

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

8 SECOND APPEAL NO. 230 OF 2016

CHANDRAKANT JAGANNATH DHAKAD

VERSUS

SUBHASH MULCHAND SANCHETI

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Mr. Zareef Khan Pathan, Advocate for Appellant.

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CORAM : T.V.NALAWADE, J.

DATE : 20th JUNE, 2016

ORDER :-

. The Appeal is filed against the Judgment and Decree of Spl. Civil Suit No. 74/2011 which was pending in the Court of the Civil Judge [Sr.Division], Amalner, district Jalgaon and also against the Judgment and Decree of R.C.A. No. 38/2013 which was pending in the Court of the Ad-hoc District Judge -1, Amalner. Heard learned counsel for the appellant/plaintiff.

2. The Suit was filed for recovery of amount of

₹ 5.95 Lakh with interest @ 12 % per annum. It is the case of the plaintiff that son of the defendant by name Prashant was doing business of share broker along with the defendant and they used to purchase sugar on wholesale basis. It is contended that as Prashant was in need of ₹ 15 Lakh for his business, he requested the plaintiff to give loan and accordingly the amount of ₹ 13.6 Lakh was given to Prashant. It is contended that the amount was used by Prashant for the benefit of joint family and it was invested in the business of joint Hindu family of the defendant.

3. It is the case of the plaintiff that Prashant had promised to return the amount within the period of 2 months and for the repayment, he had handed over 4 cheques totaling the amount of ₹ 13.6 Lakh. It is contended that on 18/06/2009, the plaintiff presented cheques for encashment, but the cheques bounced. It is contended that on enquiry, the plaintiff learnt that Prashant died on 17/02/2009.

4. It is the case of the plaintiff that he approached defendant and informed him about the transaction with Prashant and he showed him the cheques. He contended that the defendant paid amount of ₹ 7.65 Lakh to the plaintiff, but

he forcibly obtained the signature of the plaintiff and his brother on stamp paper without showing the contents of the documents to them.

5. It is the case of the plaintiff that on 13/10/2011, he issued notice to the defendant to call upon him to pay the remaining amount, the suit amount, but false reply was given by the defendant to this notice and so cause of action took place for the Suit.

6. By filing Written Statement, the defendant contested the claim. Firstly, he contended that he had no concern with the transaction of Prashant and so there was no liability of the defendant to make payment of any amount if Prashant had taken that amount from the plaintiff. He then alternatively contended that when the plaintiff had approached him, he had paid in cash the amount of ₹ 2.65 Lakh and then on 05/09/2011 he had issued cheque bearing No. 9600 for the amount of ₹ 5 Lakh and at that time the plaintiff had given up his right in respect of the remaining amount and so the document was executed in favour of the defendant. It is contended by the defendant that as the plaintiff accepted the aforesaid amount towards full

satisfaction, the plaintiff has no right to get the decree.

7. Issues were framed on the basis of the aforesaid pleadings. Both sides gave evidence. The relevant documents viz. cheques given by Prashant to the plaintiff, document executed by the plaintiff in favour of the defendant, the record in respect of cheque return memo, etc. was produced. Some record of Spl. Civil Suit No. 2/2010, which was filed by other creditor of Prashant, was also produced.

8. The main dispute is in respect of the document at Exh. 37. The aforesaid pleadings show that execution of the document is not disputed by the plaintiff and he has also admitted that his brother had signed on these documents as witness. The contents of these documents show that the defendant had paid some cash amount and some amount by cheque. The plaintiff has also not disputed that such payments were made by the defendant and he had admitted that out of the amount of ₹ 13.6 Lakh, amount of ₹ 7.65 Lakh was paid by the defendant to him. Thus, most of the contents of Exh. 37 are admitted by the plaintiff. The remaining contents show that the plaintiff had given up his right in

respect of remaining amount of ₹ 5.95 Lakh as the aforesaid amount was paid by the defendant.

9. In view of the nature of the defence taken by the plaintiff that by using force, the defendant had obtained his signature and signature of his brother on Exh. 37, the burden to prove such case was on the plaintiff. The circumstance that the plaintiff encashed the cheque of ₹ 5 Lakh mentioned in Exh. 37, itself shows that he knew the contents and that is why he encashed the cheque. If there was any truth in the allegation made by the plaintiff of use of force, he would have approached police on the same day and would not have encashed the cheque. These circumstances have created probability that the plaintiff had given up his right to recover the remaining amount and for full satisfaction of the amount due, he accepted the aforesaid amount from the defendant. When his brother had also signed on the document, it was necessary for the plaintiff to examine his brother in support of his contention, but brother was not examined. On the other hand, the defendant examined himself and also examined one witness Bipin Patil, who had also signed on Exh. 37. Some other record is also produced to show that in one more similar case, the defendant had made the payment

to third party when the loan was taken by his deceased son and the other party had also given up the right in respect of some amount.

10. Under the Indian Contract Act, 1872 the plaintiff could have given up his right and there is such provision like Section 63. In view of these circumstances and as the findings are on the question of facts, there is no scope to interfere in the said finding. The submission made by the learned counsel for the appellant that the witnesses ought to have been examined to prove the contents of the documents and due to absence of such evidence, the plaintiff's case needs to be believed can not be accepted due to the aforesaid circumstances.

11. In the result, Second Appeal stands dismissed.

[T.V.NALAWADE, J.]