

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

+ RSA No. 391-93/2006

% 23rd April, 2014

JAWALA INDUSTRIES Appellant
Through: Mr. B.D.Batra, Adv.

VERSUS

MURARI LAL MANGAL Respondent
Through: Mr. Masood Hussain, Adv.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This second appeal is filed under Section 100 CPC impugning the judgment of the first appellate court dated 2.9.2006. The first appellate court by its impugned judgment allowed the appeal filed by the respondent-plaintiff and decreed the suit for recovery of Rs.1 lac alongwith pendente lite and future interest at 9% p.a.

2. Respondent/plaintiff filed the subject suit stating that he had given a loan to appellant no.1/defendant no.1/partnership firm of which appellant nos.2 and 3/defendant nos. 2 and 3 are the partners. It was pleaded that the appellant nos.2 and 3 were intimately known to the respondent-

plaintiff and they approached the plaintiff for a temporary loan of Rs.1 lac in February 1997. The loan was given by cheque no.889782 dated 3.2.1997 drawn on State Bank of Patiala, Model Basti, New Delhi Branch and was issued from the saving bank account no. 3320/13. The cheque was got encashed by the defendant no.1 through its banker Indian Bank on 5.9.1997. Since the loan was not repaid alongwith promised interest at 30% per annum, the subject suit came to be filed.

3. Appellants in the written statement contended that the defendants never had seen the respondent-plaintiff and that there was no occasion to give the loan to the defendant no.1 by the respondent-plaintiff. In the written statement, it was pleaded that the cheque in question was given to the defendant no.1 by one Sh. Dharam Chand Handa who invested the said amount of Rs.1,00,000/-in the scrap business of the appellants-defendants. It was further pleaded in the written statement that Sh. Dharam Chand Handa filled the name of defendant no.1 in the cheque and before which there was only a figure of Rs. 1,00,000/- from the cheque besides containing the signatures of respondent-plaintiff. Appellants-defendants pleaded that Dharam Chand Handa stated that respondent-plaintiff was in need of money and therefore, he approached Dharam Chand Handa who advanced him loan and the subject cheque of Rs.1,00,000/- dated 3.2.1997

was got issued by respondent-plaintiff in favour of Dharam Chand Handa for repaying of the loan taken by the respondent-plaintiff from Dharam Chand Handa. The suit was therefore prayed to be dismissed.

4. As stated above, the trial court dismissed the suit but the first appellate court allowed the appeal and decreed the suit. The relevant observations of the first appellate court are contained in paras 9 to 13 of the impugned judgment and which read as under:-

“9. The defendant being holder of the cheque which was issued by plaintiff in their name is holder of the same for consideration as also deposed by the plaintiff Under Section 139 of the Negotiable Instruments Act which raised presumption that the cheque was drawn for consideration. As discussed, the cheque was drawn for consideration. As discussed, the defendant failed to rebut that presumption as neither they proved on record that they are holder in due course of the cheque in question as opined in the case of Braja Kishore Dikshit v. Puma Chandra Panda reported in AIR 1957 Orissa 153 which laid down as under:-

“Three conditions are necessary to be holder in due course. Firstly he must be a holder for consideration, secondly the instrument must have been transferred to him before it becomes overdue, and thirdly he must be a transferee in good faith, and that he should not have any reason to believe that there was any defect in the title of the transferor,

Nor the defendants could rebut presumption of consideration as none of the defendants that is partners of the defendant no. 1 came forward to depose and relied upon attorney holder who was not competent to answer the complex issues as were raised by the

defendant themselves by production of Shri Dharam Chand Handa in their defence.

10. The submissions by Learned counsel for respondent that statement of Shri Dharam Chand Handa clinched the issue. Does not appeal to the reason in the given facts and the discussion as made above. It is admitted case of the defendant/respondent that Shri Dharam Chand Handa was not having cordial relations with the plaintiff as there was litigation between them in the court of law in respect of immovable property. On the face of the admission, Ld. Civil Judge should not have got swayed away on the proxy war waged against plaintiff by way of deposition of Shri Dharam Chand Handa while the defendants failed to depose in the court and preferred to defend the suit through attorney holder whose testimony is of no value in view of the Apex Judgment in the case of Janki Vashdeo Bhojwani & Anr v. Indusind Bank Limited & Ors reported in (2005) 2 SCC 217 on the point.

11. The findings by the Ld. Civil Judge the plaintiff failed to prove that there was a privity of contract and rather defendants proved that there was no privity of contract is a perverse finding on the face of cheque in question being in the name of the defendant who was holder of the cheque against loan as was stated by the plaintiff which was in fact also encashed through the banker admittedly by the defendant. It being so, the financial position of the defendant as relied upon by the Ld. Civil Judge vide Ex. DW 3/2 is of no relevance for encashment of the cheque by the defendant and claim of the plaintiff to recover the same amount from the defendant which was given on loan vide cheque. The liability of the defendant of payment of the cheque amount encashed by them is towards the plaintiff being holder of the cheque against loan of Rs. 1,00,000/- taken by the defendant from the plaintiff.

12. The defence as sought to be proved on record by the defendant which was also relied upon by the Ld. Civil Judge is neither a defence to the amount in suit which was sought to be recovered from the defendant nor the same is proved on record the defendants are not liable to pay the amount to the plaintiff in view of presumptions under Section 118 of the Negotiable Instruments Act and as defined in the case reported in 2003(2) RCR (Criminal) 488 as was also referred by the Ld. Civil Judge in the impugned judgment.

13. In fact, this court is of the view that witness of the defendant namely Shri Dharam Chand Honda committed breach of trust by manipulation in the cheque which was allegedly drawn in his favour by the plaintiff as per defence of the defendant of which benefit cannot be passed on to the defendant who are holder of the cheque in question against consideration even if such defence is accepted as the cheque was encashed from the account of the plaintiff and the amount was paid to the defendant from the account of the plaintiff of which recovery was sought from the defendant by the plaintiff. Accordingly, I hold that impugned judgment and the decree suffers from non-appreciation of the evidence in right perspective by the Ld. Civil Judge which is held to be perverse because of lack of primary evidence withheld by the defendant /respondent and reliance on the hear say evidence of the witness examined by the defendant as attorney of the defendant as well as of Sh. Dharam Chand Handa who was admittedly enmical towards the plaintiff. The judgment and decree passed by Ld. Civil Judge is as such, set aside and the suit of the plaintiff is decreed for a sum of Rs.1,00,000/- with costs through out and pendentelite and future interest @9% p.a w.e.f 3-2-97 as per market rate of interest applicable on such loans. Decree sheet be drawn accordingly. Appeal file be consigned to Record Room and lower court file be returned to the court concerned with copy of the judgment and decree.”

5. I generally agree with the aforesaid conclusions of the first appellate court because firstly it is not disputed that the cheque was of the respondent-plaintiff, secondly it is not in dispute that the cheque was encashed from the account of the respondent-plaintiff and in favour of defendant no.1/appellant no.1, thirdly merely because the cheque is filled in the hand of Dharam Chand Handa cannot take away the fact that the cheque was encashed by the appellant no.1/defendant no.1. To the aforesaid aspects, I must add that the appellants-defendants have failed to prove satisfactory reason as to why necessary precautions were not taken by the appellants/defendants if the cheque was given for investment purposes to them by Dharam Chand Handa though the same was not of the account of Dharam Chand Handa but of the account of the respondent-plaintiff. Therefore, it is clear that the respondent-plaintiff had given a loan of Rs.1,00,000/- to the appellants-defendants, which they failed to repay, and therefore the suit has been rightly decreed by the first appellate court.

6. Learned counsel for the appellant argued that once Dharam Chand Handa came into the witness box as DW-2 on behalf of the appellants/defendants, the appellants-defendants have discharged their onus because the handwriting in the cheque was of Dharam Chand Handa and consequently, the cheque amount cannot be said to be towards grant of loan

by the respondent-plaintiff to the appellants. Firstly, the argument urged on behalf of the appellant is sufficiently answered by the first appellate court and to which reasoning, I have already agreed to besides giving additional reasoning as stated above, and which discussion is to be taken with the fact that the first appellate court in law is entitled to reappraise the evidence and arrive at one possible/plausible conclusion, and merely because this Court may want to take another view, the same will not create a substantial question of law under Section 100 CPC. Once the first appellate court took one possible/plausible view, and which the first appellate court was entitled to take, it cannot be said that an issue of appreciation of evidence becomes a substantial question of law under Section 100 CPC.

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

APRIL 23, 2014
ib

VALMIKI J. MEHTA, J.