

\$~15.

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

+

Date of Decision: 27.11.2015

% **RSA 407/2015**

KHEM SINGH

..... Appellant

Through: Mr. Rajiv Mehra, Advocate.

versus

RAKESH ARORA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

C.M. No.28402/2015

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

RSA 407/2015 & C.M. No.28401/2015

3. The present second appeal is directed against the judgment & decree dated 11.09.2015 passed by the First Appellate Court, namely the learned Additional District Judge-12, Central District, Tis Hazari Courts, Delhi in RCA No.28/2014, whereby the said first appeal preferred by the appellant/defendant has been dismissed and the judgment & decree dated 28.05.2014 in Suit No.98/2012 passed by the Trial Court, namely the Civil Judge-10

(Central), Tis Hazari Courts, Delhi, decreeing the suit filed by the respondent/ plaintiff for recovery has been upheld.

4. The respondent/ plaintiff had filed the suit for recovery of Rs.2,64,000/- on the premise that he had advanced a friendly loan to the defendant/ appellant on 19.04.2011 by way of a cheque of Rs.2 Lakhs bearing No.94680 dated 19.04.2011 drawn on ICICI Bank Ltd., Sadar Bazar, Delhi. The said cheque had been duly encashed on 21.04.2011. The defendant had agreed to pay interest to the plaintiff after one year.

5. The plaintiff stated that he got a legal notice dated 04.08.2012, issued on 06.08.2012, which was received by the defendant. Despite the said notice, since the amount was not paid and the notice was not replied to, the plaintiff filed suit for recovery of Rs.2,64,000/- which included the principal amount of Rs. 2 Lakhs along with interest of Rs.64,000/- from 21.04.2011 to 20.08.2012.

6. The defendant, upon being summoned, filed his written statement to contest the suit. The defence taken by the defendant, *inter alia*, was that the cheque in question was given by the plaintiff just to have an entry in the account of the defendant. He stated that the said amount was withdrawn from the account of the defendant and was returned to the plaintiff on 23.04.2011 in the evening. This was stated to be the reason why the plaintiff kept mum for a long period of 17 months. Thus, the defendant admitted to encashment of the cheque. His defence was that he had returned the said amount in cash on 23.04.2011 itself.

7. The Trial Court framed the issues on 19.12.2012. The primary issue

being: whether the plaintiff was entitled to the claimed amount. The parties led their respective evidence. The plaintiff examined himself as PW-1 and a bank official of his bank, wherefrom the cheque was issued, as PW-2. The Trial Court decreed the suit by returning a finding that the plaintiff had advanced the amount of Rs.2 Lakhs to the defendant, and on the other hand, the defendant had failed to establish the refund of the said amount in cash, as claimed by the defendant. The First Appellate Court has concurred with the said finding and consequently, dismissed the appeal.

8. The submission of learned counsel for the appellant is that during the cross-examination of the plaintiff as PW-1, he had admitted that he is an income-tax assessee and that he had filed his income-tax returns for the last year (this cross-examination took place on 06.03.2013). He stated that he could bring photocopy of the previous income-tax returns, including the computation of his income, etc. He stated that he could produce the PAN card and photocopies of the income-tax returns on the next date. The submission of learned counsel for the appellant is that on the following day of cross-examination, i.e. on 04.05.2013, when the cross-examination of the PW-1 resumed, he was not carrying either his PAN Card or his income-tax returns on the ground that his Chartered Accountant was not available. Further, PW-1 stated that he did not want to produce his PAN Card and income-tax returns in Court.

9. I may note that upon this reply, the next question posed by the defendant's counsel was that: *"I put it to you that the reason that you are not producing your PAN Card and Income Tax Returns in Court is because you have not actually given the loan to the defendant?"*. The plaintiff/ PW-

1 responded that the payment was done by way of a bank transaction and that he could produce the bank transaction.

10. Learned counsel for the appellant submits that since the plaintiff deliberately withheld the documents/ evidence in his possession, namely his PAN Card and his income-tax returns, a presumption was liable to be drawn against the plaintiff by invoking Section 114 illustration (g) of the Evidence Act to the effect that had the plaintiff produced the said documents, the same would have been unfavourable to him. Learned counsel submits that the plaintiff having withheld the said evidence, could not have been awarded the decree in the suit.

11. Learned counsel for the appellant has placed reliance on the judgment of the Supreme Court in *Hamza Haji Vs. State of Kerala & Another*, (2006) 7 SCC 416, to submit that the conduct of the plaintiff tantamounted to a fraud being played by the plaintiff upon the Court, since the plaintiff deliberately suppressed his income-tax returns, which were the foundation of his claim. The plaintiff had claimed the relief on the basis of non-existent fact. Consequently, the said fraud vitiates the decree passed in favour of the plaintiff.

12. Reliance is also placed on *Satish Khosla Vs. Eli Lilly Ranbaxy Ltd.*, 1998 RLR 180, wherein a Division Bench of this Court held that if a person does not truthfully disclose the relevant facts, it amounts to fraudulent concealment and that such a party is guilty of contempt. The Court held that a litigant must produce all relevant documents and withholding of the same tantamounts to fraud on the Court and on the opposite party.

13. Having heard learned counsel and perused the judgment of the Trial Court as well as the First Appellate Court and the examination of PW-1 referred to by the learned counsel, I am of the view that there is absolutely no merit in the present appeal and it does not raise any substantial question of law. The findings returned by the two Courts below are concurrent and premised on appreciation of evidence led by the parties. The appellant has failed to point out any perversity calling for interference with the same in the second appeal.

14. As noticed herein above, the appellant/defendant admitted to having received and encashed the cheque in question for Rs.2 lacs. Thus, the receipt of the amount of Rs.2 lacs by the defendant/appellant was not even in dispute. Even otherwise, PW-2 produced the relevant bank record, which established that the cheque issued by the plaintiff for Rs.2 lacs was encashed in the account of the appellant/defendant. It was not the defence of the appellant/defendant that the receipt of Rs.2 lacs by the plaintiff in cash – which allegedly was returned by the defendant to the plaintiff on 23.04.2011, was reflected in the income tax return of the plaintiff. The appellant/defendant sought the production of the income tax return of the respondent/ plaintiff for the purpose of establishing that the advancement of the loan by the plaintiff to the appellant/defendant was not reflected in the income tax return of the plaintiff. Even if it were to be accepted – as the appellant/ defendant would like this Court to believe, that the respondent/ plaintiff did not reflect the advancement of the loan of Rs.2 lacs to the defendant in his statement of account/income tax return, the same would of no consequence as, firstly, the advancement of the said amount of Rs.2 lacs

by the plaintiff to the defendant is admitted by the defendant and, secondly, the same has been established on record by PW-2. The said transaction is beyond the pale of doubt inasmuch, as, it is a cheque transaction. Pertinently, the suggestion given by the appellant/ defendant to the plaintiff/ PW-1 was that he is not producing his PAN Card and income-tax returns in Court because he has not advanced the loan. The suggestion was not that the loan transaction had been squared off.

15. Thus, the presumption sought to be drawn by the defendant under section 114 of the Evidence Act cannot be drawn. A presumption could be drawn in respect of a fact which is not proved. Where the transaction itself is admitted by the defendant, and is also proved by the evidence led by the plaintiff, a presumption to the contrary can, obviously, could not be drawn.

16. I may also refer to the cross examination of PW-1/plaintiff undertaken by the appellant/defendant which shows that the emphasis of the appellant/defendant was that the plaintiff did not reflect the advancement of the loan to the defendant and to others in his income tax return. The following extract from the cross examination of PW-1/plaintiff may be referred to in this regard:

“It is correct that I have given similar kind of loan to other persons namely Sh. Devi Singh. I gave a loan of Rs.5-6 lakhs to Sh. Devi Singh. It is correct that Sh. Devi Singh is the father of the defendant.

Q? Whether you have shown the loan given to the said Devi Singh in your income tax returns? (objected to by counsel for plaintiff on the ground of being beyond pleadings, objection disallowed since in para 2 of the preliminary objections in the written statement the defendant has pleaded about alleged from

the defendant as well as his father Devi Singh).

A. *I do not know if I have shown the loan given to Sh. Devi Singh in my income tax returns.*

I do not wish to confirm from my chartered accountant regarding whether I have shown the loan given to Sh. Devi Singh in my income tax returns. It is wrong to suggest that I have not shown the loan amount given to Devi Singh in my income tax returns or that this is the reason that I am concealing the factual position of my income returns as well as my PAN Card number”.

17. During the cross examination of PW-1, it was not even suggested to the said witness that he was withholding his income tax return as the same would, if disclosed, show that the amount of Rs.2 lacs advanced to the defendant was returned the very next day, (i.e. on 23.04.2011) in cash. Thus, the submission of learned counsel for the appellant premised on the refusal of the plaintiff to produce his PAN card and income tax return is of no avail.

18. Reliance placed by the appellant on ***Hamza Haji*** (supra) is misplaced. Since the finding returned by the two courts below, with which this Court concurs, is that the plaintiff had indeed advanced the loan of Rs.2 lacs to the defendant (which was also admitted by the defendant) and that the same remained unpaid, it shows that there is no fraud committed by the plaintiff either upon the Court or upon the appellant/defendant. The question of fraud being played would arise where the Court finds that the relevant and material facts as they exist are materially different from what were projected before the Court, such that the Court was misled into assuming a state of affairs – which did not exist, and base its decision thereon.

19. The same cannot be said about the present case. Merely because the defendant claims that he had returned the loan of Rs.2 lacs on 23.04.2011 in cash, the claim of the plaintiff cannot be termed as a fraud, particularly when the defendant himself has failed to establish his defence that he had refunded the said amount on 23.04.2011.

20. For the same reason, the decision in *Satish Khosla* (supra) has no application to the facts of the present case.

21. For all the aforesaid reasons, I find no merit in the present second appeal and the same is, accordingly, dismissed.

VIPIN SANGHI, J

NOVEMBER 27, 2015

B.S. Rohella/sr