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

+ RFA 636/2004

Decided on 9th April, 2013

NANAK CHAND JAIN & ANR. Appellants

Through: Mr. H.K. Monga, Adv.

Versus

HARISH CHANDER SABHARWAL Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.(ORAL)

1. This appeal is directed against the judgment and decree dated 18th September, 2004 passed by Additional District Judge whereby money decree in the sum of ₹3.50 lacs together with pendente lite and future interest @ 9% per annum with effect from January, 2000 and costs of the suit has been passed in favour of respondent and against the appellants.

2. Respondent (plaintiff) had filed a suit for recovery of ₹5,10,000/- together with pendente lite and future interest @ ₹24%

per annum along with costs of the proceedings against the appellants (defendants). Appellant no.1 is father of appellant no.2. Respondent alleged in the plaint that appellant no. 2 was his friend. On 2nd July, 2001 both the appellants approached the respondent seeking financial help to the tune of ₹5 lacs. It was represented that appellant no.1 required money for the purchase of an immovable property. On persistent requests of appellant no. 2, respondent agreed to extend financial assistance to appellant no.1. Appellant no. 2 offered to stand as a guarantor for repayment of borrowed sum. Accordingly, respondent paid a sum of ₹3.50 lacs to the appellants through three bearer cheques bearing numbers (i) 253486 dated 2nd July, 2001 for ₹1 lac, (ii) 526007 dated 13th August, 2001 for ₹50,000/- and (iii) 526010 dated 23rd August, 2001 for ₹2,00,000/- all drawn on UTI Bank, Pitampura Branch, Delhi. Cheques were encashed by appellant no.2 and amounts were passed on to the appellant no.1. Appellants had assured to return the loan on or before 31st December, 2001, however, loan was not repaid despite repeated demands. Hence the suit for recovery of ₹3.50 lacs besides interest @ 24% per annum.

Appellants were liable to pay interest as per mercantile custom, usage and market trend.

3. Appellants filed separate written statement(s). Appellant no.1, in his written statement, denied having borrowed any money from the respondent. He also denied that appellant no.2 was friend of respondent. He denied that he approached the respondent for financial assistance or that respondent had paid ₹3.50 lacs to him by way of three bearer cheques. It was further denied that appellant no. 2 had encashed the alleged cheques and handed over the money to him. He also denied that appellant no.2 guaranteed the due repayment. In his written statement, appellant no.2 denied that he was friend of respondent. However, he admitted that respondent was known to him. He also denied that respondent had given any loan to appellant no.1. Appellant no. 2 denied that he guaranteed the due repayment of loan. It was alleged that no documentary proof was placed on record by the respondent to support his version. He stated that he got encashed the three bearer cheques on behalf of the respondent and handed over the money to respondent. He further alleged that he got the bearer cheques

encashed at the request of respondent. Mere encashment of the cheques was not sufficient to indicate that respondent had extended any loan to either of the appellants. It was further alleged that on 23rd August, 2001 appellant no.2 was travelling with respondent on his scooter when respondent dropped him in front of his bank and requested him to encash the cheques on his behalf as he had to go somewhere else and the bank was likely to close for lunch. Respondent appended his signatures on the back of cheque dated 23rd August, 2001 which indicates that same was encashed by him. Respondent filed replication(s) to the written statement(s) of appellants and denied the allegations levelled therein while reiterating the averments made in the plaint.

4. On the pleadings of the parties following issues were framed by the trial court:-

“1. To what amount the plaintiff is entitled for a recovery from the defendants?”

2. Relief, if any”

5. Respondent examined himself as PW1. Mr. Sanjiv Verma, Deputy Manager, UTI Bank was examined as PW-2. As against this appellants examined themselves as DW-1 and DW-2

respectively. Cheques were proved as Ex. PW2/1 to Ex. PW2/3. Trial Court examined the evidence lead by the parties threadbare and held that respondent had been successful in proving issue no.1, consequently, decreed the suit.

6. I have heard the learned counsel for appellants and perused the trial court record carefully and do not find any illegality or perversity in the impugned judgment, inasmuch as, same is inconsonance with the evidence adduced by the parties before trial court. Version of PW1 has remained consistent and inspires confidence, inasmuch as, is supported by documentary evidence, that is, Ex. PW2/1 to Ex. PW2/3. His testimony has remained unshattered in his cross-examination. Ex. PW2/1 is a cheque dated 2nd July, 2001 bearing no.253486 for ₹1 lac. Ex. PW2/2 is a cheque bearing no. 526007 dated 13th August, 2001 for ₹50,000/- whereas Ex. PW2/3 is cheque bearing no. 526010 dated 23rd August, 2001 for ₹2 lacs. All these cheques are bearer cheques duly signed by the respondent. These cheques also contain signatures of appellant no.2 on the reverse side which indicates that same were encashed by the appellant no.2.

7. In their cross-examination, DW1 and DW2 have also admitted that cheques were encashed by the appellant no. 2 though it was contended during the course of hearing that Ex. PW2/1 was encashed by the respondent since his signatures were also there on the reverse side of the cheque. Statements of DW1 and DW2 are shaky, inasmuch as, they have taken shifting stand. In my view, statement of PW1 has to be preferred and has rightly been accepted by the trial court as against the version of appellants who are not trustworthy and reliable witnesses. PW1 has categorically deposed that appellant no.2 was his friend and appellant no.1 is father of appellant no.2. On 2nd July, 2001 both the appellants approached him and sought financial help of ₹5 lacs. Appellant no.2 offered his guarantee for repayment of financial assistance extended to appellant no.1. All these three cheques were given to appellant no.1 but were encashed by appellant no.2 and the money was ultimately given to appellant no.1. Though, initially, DW1 (appellant no.1) showed his ignorance about this fact but in his cross-examination he has admitted that the amounts involved in the cheques were withdrawn by the appellant no.2. As regards his

meeting with respondent he had denied the fact in the pleadings but in his cross examination he gave evasive reply on this issue. He stated that he cannot say if he had accompanied the appellant no.2 on 2nd July, 2001, 3rd August, 2001 and 23rd August, 2001. This clearly shows that appellant no.1 is not a trustworthy and reliable witness. Appellant no.2 has also not denied in his cross-examination regarding encashment of cheques by him, however, he has deposed that the amounts were withdrawn at the instance of respondent and were made over to the respondent but no cogent evidence in this regard has been adduced by the appellants. When statement of respondent is evaluated vis-à-vis statements of appellants in balance scales tilt in favour of respondent in view of consistent stand taken by him together with the fact that cheques were encashed by appellant no.2 which fact is supported by Ex. PW2/1 to Ex. PW2/3.

8. In Mathura Das and Ors. versus Secy. of State and Anr. AIR 1930 ALL848, a Single Judge of Allahabad High Court held that a contract of indemnity or a contract of guarantee may be created either by parol or by a written instrument. Ch.8 Contract Act, is

not exhaustive on the subject. A contract of guarantee need not necessarily be in writing; it may be express, by words of mouth, or it may be tacit or implied and may be inferred from the course of conduct of the parties concerned. The above view has been followed in *Nandlal Chanandas versus Firm Kishinchand-Butamal* AIR 1937 Sindh 50. From the statement of PW1, which inspires confidence, it is proved that loan was extended to appellant no.1 and appellant no. 2 assured the repayment.

9. Since the loan was not returned by the appellants, in my view, trial court has rightly held that appellants are liable to pay interest to the respondent since they have benefitted themselves by retaining the amounts and respondent has been deprived of the use and benefit of the said amounts. Rate of interest, as awarded by the trial court, requires no interference. However, to my mind, trial court has erred in awarding interest from 1st January, 2000 more so when cheques pertain to the period July-August, 2001. Accordingly, decree is modified to the extent that respondent would be entitled to ₹3.50 lacs together with interest @ 9% per annum with effect from 1st September, 2001 till the realization of

decretal amount. Respondent shall also be entitled to costs of the proceedings.

10. Appeal is disposed of in the above terms.

A.K. PATHAK, J.

APRIL 09, 2013

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