

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

Date of decision: 21st November, 2013.

+ **RFA 149/2005**

M/S HANSA ELECTRICALS & ORS. Appellants

Through: Mr. Alok Mahajan and Mr. Rajesh
Arya, Advocates.

Versus

D.N.WADHWA (DECEASED) THROUGH LR'S ... Respondents

Through: Mr. M.S. Vinaik, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree (dated 30th November, 2004 of the Court of the Additional District Judge (ADJ), Delhi in Suit No.194/2003 filed by the deceased respondent/plaintiff) for recovery of Rs.8,40,000/- jointly and severally from the three appellants/defendants together with costs and interest *pendente lite* and future @ 10% per annum.

2. Notice of the appeal was issued and subject to the appellants/defendants depositing the entire decretal amount in this Court, execution was stayed. In compliance therewith, a sum of Rs.8,40,000/- only was deposited and no amount of interest *pendente lite* and till the date of deposit, also decreed was deposited by the appellants/defendants. However,

no objection in this regard was taken by the deceased respondent. The amount deposited was ordered to be kept in a Fixed Deposit Receipt (FDR). The appeal was on 2nd March, 2006 admitted for hearing and the earlier interim order made absolute.

3. The counsels for the parties have been heard.

4. The counsel for the appellants/defendants has contended that out of the decretal amount of Rs.8,40,000/-, Rs.5,25,000/- was the principal amount and the balance was the interest @ 24% per annum till the date of institution of the suit. He further contended that the principal amount of Rs.5,25,000/- also comprises of two components i.e. Rs.4,40,000/-, the decree for recovery of which is challenged and the sum of Rs.85,000/-, the decree for recovery of which part is now not challenged by the appellants/defendants. He further contended that the appellants/defendants however challenge the grant of pre-institution interest @ 24% per annum on the said sum of Rs.85,000/- as well.

5. The counsel for the appellants/defendants has further contended,

(i) that the deceased respondent was a partner in the appellant/defendant No.1 along with the appellants/defendants No.2 & 3 for nearly 31 years;

(ii) that the said partnership firm was dissolved with effect from 31st March, 1991, with the deceased respondent / plaintiff opting to retire therefrom and the appellants/defendants No.2 & 3 namely Mr. Hans Raj Kapur and Mr. Rakesh Kapur opting to continue the partnership business;

(iii) that two documents i.e. Dissolution Deed and an Agreement, both dated 31st March, 1991 were executed by the parties in this regard and whereunder the appellants/defendants agreed to pay and the deceased respondent/plaintiff agreed to receive a total sum of Rs.5,00,000/- out of which Rs.1,15,000/- was paid and receipt thereof acknowledged in the documents itself and the balance Rs.3,85,000/- was agreed to be paid vide post dated cheques dated 28th April, 1991, 28th May, 1991, 28th July, 1991, 28th August, 1991 all for Rs.75,000/- and cheque dated 28th September, 1991 for Rs.85,000/-;

(iv) that the deceased respondent / plaintiff however filed the suit for recovery of Rs.4,40,000/- aforesaid on the basis of yet another cheque dated 10th April, 1991 of the appellant/defendant No.1 firm in favour of the deceased respondent, claiming that the said amount of Rs.4,40,000/- had also been agreed to be paid by the

appellants/defendants to him in settlement of the accounts of the erstwhile partnership but had been returned dishonoured;

(v) that the appellants/defendants contested the suit, by not disputing the issuance of the said cheque of Rs.4,40,000/- but pleading the same to have been issued towards a friendly loan agreed to be advanced by the appellants/defendants to the deceased respondent / plaintiff with whom they had a 31 years relationship and that though the appellants/defendants subsequently on account of their financial hardship had asked the deceased respondent / plaintiff not to present the said cheque but the deceased respondent / plaintiff presented the cheque and upon dishonour thereof, filed the suit for recovery of the amount thereof;

(vi) that there could be no payment of Rs.4,40,000/- due to the deceased respondent / plaintiff towards dues of the erstwhile partnership business over and above the amount mentioned in the Dissolution Deed and the Agreement, both dated 31st March, 1991, in full and final settlement of all accounts of the partnership;

(vii) that the learned ADJ has also observed the said amount of Rs.4,40,000/- to be ‘presumably’ due towards the erstwhile

partnership and not given any categorical finding in this regard;

(viii) that the decree for the said sum of Rs.4,40,000/- is thus bad and unsustainable in law;

(ix) that though the liability for Rs.85,000/- is now admitted but the said amount also could not be paid owing to the excessive rate of interest @ 24% per annum awarded thereon also for the pre-institution period;

(x) that the said cheque dated 10.04.1991 for Rs.4,40,000/- was not presented by the deceased respondent / plaintiff immediately after the date thereof but after several months, in September/October, 1991.

6. It has been enquired from the counsel for the appellants/defendants whether the cheque for Rs.4,40,000/- was presented after the dates of all the post dated cheques given under the Dissolution Deed/Agreement dated 31st March, 1991.

7. The counsel for the appellants/defendants replies in the affirmative.

8. It has next been enquired from the counsel for the appellants/defendants as to why a cheque dated 10th April, 1991, if towards friendly loan, will not be presented immediately after 10th April, 1991 and be presented after nearly 5/6 months in September/October, 1991.

9. The counsel for the appellants/defendants states that since the appellants/defendants had informed the deceased respondent / plaintiff that they were, owing to their financial constraint, unable to advance the loan for which the cheque was given and not to present the cheque, the cheque was not presented and the deceased respondent / plaintiff presented the same dishonestly in September/October, 1991, after receiving payments for which post dated cheques as mentioned in the Dissolution Deed / Agreement dated 31.03.1991 had been issued to him.

10. It has further been enquired from the counsel for the appellants/defendants as to what was the change in the financial position of the appellants/defendants between 10th April, 1991 when the cheque was given and the date when the appellants claim to have reneged from advancing the friendly loan to the deceased respondent and what was the date when the appellants/defendants so reneged from giving a friendly loan.

11. The counsel for the appellants/defendants has fairly admitted that there is no pleading or evidence to the said effect.

12. It has yet further been enquired from the counsel for the appellants/defendants whether the appellants/defendants have proved the statement of their bank accounts to show as to how much money was there

in the bank account on 10th April, 1991 when the appellants/defendants agreed to give a friendly loan and issued the cheque therefor.

13. The counsel states that no such evidence has also been led.

14. Attention of the counsel has been invited to Section 118 of the Negotiable Instruments Act, 1881 which provides that, until the contrary is proved, it shall be presumed that every negotiable instrument made or drawn was for consideration and it has been enquired as to how the appellants / defendants have rebutted the presumption under the said provision that the cheque admittedly issued by them was for consideration.

15. The counsel for the appellants/defendants has contended that the appellants/defendants in their deposition have deposed that the cheque was not for any consideration but by way of friendly loan and the presumption thus would be rebutted and the onus shifted on the deceased respondent/plaintiff to show that the said cheque was for the consideration alleged by the deceased respondent / plaintiff. It is yet further contended that the deceased respondent / plaintiff having, in the Dissolution Deed/Agreement dated 31st March, 1991, agreed to the amounts specified therein only being due to him on account of the erstwhile partnership, was estopped from claiming the sum of Rs.4,40,000/- also to be due on that account. Attention

is drawn to para 3 of the plaint in the suit filed by the deceased respondent / plaintiff, where the deceased respondent / plaintiff pleaded that “in addition to the amounts mentioned in the said agreement, another sum of Rs.4,40,000/- (Rupees Four Lakhs and Forty Thousands only) was found due and payable to the plaintiff by the defendants.” It is argued that after acknowledging the amounts mentioned in the Dissolution Deed / Agreement to be in full and final settlement, there could be no scope for pleading any further liability of the appellants / defendants. Reliance before the Trial Court in this regard was placed on Section 92 of the Indian Evidence Act, 1872.

16. I am however of the view that the presumption under Section 118 supra, in the facts of the present case, cannot be said to have been rebutted merely by the appellants/defendants deposing that the cheque admittedly issued/drawn by them was not for any consideration but was with an intent to give a friendly loan to the deceased respondent. Giving and taking of a loan always implies an urgency. As on 10.04.1991 monies were admittedly due from the appellants / defendants to the respondent / plaintiff. Had the respondent / plaintiff any urgent need for money and had the appellants / defendants agreed to on friendly basis to so come to the rescue of the

respondent / plaintiff, the appellants / defendants would have immediately paid the admitted dues of the respondent / plaintiff for which post dated cheques had been issued and there was no need for a loan transaction. The version of the appellants / defendants is thus contrary to the normal human behaviour. It was thus incumbent upon the appellants/defendants to give particulars, of the circumstances in which, instead of paying monies admittedly due to the respondent / plaintiff to enable the respondent / plaintiff to meet his urgent monetary requirement, loan was agreed to be given, of the financial constraint which occurred after 10th April, 1991 for the appellants / defendants to, after agreeing to give, refuse such loan to the deceased respondent / plaintiff and as to why the cheque issued towards loan was not taken back. Without the appellants/defendants pleading or proving so, their version of the cheque having been issued/drawn in advancement of a loan, cannot be believed. Moreover, if the relations between the parties were so cordial, so as to the appellants/defendants immediately on the next date after the issuance of the cheque for loan communicating to the deceased respondent that they were no longer in a position to give the loan, the appellants/defendants would have also collected back the cheque from the deceased respondent / plaintiff. The

factum of the cheque, though dated 10th April, 1991, having been presented for payment for the first time in September/October, 1991 i.e. when the period of its validity was nearly over, is indicative of the said cheque being towards some payment and having been issued to secure that payment. It also cannot be lost sight of that even for the admitted amounts due from the appellants/defendants, the deceased respondent / plaintiff did not trust the mere word of the appellants/defendants that the payments would be made in instalments on the dates of which the cheques were given but insisted upon issuance of post dated cheques for the said amount. The same also belies the version of 'friendly' loan. It also cannot be lost sight that the cheque dated 28th September, 1991 for Rs.85,000/-, admittedly issued, was also dishonoured.

17. The counsel for the deceased respondent / plaintiff has contended that all the cheques i.e. cheque for Rs.4,40,000/- and the cheques supra under the Dissolution Deed/Agreement were on the same bank account; that the appellants/defendants mischievously in or about the month of August, 1991 closed the said account and owing where to the cheques under the Agreement also of after that date were dishonoured. He has further contended that the learned ADJ in the impugned judgment has given cogent

reasons for the claim of the deceased respondent being not barred by Section 92 of the Evidence act. It is yet further contended that from the failure of the appellants/defendants to reply to the legal notice preceding the suit also adverse inference has rightly been drawn by the learned ADJ.

18. The counsel for the appellants/defendants in rejoinder has contended that the notice preceding the suit was not even proved, though was referred to by the deceased respondent in his evidence.

19. A perusal of the Trial Court record does not show any office copy of the notice or of the postal receipt, dispatch thereof or of the AD card of delivery thereof having been filed, though photocopies are found on record. The said photocopies also are not found to bear any mark or exhibit. Though in the examination-in-chief of the deceased respondent, the notice issued is referred to as Ex.PW1/A but no attempt to prove dispatch or service thereof even, was made. Thus, the service of the notice cannot be said to have been proved.

20. I am however otherwise of the view that the learned ADJ on preponderance of probabilities has taken a reasonable view of the matter and no ground is found to interfere therewith.

21. I am also not inclined to interfere with the rate of interest awarded by

the learned ADJ for the period prior to the institution of the suit for the following reasons:

- (i) the parties were trade persons and when deposits in Nationalised Banks have on an average earned rate of interest of 10% per annum, it is safe to assume that monies invested in business would yield more than double the said rate, else, it would not be worthwhile for any trade person to take risks in business;
- (ii) the conduct of the appellants/defendants has been found to be dishonest; they contested the claim for Rs.85,000/- also which now is admitted to be due. Even after the decree, the said sum of Rs.85,000/- which is admitted to be due was not tendered;
- (iii) even today, the offer given for agreeing to the principal amount of Rs.4,40,000/- for which cheque was given, was refused; what is offered is only double of Rs.85,000/-;
- (iv) the deceased respondent / plaintiff gave sufficient leeway to the appellants/defendants before filing the suit but the appellants/defendants not only during the said time failed to discharge their liability which is admitted also but attempted to use the litigation as a tool to coerce the deceased respondent / plaintiff into settling for

an amount lesser than which was admittedly due and has been found to be due;

(v) unless the Courts in such situations award such compensatory rate of interest, litigation will continue to be used to defer payment/loan admitted to be due, with a view to during the pendency of litigation earn higher returns therefrom.

22. There is no merit in the appeal, which is dismissed with costs.

23. The amount deposited in this Court together with interest accrued thereon be released forthwith equally in favour of the three legal heirs of the deceased respondent.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 21, 2013

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