

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

SUIT NO.1947 OF 2008

Vinergy International Pvt. Ltd.Plaintiff

V/s.

Dimple Dineshbhai ShahDefendant

Mr.Mikhail Behl a/w Mr.Sachin Kudalkar i/by M/s.Madekar & Co. for the plaintiff.

Mr. D.P.Desai a/w Mr.Jay Mehta i/by Law Frame for the defendant.

**CORAM : K.R.SHRIRAM,J
RESERVED ON : 22.11. 2016
RONOUNCED ON : 7.12.2016**

P.C.:-

1 The plaintiff had filed this suit for a summary decree in the sum of Rs.1,49,50,000/- with interest @ 18% p.a. on the amount of Rs.1,00,00,000/- from the date of filing of the suit till payment/realization. The suit as filed is based on dis-honoured cheque which was issued by the defendant for an amount of Rs.1,00,00,000/-. By an order dated 16.2.2010, unconditional leave to defend was granted by this court.

2 According to the plaintiff, the defendant had issued the cheque as security in favour of plaintiff to secure payment in respect

of supply effected by plaintiff on M/s.Umesh Enterprises and its customers. It is the plaintiff's case that some time in or around March, 2004 one Umesh Shah, Proprietor of M/s.Umesh Enterprises, approached the plaintiff and requested plaintiff to supply Furnace Oil and Light Diesel Oil to M/s.Umesh Enterprises as well as to the customers of M/s.Umesh Enterprises and had agreed to make payment to plaintiff on behalf of its customers. Accordingly, the plaintiff supplied the goods from time to time to diverse customers of M/s.Umesh Enterprises as well as to M/s.Umesh Enterprises and initially payments were made by Umesh Enterprises. However, subsequently, the cheques issued by M/s.Umesh Enterprises started getting dishonoured and when the matter was taken up with M/s.Umesh Enterprises, plaintiff was assured that payment towards the said supplies would be effected through another group concern of the said Umesh Enterprises, i.e., through the defendant herein who was the brother of the said Umesh Shah and carrying on business as Proprietor of Arihant Petrochem. In view of the assurances given by the Proprietor of M/s.Umesh Enterprises, plaintiff supplied material to its customers once again and the amount which was due and payable to plaintiff as on 11.01.2005 was Rs.3,25,96,444/-.

The plaintiff has received part payments from M/s.Umesh Enterprises as well in the sum of Rs.1,35,88,279/- (Rupees One Crore Thirty Five Lakh Eighty Eight Thousand Two Hundred Seventy Nine) and a sum of Rs.54,40,000/- from defendant and that left an amount of Rs.1,35,68,165/- (Rupees One Crore Thirty Five Lakh Sixty Eight Thousand One Hundred Sixty Five) due and payable .

3 It is the case of the plaintiff that as there was a large amount of Rs.1,35,68,15/- (Rupees One Crore Thirty Five Lakh Sixty Eight Thousand One Hundred Sixty Five) due and payable by M/s.Umesh Enterprises to the plaintiff the plaintiff met the defendant and Umesh Shah. During the meeting the defendant guaranteed payments to be made by Umesh Shah Enterprises and in furtherance thereto gave a cheque for Rs.1 crore as security. As the said Umesh Enterprises did not pay the balance amount and since the defendant had guaranteed the repayment of the dues of Umesh Enterprises and its customers, the plaintiff presented the cheque for Rs.1 crore issued by the defendant. The cheque was dishonoured on presentation. According to the plaintiff, notice was issued to the defendant after dishonour of the said cheque and a complaint was filed on or about

22.8.2005.

The present suit is instituted against the defendant in his capacity as guarantor of the dues of his brother Mr.Umesh Shah.

4 In the written statement filed, the defendant took the following defences :-

(i) There is no privity of contract between the defendant and plaintiff and therefore the defendant is not liable to pay or agreed to discharge the liability of Umesh Enterprises as the plaintiffs have not produced any document to show that Umesh Enterprises have agreed to discharge the liability of the plaintiffs ;

(ii) The plaintiffs have not joined Umesh Enterprises as necessary party to the suit ;

(iii) The plaintiffs filed false and frivolous criminal case being Criminal Case No.192 of 2005 against the defendant under Section 138 of the Negotiable Instrument Act in Magistrate Court at Jodhpur ;

(iv) The plaintiffs have failed to produce any document to show that the defendant stood as a guarantor to discharge the liability of Umesh Shah or Umesh Enterprises ;

(v) The defendant is not concerned with Umesh Enterprises. The defendant is proprietor of Arihant Petrochem and the defendant has no concern with the business of Umesh Enterprises ;

(vi) The defendant has not issued any cheque to the plaintiff. The plaintiff have managed to get one blank cheque which they used by forging the same. In fact, the plaintiff misused the blank cheque and deposited the same in the Jodhpur bank account and filed false criminal case against the defendant when the cheque got dishonoured ;

(vii) In the cross examination dated 27.9.2005 filed in the Magistrate's Court at Jodhpur in the affidavit of evidence, Mr.Mukul Agarwal of the plaintiff has admitted the fact that Umesh Enterprises does not owe anything to the plaintiff.

5 On 30.9.2014 issues were settled, as reproduced in paragraph no.22.

6 In order to prove its claim the plaintiff led evidence of one witness Sunil Shukla (General Manager-Accounts) (PW 1). The defendant did not lead any evidence. PW 1 filed two affidavits in lieu of examination in chief, one dated 9.12.2014 and the other dated 12.10.2015. He has deposed on the basis that he was personally conversant with the facts of the case, on the basis of personal knowledge as well as records available with the plaintiff. Based on the testimony of PW-1, documents produced by the plaintiff were received in evidence and marked as Exhibits.

7 PW-1 has given testimony regarding an oral agreement between the defendant, his brother Umesh Shah and the plaintiff, whereby the defendant guaranteed to the plaintiff that in case of default in payment by Umesh Shah, the defendant would discharge

the liability of Umesh Shah. PW-1 has stated that in furtherance of the contract of guarantee the defendant also issued a cheque in favour of the plaintiff bearing No.214672 (Exhibit P-8) as security for an amount of Rs.1,00,00,000/-. In paras 6 & 11 of affidavit dated 9.12.2014 (Exh.P-1), PW-1 has stated as under :-

(6)I say that when the matter was taken up with the said Umesh Shah of M/s.Umesh Enterprises, the defendant being the brother of the said Umesh Shah in or about August 2004 promised me on behalf of the plaintiffs that in case of default in payment by the said Umesh Shah, the defendant shall discharge the liability of the plaintiff that and he would personally and be jointly and severally liable to pay the plaintiffs, towards the supplies effected by the plaintiffs to M/s.Umesh Enterprises and to its customers would be made by the defendant.....

(11) I say that in furtherance of the guarantee and assurance that the payment towards the supply effected by the plaintiffs to M/s.Umesh Enterprises would be made by the defendant and to secure the payment in respect of supplies effected by the plaintiffs to Umesh Enterprises and its customers, the defendant also issued and handed over to the plaintiffs a cheque bearing no.214672 drawn in favour of the plaintiffs and on Tamilnad Mercantile Bank Ltd. Mandavi Branch, Mumbai for a sum of Rs.1,00,00,000/- (Rupees One Crore only) as security. I say that the said cheque has been signed by the defendant as the proprietor of the said M/s.Arihant Petrochem.

8 During cross-examination PW-1 was called upon to provide particulars of the meeting during the course of which this agreement was arrived at. A perusal of the notes of evidence of PW-1 recorded and in particular the answers in cross-examination of PW-1 would show that PW-1 has, to the question nos.20, 21, 81, 82, 83 & 84 put

to him, replied by providing the information. It will be useful to reproduce the answers to these questions.

20.....Per Commissioner :

Ans. :- Mr.Mukul Agarwal is the Director of the plaintiff company. Whatever deal is structured by the company is handed over to respective department namely marketing and accounts. Marketing is concerned with day to day supply and I maintained the cash flow as a result of which I am concerned with receivables. When there were outstanding of Umesh Enterprises and the cheques issued by Umesh Enterprises started bouncing. Mr.Umesh Shah brother of Mr.Dimple Shah introduced us in the month of July 2004 that Mr.Dimple Shah is liable to pay the outstanding supply to Umesh and his customers. In that meeting, I was present along with my Director Mr.Mukul Agarwal and Marketing G.M. Mr.Kamal Singh Kandiyal. We discussed jointly to continue to supply and that Mr.Dimple Shah is responsible to pay the outstanding liability on behalf of Umesh Enterprise. That time he hand over the cheque in the name of Sumex Organics Pvt. Ltd. and based on our exposure agreed, I filled the amount of Rs.One Crore in front of Mr.Dimple Shah.

Q.21. Just now in the above answer, you have said that my Director Mr.Mukul Agarwal and Marketing G.M.Mr.Kamal Singh Kandiyal were present. When did this meeting take place ?

Ans. : In the month of July 2004 in our office.

Q.81. Have you demanded payment either from Umesh Enterprises and/or its alleged customers ?

Ans. : No.

Q.82. Is the alleged guarantee in writing ?

Ans. : No.

Witness volunteers : I have already mentioned in my earlier answer that we have meet jointly in the month of July 2004 discussed and decided to continue supply of material to Umesh Enterprises and its customers and taken the cheque of Rs.1 crore as a guarantee from Mr.Dimple Shah.

Q.83 : Where did the alleged meeting take place ?

Ans. : At our office i.e., 403, Arun Chamber, Tardeo Main Road, Mumbai-400 034.

Q.84 : Was the alleged cheque handed over to you in the above stated meeting ?

Ans. : Yes.

Witness volunteers : I have already mentioned in my earlier answer. I was present in that meeting and collected the cheque after finalizing the meeting.

As held in ¹***Madhuri Pukhraj Baldota Vs Omkarlal Daulatram Banwat*** by eliciting these particulars the defendant elicited positive statements which damaged the allegation of the defendant namely that there was no contract of guarantee. The defendant did not even put its affirmative case in this regard to the witness and therefore must be deemed to have accepted the correctness of the evidence. Further the defendant did not contravene or rebut this positive evidence by leading its own evidence and hence must be deemed to have accepted the correctness of the same. The evidence proves that a contract of guarantee came into existence between the plaintiff, the defendant and Umesh Shah in July 2004 at which time the defendant issued the cheque bearing No.214672 drawn on the Tamilnad Merchantile Bank Ltd. (Exhibit P-8).

9 The testimony of PW-1 is not contradicted or undermined. No suggestion is put to PW-1 that his deposition regarding the

1 2015(4) Mh.L.J.327

contract of guarantee and/or the further particulars he was called upon to provide regarding the contract of guarantee were false.

Likewise no suggestion is put to PW-1 that there was no supplies made to M/s.Umesh Enterprises or its customers. This is extremely pertinent given the defence taken by the defendant in the written statement. There is no cross-examination of PW-1 as to how he came into possession of the aforementioned security cheque (Exhibit P-8) though it is the case of the defendant that PW-1 misappropriated the said cheque. This is of significance given the nature of the allegations raised by the defendant against the plaintiff in paragraph 18 of the written statement. The failure to confront PW-1 with the defendant's affirmative case must go against the defendant.

In ²**A.E.G Carapiet Vs. A.Y.Derderian** paras 8 & 9 read as under :-

“8. Failure to put the important and crucial part of the case to the witnesses coming to prove testamentary capacity must be held against the respondents. It is all the more so because the case of witness Venkat Ramiah is that as early as in October, 1956 he had told this story at Poona to Mr.Aratoon and the learned Counsel Mr.Ganguli. If that was so, then there can be no doubt that this case would have been put to the doctors and nurses who were being examined on commission in Poona itself. It is also strange why then the Respondents did not have the evidence of this witness Venkata Ramiah immediately on commission at Poona and why he was kept up the sleeves to be played as a last trump as a last witness in the case when the entire evidence on the case of the propounder had been made and concluded. Lastly this course is all the more reprehensible here because witness Venkat Ramiah admits that on all his visits

² AIR 1961 Cal 359

to the testator's room in the nursing home he found the wife present (Q.81) and if that is so then if the wife was put that case she might have denied but by keeping back this case from her, she was denied the necessary opportunity to do so, leading to failure of justice in this case.

9. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponents witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witness and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

10 The defendant through their learned counsel submitted that the cheque was misappropriated. But the admitted position is till date there been no criminal complaint of cheating/misappropriation filed by the defendant against any officer of the plaintiff. This belies this allegation of defendant. It is also necessary to note that the cross-suit filed by the defendant has been dismissed.

11 PW 1 has deposed that post the meeting in July, 2004 between M/s.Umesh Enterprises, the defendant and the plaintiff, M/s.Umesh Enterprises placed several orders in respect of which the plaintiff has made supplies and raised its invoices. PW-1 has also stated that the defendant without demurrer or protest as to rate, quality and/or quantity received the products. The invoices produced by the plaintiff were received in evidence and marked as Exhibit P-11 (colly). The Judgment of the Calcutta High Court in Carapiet Vs.Derderian (supra) was followed by a single judge of this court in ³***Harish Loyalka & Ors. Vs. Dilip Nevatia & Ors.*** Paras-9 & 10 read as under :-

“9 Failure to put the important and crucial part of the case to the witnesses coming to prove testamentary capacity must be held against the respondents.....

10 The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a Counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiffs account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise

upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.”

12 The defendant did not cross-examine PW-1 on the invoices produced. There is no case put to the witness “denying supply”, “disputing price”, “disputing quantity”, “disputing quality” etc. Furthermore the defendant calls upon the plaintiff to produce a statement showing (a) the details of invoices relating to M/s.Umesh Enterprises and (b) the details of invoices relating to the customers of M/s.Umesh Enterprises. This statement was received in evidence and marked Exhibit D-1. It is pertinent to note that though the meeting before the commissioner was adjourned for the purpose of producing this statement once it was produced, cross-examination was closed by the letter dated 4.4.2016 (Exhibit D-2).

13 By not putting any of its affirmative case namely as regards “the misappropriation of the cheque” and “the allegation of non supply of goods” the defendant must be deemed to have accepted the case of the plaintiff in its entirety.

14 The failure to cross-examine a witness on material portions

of his deposition must be taken as being truthful and credible. I find support in (a) ⁴***State of U.P. Vs. Nahar Singh & ors.*** Paras-13 & 14 read as under :-

“13 It may be noted here that that part of the statement of PW-1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence of PW-1 remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned :

(1) to test his veracity ;

(2) to discover who he is and what is his position in life, or

(3) to shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft-quoted observation of Lord Herschell, L.C. in Browne V. Dunn clearly elucidates the principle underlying those provisions. It reads thus :

“I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box to give an opportunity of making any explanation which is open to him and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.”

This aspect was unfortunately missed by the High Court when it

4 (1998 3 SCC 561

came to the conclusion that explanation for the delay is not at all convincing. This reason is, therefore, far from convincing.”

(b) In ⁵**Amar Singh Vs. The State of Bihar** the Apex Court held as under :-

“where evidence clearly discloses that : (1) the truck was being driven at a very high speed. (2) it was having no lights, (3) it was being driven without the driver sounding the horn, and (4) the visibility was very poor at that time, and there is no cross-examination on the above crucial aspects, the finding that the accident happened due to rash and negligent driving of the truck is justified.”

(c) In ⁶**Mahavir Singh Vs. State of Haryana** , paragraphs 16 & 17 read as under :-

“16. It is a settled legal proposition that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised (Vide Atluri Brahmanandam v. Anne Sai Bapuji and Laxmibai v. Bhagwantbuva)

17. In the instant case, we had gone through the cross-examination of the witnesses who could furnish an explanation for the discrepancies pointed out by the learned counsel for the appellant. However, we came to the conclusion that the defence had never put any question in these regards to the material witness who could furnish the explanation for the same. So the chain of all the circumstantial evidence is complete and no link is missing and the accused persons had an opportunity to commit the murder of the deceased.”

15 The plaintiff has also produced circumstantial evidence,

5 (1971) 3 SCC 273

6 (2014) 6 SCC 716

which supports and corroborates its case. The plaintiff has tendered in evidence a letter dated 4th January 2005 (Post the contract of guarantee which was arrived at in July 2004) (Exh.P-4) sent by fax from Umesh Enterprises to the plaintiff (Plaintiff's earlier name was Sumex Organics Pvt. Ltd.). As stated earlier, one Umesh Shah, the brother of the defendant, was the sole proprietor of Umesh Enterprises. When one reads Exh.P-4, P-5, P-6 and P-7 together, it pertains to invoice No.LO6967 dated 4th January, 2005. Exh.P-4 provides excise details in respect of the supply covered by the invoice. The invoices are received in evidence as Exhibit P-11 (colly). If the statement (Exh.P-7) pertaining to the payments made by the defendant to the plaintiff following his commitment to discharge his brother's dues is seen, it can be noted that the defendant issued a cheque dated 13th January, 2015 bearing No.214671 for Rs.4,00,000/- which was adjusted towards payment of invoice LO6928, LO6947, LO6966, LO6967 & LO6968. The statement (Exh.P-7) if perused in comparison with the invoices would corroborate that likewise for several other invoices the defendant issued cheques to discharge his brother's liability. These also establish the agreement between the plaintiff and the defendant.

16 The defendant has contended in the written statement that the payments it had made the plaintiff were temporary loans. The defendants however, did not confront PW-1 with this case in the cross-examination. Furthermore the suit that was filed by the defendant for the recovery of the said sums alleged to be loans has been dismissed and has attained finality. The defendant did not also lead any evidence in the present suit.

17 During the course of cross-examining PW-1 the defendant put suggestions (Q.91 & Q.92) that M/s.Umesh Enterprises had repaid the entire amount to the plaintiff and the goods were supplied to customers of Umesh Enterprises, where Umesh Shah was only a broker. Therefore, this gives an assumption of delivery of goods as also a liability to pay. However, despite asserting this case and it being denied, no evidence was produced by the defendant to show discharge of dues by M/s.Umesh Enterprises.

18 The counsel for the defendant submitted that the fact that the date on Cheque No.214672 for Rs.1 crore is 23rd May, 2005

(Exhibit P-8) establishes that the Cheque was not issued at the meeting held in July, 2004. This submission in my view is based on assumptions and conjectures. The counsel assumes that the cheque (Exhibit P-8) was not post-dated. The post dating of a cheque is a matter that quite easily fits in with the case of the plaintiff that the defendant stood security for the supplies to be made by the plaintiff to M/s.Umesh Enterprises and its customers. It is extremely pertinent to note that PW-1 was never asked to explain this so called anomaly.

19 The learned counsel for the defendant submitted that the plaintiff did not produce the ledger books of M/s.Umesh Enterprises. PW-1 has, during his course of cross-examination, in response to Questions 61 to 63 stated that the statement (Exhibit P-5) was prepared based on the ledger account of M/s.Umesh Enterprises as maintained by the plaintiff. PW-1 was not called upon to produce the same.

20 PW-1 has also, during his course of cross-examination, in response to questions 73 to 76 pertaining to the statement (Exhibit P-6) stated that though the ledger account of Arihant Petrochem was

not produced he was willing to produce the same. PW-1 was not called upon to produce the statement on the next session of the commission, instead was called upon to produce other documents which are at Exhibits D-1 to D-5. There is no cross-examination of any nature on the documents produced at Exhibit D-1 to D-5. The defendant therefore, must be considered to have accepted the correctness of the contents of the documents.

21 No evidence , however, was led by the plaintiff on the rate of interest at 18% p.a. claimed on Rs.1 crore from 23.7.2015. Therefore, this court is inclined to grant interest only from the date of the suit until payment/realizations at 9% p.a. which is a reasonable rate.

22 In the circumstances, I answer the issues as under :-

Nos.	Issues	Findings
(i)	Whether the plaintiff proves that it is entitled to recover from the defendant a sum as prayed for ?	Yes
(ii)	Whether the plaintiff proves that a cheque for a sum of Rs.1 crore was issued by the defendant on behalf	Yes

	of M/s.Umesh Enterprises as a security for the sale and supply of furnace oil and light diesel oil effected by the defendant upon M/s. Umesh Enterprises as alleged in para 7 and 11 of the plaint ?	
(iii)	Whether the defendant proves that the monies paid by the defendant to the plaintiff were the advances and not towards the purchase price of goods sold and supplied by the plaintiff to one M/s.Umesh Enterprises and/or all its customers	No
(iv)	Whether the defendant proves that there is no privity of contract between the parties to the suit as alleged in para 4 of the Written Statement ?	No
(v)	Whether the defendant proves that the suit is not maintainable as alleged in para 1 of the Written statement ?	No
(vi)	Whether the defendant proves that the plaintiff procured the subject cheque by dishonest means as alleged in para 18 of the Written Statement ?	No
(vii)	Whether the defendant proves that she never paid any or agreed to pay any amount to the plaintiff on behalf of M/s.Umesh Enterprises ?	No
(viii)	What reliefs ?	The suit is decreed in the sum of Rs.1 crore

		together with interest thereon at 9% p.a. from the date of the suit until payment/realization.
(ix)	What costs ?	The defendant to pay a sum of Rs.1 lakh as cost to the plaintiff.

23 Decree be drawn up accordingly. Suit stands disposed.

(K.R.SHRIRAM, J)