

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

+ **RFA No. 946/2018**

% **26th November, 2018**

MUKESH KUMAR SHARMA Appellant

Through: Mr. G.S. Sharma and Mr. V.K. Sharma, Advocates (Mobile No. 9911140170).

versus

GIRISH CHANDER Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 48445/2018 (for exemption)

1. Exemption allowed, subject to just exceptions.

C.M. stands disposed of.

RFA 946/2018 and C.M. Appl. No. 48444/2018 (for stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the trial court dated 15.10.2018 by which the trial court has decreed the suit for recovery of money filed by the

respondent/plaintiff and has passed a decree for a sum of Rs. 7,00,000/- with interest at 9% per annum. The suit has been decreed on account of loan having been given by the respondent/plaintiff to the appellant/defendant, and which loan was secured by cheques of the appellant/defendant which were dishonoured on presentation with the first noting that '*contact the drawer*' and the second noting that the appellant/defendant had closed his bank account.

3. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that he gave to the appellant/defendant a total loan amount of Rs. 7,00,000/- on three occasions. First time the loan was given of Rs. 3,00,000/-, and which was secured by the appellant/defendant by his two cheques of Rs. 1,00,000/- and Rs.2,00,000/- dated 28.05.2010 bearing nos. 255027 and 255026. The cheques were drawn on State Bank of India (SBI), Shakurpur, Delhi. Second time the loan was given on 20.07.2010 of Rs. 2,00,000/- and which was again secured by a cheque dated 20.07.2010 bearing no. 254981 of the same bank SBI. Third time loan of Rs. 2,00,000/- was given on 29.07.2010 which was secured by a cheque bearing no. 254982 of the same bank SBI. When these cheques were

first presented by the respondent/plaintiff the same were dishonoured with the remarks '*contact the drawer/drawee bank and please present again*' with the Cheque Returning Memo dated 30.11.2010. Subsequently, when the cheques bearing nos. 254982 and 254981 were re-presented they were returned back with the remarks '*no such account*'. After serving a Legal Notice dated 12.01.2011 upon the appellant/defendant, the subject suit for recovery of Rs. 7,00,000/- was filed.

4. Appellant/defendant contested the suit by filing written statement and pleaded that the suit is false and frivolous. It was pleaded that parties were well known to each other and the appellant/defendant never took any loan from the respondent/plaintiff. It was pleaded that the respondent/plaintiff was in fact operating a committee (private chit fund) and the cheques which were given were given towards the payment of committee amount by the appellant/defendant. It was pleaded that since the subject four cheques of the appellant/defendant were stated to become outdated/expired, hence the appellant/defendant got four other cheques issued from his brother Sh. Dinesh Kumar Sharma which were given

to respondent/plaintiff but the respondent/plaintiff however did not return the expired cheques. It was pleaded that the respondent/plaintiff has misused the four cheques which were substituted by the four other cheques, and therefore the suit was prayed to be dismissed because the respondent/plaintiff is pleaded not to have returned the subject cheques despite repeated requests of the appellant/defendant.

5. The following issues were framed in the suit, and parties led evidence, and which aspects are recorded in paras 5 to 10 of the impugned judgment and which paras read as under:-

5. From the pleadings and consent of the parties, following issues were framed on 06.03.2017:-

- (i) Whether the plaintiff is entitled to a decree of Rs. 7,00,000/-? OPP.
- (ii) Whether the plaintiff is entitled to interest, if any, and if so, at what rate? OPP.
- (iii) Whether the plaintiff has got no cause of action for filing the present suit? OPD.
- (iv) Whether the suit of the plaintiff has not been valued properly for the purposes of court fees and jurisdiction? OPD.
- (v) Relief.

6. In order to prove his case, the plaintiff examined three witnesses, in total, the details of whom are here as under:-

- PW1 - Sh. Girish Chander i.e. the plaintiff himself;
- PW2 - Sh. Rajender Prasad, Clerk in State Bank of India, Shakurpur Branch, Delhi.
- PW3 - Ramesh Prakash, Sr. Manager in Canara Bank, Sector-5, Rohini Branch, Delhi.

7. The plaintiff appeared in the witness box as PW1 and tendered his affidavit in evidence as Ex. PW1/A which is on the identical lines as per the plaint. PW1 also relied upon various documents i.e. Exs. PW1/1 to PW1/12 and Marks A & B. Documents Exs. PW1/1 to PW1/4 are the cheques bearing nos. 254981, 254982, 255027 and 255026 respectively issued by the defendant in favour of the deponent; Ex. PW1/5 (colly) are the cheque deposit receipts dated 26.11.2010 and 14.12.2010; Exs. PW1/6 to PW1/11 are the computer generated bank returning memos and Ex. PW1/12 (colly) are the postal receipts regarding issuance of legal notice to the defendant. Mark A is the copy of legal notice dated 12.01.2011 and Mark B (colly) are the copies of GPA, Receipt, Affidavit and Deed of Will. *Documents exhibited as Exs. PW1/6 to PW1/11 were objected to by the learned Counsel for the defendant.*

PW1 was duly cross examined.

8. PW2 Sh. Rajender Prasad, Clerk in State Bank of India, brought the summoned record i.e. copy of cheques bearing nos. 254981 dated 20.07.2010, 254982 dated 29.07.2010, 255026 dated 28.05.2010 and 255027 dated 28.05.2010 amounting to Rs. 2,00,000/-, 2,00,000/-, 2,00,000/- and 1,00,000/- respectively, which are already exhibited as Exs. PW1/1 to PW1/4. He deposed that all these cheques are drawn on from account bearing no. CA30396375725 of Sh. Mukesh Kumar Sharma. PW2 also brought the computer generated copies of cheque return memos in respect of the above mentioned cheques showing the reason of dishonour at points A & B. The same are exhibited as Exs. PW2/1 and PW2/2.

9. PW3 Sh. Ramesh Prakash, Sr. Manager in Canara Bank, also brought the summoned record i.e. the certified copy of statement of account for the period of 01.01.2010 to 30.11.2010 in respect of the account bearing no. 2590101002390 of Girish Chander. Same are exhibited as Ex. PW3/1 (containing 4 pages) showing the relevant entries at points A to E.

10. On the other hand, the defendant examined himself as DW1 and tendered his affidavit as Ex. DW1/A in evidence. DW1 also relied upon the documents i.e. Ex. PW1/D1 to PW1/D4 which were got exhibited during the cross examination of PW1.

DW1 was duly cross examined.”

6. Trial court, in my opinion, has rightly decreed the suit by arriving at the conclusions that the dishonoured cheques were proved as Ex.PW1/1 to PW1/4, and the deposit receipts and the bank returning memos were proved as Ex.PW1/5 (colly), Ex.PW1/6 to Ex.PW1/11 and Ex.PW1/12 (colly). Trial court has held that the cheques were admittedly of the appellant/defendant, and had the signatures of the appellant/defendant. Trial court has further observed that it is not possible to believe that if the subject cheques were expired, and were substituted by four cheques given by the brother of the appellant/defendant Sh. Dinesh Kumar Sharma, then there was no reason why on the respondent/plaintiff not returning the cheques, the appellant/defendant did not issue a legal notice or filed a complaint against the respondent/plaintiff for not returning the subject cheques which were substituted by the four other cheques. Additionally, this Court would like to observe that leave aside issue of sending of a legal notice by the appellant/defendant to respondent/plaintiff or even filing a criminal complaint against the respondent/plaintiff, not even a simple letter has been sent by the appellant/defendant to the respondent/plaintiff for return of the four subject cheques. Trial court

has further observed that appellant/defendant only conveniently claimed that the cheques were given by the appellant/defendant towards a committee, but neither any names of the alleged committee members were stated by the appellant/defendant nor a single member of the alleged committee was produced on behalf of the appellant/defendant to depose that the respondent/plaintiff was running any committee. Trial court has further observed that appellant/defendant has in fact not even brought into the witness box his own brother who is said to have given substituted cheques in place of the four subject cheques. Trial court has also relied upon legal notice which was filed and proved by the respondent/plaintiff as Ex.PW1/12 (colly.) with the copy of the notice being marked as Mark PW1-A, and which was not replied to by the appellant/defendant.

7. I do not find any illegality or perversity in the aforesaid findings and conclusions of the trial court which are based upon evidence on record. Once the cheques are admittedly of the bank of the appellant/defendant, they do bear the signatures of the appellant/defendant, the same were dishonoured on presentation on two occasions, with on one occasion the instruction being that to refer

to the appellant/defendant/drawer. The appellant/defendant was served a legal notice for payment but he did not reply to the same nor did he make the payment, the appellant/defendant also led no evidence of any other alleged committee member or of his own real brother for that matter, consequently the trial court has rightly decreed the suit for recovery of moneys.

8. Learned counsel for the appellant/defendant firstly argued that the respondent/plaintiff has failed to prove that he had the means to advance the loan of Rs. 7,00,000/- to appellant/defendant. In my opinion however this argument has to be rejected because Section 118 of the Negotiable Instruments Act, 1881 provides that a cheque when issued is presumed to have been given for consideration. Therefore, it does not lie in the mouth of the appellant/defendant to argue that no loan was given by the respondent/plaintiff to the appellant/defendant, because onus of proof was on the appellant/defendant that he did not receive any loan, and in this regard once the aforesaid facts and conclusions have been arrived at by the trial court, it has been rightly so held by the trial court, that the appellant/defendant had received

loan from the respondent/plaintiff which was secured by the subject four cheques.

9. Learned counsel for the appellant/defendant then argued that the subject cheques were substituted by four cheques of the brother of the appellant/defendant, but in this regard, and as already discussed above, trial court has rightly held that if really the subject four cheques were secured by four substituted cheques of the brother of the appellant/defendant then there was no reason why either a legal notice or a criminal complaint or for that matter even a simple letter was not issued by the appellant/defendant to the respondent/plaintiff to return the subject four cheques which were outdated and were allegedly substituted by four cheques of the brother of the appellant/defendant, Sh. Dinesh Kumar Sharma. Also, Sh. Dinesh Kumar Sharma, the real brother of the appellant/defendant, has not even come to the witness box to depose in favour of the appellant/defendant with respect to the case which has been put up by the appellant/defendant.

10. Learned counsel for the appellant/defendant finally argued that the trial court has erred in placing reliance upon the legal

notice because the legal notice proved is only a copy of the legal notice and not the original legal notice. This argument of the appellant/defendant is also misconceived because a person who sends a legal notice does not have the original legal notice with him and would only have a copy thereof, and the copy of the legal notice has been exhibited in this case. Reference in this regard is invited to Section 65 of the Evidence Act, 1872 which provides that secondary evidence of a document is admissible when the original is in power and possession of the person against whom the document is sought to be proved. In any case even if Section 65 of the Evidence Act is not referred to, since however and admittedly the postal receipts have been proved and exhibited by the respondent/plaintiff, onus shifted upon the appellant/defendant to show that if the appellant/defendant did not receive the subject Legal Notice dated 12.01.2011, then what was the document which was received under the postal receipts which

were proved and exhibited by the respondent/plaintiff as Ex.PW1/12 (colly), and this the appellant/defendant failed to do.

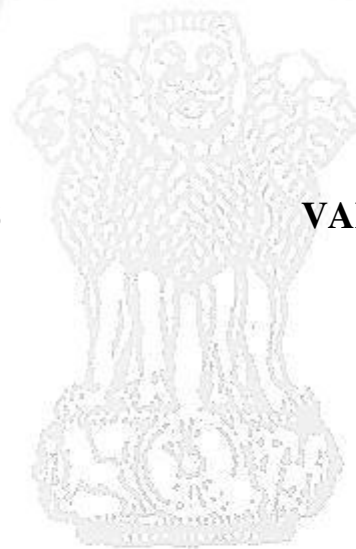
11. No other ground or issue is urged before this Court except as discussed above.

12. There is no merit in the appeal and the same is hereby dismissed.

NOVEMBER 26, 2018

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VALMIKI J. MEHTA, J



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