

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

% **Date of decision: 22nd April, 2016.**

+ **RFA 111/2015**

M/S KALYANI SURGICAL AND MEDICAL STORE..Appellant

Through: Mr. S.K. Dayal, Adv.

Versus

M/S CACHET PHARMACEUTICALS PVT. LTD. ...Respondent

Through: Mr. Govind Rishi, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 impugns the judgment and money decree dated 27th November, 2014 of the Court of Additional District Judge (ADJ)-02, (North), Rohini Courts, Delhi in CS No.765/2014 filed by the respondent / plaintiff under Order XXXVII of the Civil Procedure Code, 1908 (CPC) consequent to the dismissal of the joint application for leave to defend of the appellant / defendant, a partnership firm of whom Sh. Ram Gopal Sharma and Sh. Asha Ram Sharma are partners.

2. Trial Court record was requisitioned and notice of the appeal was issued and subject to the appellant / defendant depositing Rs.10 lacs in this Court and which has been deposited, execution was stayed. Though the

respondent / plaintiff was permitted to withdraw the amount deposited subject to furnishing security but has not done so.

3. Admit.

4. Considering that in the event of the appeal succeeding, after granting leave to defend to the appellant / defendant the matter will have to be remanded to the Trial Court for trial, the appeal, with consent of the counsels, has been taken up for hearing today itself. The counsels have been heard and the Trial Court record perused.

5. The respondent / plaintiff instituted the suit from which this appeal arises, as aforesaid under Order XXXVII of the CPC, pleading i) that the respondent / plaintiff which is a manufacturer of medicine was supplying the same to the appellant / defendant engaged in the business of retail sale of medicine and surgical goods and used to supply medicines / goods to the appellant / defendant on credit; ii) that the appellant / defendant during the period December, 2011 to March, 2012 placed several purchase orders on the respondent / plaintiff and made part payments therefor from time to time; iii) that the respondent / plaintiff in the month of May, 2012 asked the appellant / defendant to clear the outstanding amount of Rs.15,57,408/- and upon the appellant / defendant asking for particulars of the said demand,

furnished a copy of its ledger to the appellant / defendant and the appellant / defendant in acknowledgment of the correctness thereof put its stamp with signatures thereon; iv) that the appellant / defendant out of the aforesaid amount due, paid a sum of Rs.1,00,000/- vide cheque dated 29th June, 2012 and subsequently paid the balance amount vide cheque dated 11th August, 2012 for Rs.14,57,408/-; v) that while the cheque for Rs.1,00,000/- was encashed, the cheque for Rs.14,57,408/- was returned dishonoured with the endorsement “exceeds arrangement”; vi) that the respondent / plaintiff got issued a legal notice dated 4th September, 2012 to the appellant / defendant but the appellant / defendant inspite of receipt thereof failed to reply thereto; vii) that the respondent / plaintiff instituted a complaint of the offence under Section 138 of the Negotiable Instruments Act, 1881 (NI Act) against the appellant / defendant and which was pending; viii) that though the appellant / defendant as per the commercial rate of interest was entitled to interest at 20% per annum but was restricting the claim for interest 15% per annum since 11th August, 2012 till the institution of the suit amounting to Rs.3,49,778/-; ix) that accordingly the suit for a total sum of Rs.18,07,186/- under Order XXXVII of the CPC on the basis of the cheque was being filed.

6. The appellant / defendant sought leave to defend not denying the relationship as averred by the respondent / plaintiff but pleading; i) that the plea of the respondent / plaintiff of the appellant / defendant having issued the cheque was false, frivolous and concocted; ii) there was continuous business transaction between the parties since the year 2004; iii) that in the year 2008 upon the respondent / plaintiff agreeing to supply goods / medicine to the appellant / defendant on credit, the appellant / defendant had given some blank signed cheques in which only the name of the respondent / plaintiff was filled up as security in lieu of credit facility; iv) that from the month of December, 2011 to April, 2012, the appellant / defendant has not placed / booked any order regarding purchase of medicines / surgical goods on the respondent / plaintiff; v) that the appellant / defendant did not receive any goods from the respondent / plaintiff between December, 2011 to April, 2012; vi) that the purchase orders purportedly issued by the appellant / defendant filed by the respondent / plaintiff along with the plaint do not bear the signature and rubber stamp of the appellant / defendant and the respondent / plaintiff had forged the same; vii) that the respondent / plaintiff had forged the cheque by putting the figures and amounts and by presenting the same for payment; viii) that the appellant / defendant had not furnished

the subject cheque to the respondent / plaintiff in discharge of any liability;
ix) that the suit of the respondent / plaintiff was false.

7. The learned ADJ has refused leave to defend to the appellant / defendant and decreed the suit finding/observing/holding i) that the defence taken up by the appellant / defendant was not plausible and could not be substantiated; ii) the respondent / plaintiff has placed on record all the invoices reflecting outstanding amounts; iii) that before filing of the suit, a notice has been served on the appellant / defendant but the appellant / defendant had not pleaded to have sent any reply thereto; iv) that if the cheque was given as a security as claimed by the appellant / defendant, the appellant / defendant ought to have replied to the legal notice; v) that through the appellant / defendant has alleged forgery by the respondent / plaintiff but had not taken any civil or criminal action with respect thereto; vi) that the plea taken by the appellant / defendant in the application for leave to defend was sham, moonshine and illusory within the meaning of *M/s Mechalec Engineers & Manufacturers Vs. M/s Basic Equipment Corporation Ltd.* AIR 1977 SC 577.

8. The counsel for the appellant / defendant has at the outset contended that the suit from which this appeal arises was filed by the respondent /

plaintiff after knowing the defence of the appellant / defendant from the statement made by the appellant / defendant in the complaint of offence under Section 138 of the NI Act. However, on enquiry as to how the same has prejudiced the appellant / defendant and how can that be a bar to simultaneous maintainability of proceedings under both civil and criminal law, as has been held by Courts, no reply is forthcoming.

9. It is then contended that the appellant / defendant has along with the appeal filed a reply sent to the legal notice. However on enquiry, it is frankly admitted that it was not so pleaded in the leave to defend application and no copy of the reply was filed along with the leave to defend application. Even before this Court only copies of the reply and postal receipt are filed and the counsel for the appellant / defendant on enquiry states that the said reply was sent by an advocate who was not the advocate for the appellant / defendant before the Trial Court or the advocate for the appellant / defendant before this Court and the original of the postal receipt would be with the advocate only and that though the appellant / defendant attempted to get the original but could not receive the original.

10. It is further argued that while the respondent / plaintiff in the complaint of offence under Section 138 NI Act was claiming a sum of

Rs.14,57,408/- to be due but in the plaint pleaded an outstanding of Rs.15,57,408/-. There is no inconsistency. A complaint of offence under Section 138 NI Act is concerned only with the dishonoured cheque; however in the civil suit, the consideration was which cheque was issued and the accounts have been explained.

11. Else, the same plea as taken in the leave to defend, of the cheque having been given by way of security, has been repeated.

12. The counsel for the respondent / plaintiff has contended that while the appellant / defendant in the statement in the complaint case supra stated that the cheque was given by way of security in 2011-12, in the leave to defend pleaded that the same was given in the year 2008 and the said inconsistency alone shows the falsity of the ground on which the appellant / defendant sought leave to defend.

13. Having considered the matter, I am unable to take a view different from that taken by the learned ADJ on the averments as contained in the application for leave to defend. The appellant / defendant cannot be permitted to now as an afterthought contend that the reply to the legal notice was sent when the same was admittedly not the ground pleaded in the leave to defend and that too without even producing the original proof even now of

having sent the same. The possibility of the appellant / defendant shying from producing the original for the reason not wanting to face prosecution in the event of the document turning out to be forged, cannot be ruled out.

14. There is no inconsistency in the stand of the respondent / plaintiff. The respondent / plaintiff was in the complaint case required to confine itself to the cheque amount only and has in the civil suit stated the total amount which was due and part payment whereof was made by cheque dated 29th June, 2012 for Rs.1,00,000/-.

15. The appellant / defendant in the leave to defend application did not deny the payment of Rs.1,00,000/- vide cheque dated 29th June, 2012. The appellant / defendant is deemed to have admitted the said averment in the plaint which was not controverted. Once that is so, the same demonstrates the falsity of the other defence taken in the leave to defend. If no amount was due from the appellant / defendant and no purchase orders had been placed, it belies reason why the appellant / defendant would pay the sum of Rs.1,00,000/- shortly before the date of the cheque subject matter of the present suit. Similarly, if the transactions of sale purchase between the parties had ceased in the year 2011 as was the ground in the leave to defend application, there is no reason why the appellant / defendant should not have

taken back the cheque from the respondent / plaintiff. It was not even the case that any attempt in this regard was made. Though it was vaguely pleaded that the cheque was given as security but the appellant / defendant did not show the number of the cheque book currently being issued or plead or prove that the cheque on the basis whereof the suit was filed was of a series as was prevalent in the year 2008 when the cheque was claimed to have been given.

16. There is thus no merit in the appeal; the same is dismissed with costs; counsels fee computed at Rs.7,500/-.

17. Decree sheet be prepared.

18. The amount lying deposited in this Court together with interest accrued thereon be released to the respondent / plaintiff / decree holder.

19. The respondent / plaintiff / decree holder shall be entitled to execute the decree for the balance amount due.

APRIL 22, 2016
'gsr'

RAJIV SAHAI ENDLAW, J.