

HARISH KUMAR

..... Respondent

Through: Mr. Robin Kamra, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 23.9.2011 decreeing the suit of the respondent/plaintiff filed under Order 37 CPC by dismissing the leave to defend application filed by the appellant/defendant.

2. A reading of the plaint shows that the suit has been filed on the basis of a cheque for Rs. 3 lacs dated 3.11.2008 which was dishonoured.

The plaint also makes a mention of another receipt (date not given) by which the appellant/defendant promised to pay this sum of Rs. 3 lacs, and which is stated to be filed with the plaint. Therefore, the case of the respondent/plaintiff in the plaint was that he was entitled to an amount of Rs. 3 lacs with respect to which not only the cheque was dishonoured but a receipt dated 16.12.2009 was signed by the appellant/defendant.

3. In the leave to defend application filed by the appellant/defendant, the appellant/defendant specifically took up the defence of his having paid a sum of Rs. 2,25,000/- to the respondent/plaintiff on 7.11.2008. There are also averments of the respondent/plaintiff receiving Rs. 1,25,000/- from the main broker M/s. Moti Lal Oswal Securities Ltd. and of which company the appellant/defendant was a sub-broker. The relevant paragraphs, in this regard, of the leave to defend application read as under:-

“7.11 The plaintiff was also losing in other trading of shares really, Axis Bank, Reliance etc. this caused huge margin short fall in the Margin Funding Account of Shri Madan Lal Sharma without his knowledge. The Main Broker M/s Moti Lal Oswal Securities Ltd. adjusted the loss through those 19 scripts transferred by the plaintiff himself with the help of Prashant. As the stock market badly affected due to recession in global market which caused fall in all equity markets prices trembled instantly and continuously in equity markets and ultimately caused huge losses to the plaintiff.

Due to illegal transaction by the plaintiff caused huge loss hence the main broker M/s Moti Lal Oswal Securities Ltd. also asked Shri Madan Lal Sharma to pay the balance amount of trade. It was shocking for Shri Madan Lal Sharma and defendant as they had not made any trading in Margin Funding Account since long hence they enquired from Prashant who disclosed his evil design to earn quick money in collusion with the plaintiff. The defendant called the plaintiff who narrated the whole story of his ill design with Prashant to earn extra quick money with the help of Margin Funding Account of Madan Lal Sharma however could not control the loss due to crash of market and felt sorry. Due to the age and poor condition of the plaintiff and crash of market, the defendant or his father did not take any action against the plaintiff.

7.12 However the plaintiff took this as submissiveness of the defendant hence he made telephonic complaint against the defendant's company to M/s Motilal Oswal Securities Ltd, to extort money. M/s Motilal Oswal Securities Ltd. put pressure upon the defendant to settle the dispute of plaintiff as case related to the sub-brokership of the defendant's company and M/s Motilal Oswal Securities Ltd. did not want any litigation as he would also be a party in such case if any customer file case against any sub-broker. After several meetings, the defendant settled the dispute with the plaintiff in the month of November 2008. As per agreement, face value of those 19 scripts were valued at ₹ 3,00,000/- and accordingly, It is agreed that the defendant will transfer 19 scripts in account of the plaintiff and till the time he handed over a Cheque No.513904 for a sum of ₹ 3,00,000/- as security towards the face value of those 19 scripts. Later on the plaintiff asked the defendant to give him ₹ 3,00,000/- instead of transfer of 19 scripts in his account as the share market was going down each and every day. The plaintiff promised to return back the security Cheque No.513904 for ₹ 3 lac immediately on the day entire payment of ₹ 3 lac paid to the plaintiff. Accordingly the defendant deposited ₹ 2,25,000/- in the account of the plaintiff on 07.11.2008 and promised to pay the balance payment of ₹ 75,000/- within few days.

However when the defendant contacted the plaintiff for balance payment of ₹ 75,000/- on 25.11.2008 and asked return back of Cheque No.513904 for a sum of ₹ 3,00,000/-, the plaintiff clearly refused to return back of the cheque. He threatened the defendant for filing false and frivolous complaint against him and his father if the defendant does not give him another ₹ 3,00,000/- in lie of said Cheque No.513904 for a sum of ₹ 3,00,000/-.

7.13 When the defendant refused to give another ₹ 3 lac to the plaintiff, he made a false written complaint against the defendant and his company to M/s Motilal Oswal in December 2008 whereby alleged that he has been cheated by the defendant and his father. He alleged the transferred of 19 scripts fraudulently in the account of Shri Madan Lal Sharma, depositing of three cheque for ₹ 50,000/-, ₹ 35,000/- and ₹ 40,000/- in the account of sub-broker company etc. however hide all the relevant information of the amount he has received from the sub-broker. The plaintiff cleverly mislead the main brother M/s Motilal Oswal however he again made settlement with main broker M/s Motilal Oswal in the month of February and agreed to settle his entire account, complaint and dispute against the main broker and sub-broker for a sum of ₹ 1,25,000/- and accordingly he received a sum of ₹ 1,25,000/- on 13/02/2009 from M/s Moti Lal Oswal Securities Ltd. and withdrew his entire complaint against main broker and sub-broker and agreed for not raising any dispute in future. It is submitted that M/s Motilal Oswal Securities Ltd paid the said amount of ₹ 1,25,000/- to the plaintiff by deducting the security deposit of Sub-Broker A/c No.DRS 1200 belong to the company of defendant. By his cleverness, the plaintiff received ₹ 3,50,000/- more than what he agreed to settle with the defendant. He wrote a letter dated 16/03/2009 whereby he withdrew his complaint as fully resolved and he cannot ask for more money and cannot proceed for any civil and criminal case against the broker and sub-broker in near future.” (underlining added)

4. In reply to the aforesaid paras, the respondent/plaintiff did not

specifically deny the receipt of Rs. 2,25,000/- or the sum of ₹ 1,25,000/- from the main broker, M/s. Moti Lal Oswal Securities Ltd. The relevant para of the reply to the application for leave to defend, reads as under:-

“7.1 to 7.17 That contents stated in para no.7.1 to para no.7.17 of the affidavit are specifically wrong and denied by the plaintiff as they are not related with the plaintiff and present suit has nothing to do with the same in any manner as the same para is ambiguous and vague in nature does not convey any understandable thing or information as nothing as such is disclosed by the defendant in his statements given to the police as no such disclosure has been given by the defendant to the police as no such disclosure has been given by the defendant to the police and police have not received any complaint against the same or similar person from the defendant and contents stated in para no.7.2 of the affidavit are specifically wrong and denied by the plaintiff as they are not related with the plaintiff and present suit has nothing to do with the same in any manner and also the others paras of the affidavit are conveying the same and similar story which is false and frivolous and vague in nature though such stories the defendant wants to mislead this hon’ble court and wants to divert the process of justice it is pertinent to mention here that the defendant himself is admitting the transactions took place between the plaintiff and defendant and there was outstanding on the defendant in favour plaintiff but the concocted story apart from this fact does not create and triable issue, the present matter is clean and clear case of cheque dishonor, default in payment and for that the recovery of the debt must be done and the said cheque amount must be recovered from the defendant as the defendant himself also promised the plaintiff in written that he will pay the said cheque amount on or before a date mentioned on the same paper by the defendant but now the defendant is narrating a false story of misuse of cheque by the plaintiff, through which the defendant is misleading the court, hence the false and misleading story containing paragraphs 7.1 to 7.17 are collectively replied by

the plaintiff because the false and baseless stories are purely wastage of precious time of every hon'ble court of law and the irrelevant facts mentioned in the affidavit are also wastage of stationery and papers therefore the facts mentioned in all the paragraphs of the affidavit of the plaintiff filed with the application for issuance of summons for judgment are reiterated here and may be read as part of this reply of the affidavit of the defendant, for the sake of brevity.”

5. A reading of the aforesaid para therefore shows that on the one hand, the appellant/defendant on 16.12.2009 issued a document showing his liability to pay a sum of Rs. 3 lacs, and which as per the respondent/plaintiff was towards liquidation of the liability of the dishonoured cheque of November, 2008. In between November, 2008 and December, 2009, however, there are further facts which show payment of Rs. 2, 25,000/- to the respondent/plaintiff by the appellant/defendant and the respondent/plaintiff receiving a sum of Rs. 1,25,000/- from the main broker, M/s. Moti Lal Oswal Securities Ltd.

6. The principles with regard to grant of leave to defend are contained in the celebrated judgment of the Supreme Court in the case of *M/s. Mechelec Engineers & Manufacturers vs. M/s. Basic Equipment Corporation*, AIR 1977 SC 577 and para 8 of which judgment reads as under:-

“8. In Smt. Kiranmoyee Dassi and Anr. v. Dr. J. Chatterjee, Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253) :

(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is entitled to unconditional leave to defend.

(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.

(c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled

to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence.”

7. The facts of the aforesaid case show that both the parties have something in their favour. On the one hand, the respondent/plaintiff has in his favour the fact that on 16.12.2009 a document was executed showing liability to pay Rs. 3 lacs, however, even as per the respondent/plaintiff this document dated 16.12.2009 is towards the earlier dishonoured cheque of November, 2008, and the appellant/defendant has shown in the leave to defend application payment subsequent to 3.11.2008 of Rs. 2,25,000/- on 7.11.2008, and of the respondent/plaintiff receiving a sum of Rs. 1,25,000/- from M/s. Moti Lal Oswal Securities Ltd. and therefore such facts/respective contentions of the parties require deeper examination which can take place only during trial.

8. Counsel for the appellant/defendant states that the amount of Rs. 3 lacs deposited in this Court can continue to remain deposited in this Court and which amount will abide by the final judgment to be passed in the suit. In my opinion, the facts of the present case show that the case is covered by test (b) and definitely, if not by test (b), then by tests (c) or (e) of the tests which have been laid down in the judgment in the case of *M/s. Mechelec Engineers & Manufacturers (supra)*.

9. In view of the above, appeal is allowed. Impugned judgment dated 23.9.2011 decreeing the suit of the respondent/plaintiff is set aside and the appellant/defendant is granted leave to defend the suit on the deposit of Rs. 3 lacs, and which deposit has already been made in this Court.

10. Parties to appear before the District Judge, Saket, New Delhi on 16th July, 2012, and on which date the District Judge will mark the suit for disposal to a competent Court in accordance with law. The disposal of the suit is expedited. Trial Court record be sent back.

VALMIKI J. MEHTA, J

MAY 10, 2012

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