

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

+ **RSA No. 301/2016**

% **17th October, 2016**

SH. HITESH PANCHORI Appellant

Through: Mr. Mahipal Singh, Advocate.

versus

M/S HEAVEN PLAST INDIA PVT. LTD. Respondent

Through:

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. 37232/2016 (for condonation of delay of 5 days in filing the appeal)

1. This is an application seeking condonation of delay of 5 days in filing the appeal.

2. For the reasons stated in the application, the same is allowed and the delay is condoned.

3. The application stands disposed of.

C.M. Appl. No. 37246/2016 (for condonation of delay of 53 days in re-filing the appeal)

4. This is an application seeking condonation of delay of 53 days in re-filing the appeal.

5. For the reasons stated in the application, the same is allowed and the delay is condoned.

6. The application stands disposed of.

RSA No.301/2016 and C.M. Appl. No. 37231/2016 (under Order XLI Rule 5 read with Order XLII Rule 1 CPC, for *ex parte* interim stay)

7. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/defendant against whom the respondent/plaintiff filed the subject suit for recovery of Rs.2,35,596/- for goods supplied being footwear. The suit was decreed by the Trial Court by its Judgment dated 3.9.2015 for a sum of Rs.1,20,000/- along with interest at the rate of 5% per annum. The First Appellate Court vide its Judgment dated 30.3.2016 has confirmed the judgment of the trial court by dismissing the first appeal filed by the present appellant/defendant.

8. The subject suit was filed by the respondent/plaintiff seeking the balance due with respect to nine bills totalling to Rs.5,77,752/-. Since the appellant/defendant is stated to have made the payment of Rs.3,61,952/-, there remained balance of Rs.2,15,800/-. Thereafter in proceedings under Section 138 of the Negotiable Instruments Act, 1881 filed by the respondent/plaintiff against the appellant/defendant with respect to two cheques of Rs.15,800/- and Rs.32,256/-, a sum of Rs.48,056/- was paid and therefore the principal balance which remained was Rs1,80,000/- and with respect to which amount the subject

suit was filed along with claim of interest of Rs.55,596/- at the rate of 18% per annum. Appellant/defendant had issued a total of eight cheques which were dishonoured. With respect to two of the cheques the amount was paid as disputes were settled in the Section 138 of the Negotiable Instruments Act proceedings as already stated above. The details with respect to the bills, cheques issued, their dishonour, and filing of proceedings under Section 138 of the Negotiable Instruments Act and the payment made by appellant/defendant in such proceedings are stated in paragraphs 2 to 4 of the plaint and which read as under:-

“2. That the defendant has been making purchases of footwear in the name of his business establishment and made purchases to the tune of Rs.5,77,752/- vide the following bills:

i.	Bill No. 237 dated 11.5.2006	for Rs.41,892/-
ii.	Bill No. 238 dated 12.5.2006	for Rs.56,940/-
iii.	Bill No. 251 dated 23.5.2006	for Rs.55,356/-
iv.	Bill No. 267 dated 17.6.2006	for Rs.1,10,268/-
v.	Bill No. 270 dated 21.6.2006	for Rs.98,604/-
vi.	Bill No. 274 dated 26.6.2006	for Rs.73,080/-
vii.	Bill No. 277 dated 27.6.2006	for Rs.89,532/-
viii.	Bill No. 294 dated 21.7.2006	for Rs.26,040/-
ix.	Bill No. 296 dated 21.7.2006	for Rs.26,040/-
	Total:	Rs.5,77,752/-

Out of which the defendant has paid a sum of Rs.3,61,952/- leaving a balance of Rs.2,15,800/- and in order to square up the liability and in discharge of the total outstanding dues against his establishment had issued the following post dated cheques after settlement:-

Cheque No.	Date	Amount
1. 626825	15.6.07	Rs. 30,000/-
2. 626826	15.7.07	Rs. 30,000/-
3. 626827	15.8.07	Rs. 30,000/-
4. 626828	15.9.07	Rs. 30,000/-
5. 626829	15.10.07	Rs. 30,000/-
6. 626830	15.11.07	Rs. 30,000/-

7.	626831	15.12.07	Rs. 15,800/-
8.	626832	15.01.08	Rs. 32,256/-
		Total :	Rs. 2,28,056/-

All these cheques are drawn on Bank of Baroda, Paloda, Distt. Banswara (Raj.).

3. That all the cheques were dishonoured on presentation for the reason FUNDS INSUFFICIENT and was received back and notice of demand was served for each and every cheque.

4. That the plaintiff filed complaint under Section 138 of the Negotiable Instruments Act in respect of cheque No. 626829 dated 15.10.2007 for Rs.30,000/-, cheque No. 626830 dated 15.11.2007 for Rs.30,000/- drawn on Bank of Baroda, Paloda, Distt. Banswara (Raj.) which is pending in the Court of Shri Vishal Singh, M.M., Ronini, Delhi and another/separate complaint was filed in respect of other two cheques bearing No. 626831 for Rs.15,800/- and cheque No. 626832 for Rs.32,256/- has been settled as the defendant paid a sum of Rs.30,000/- by way of D.D. on 13.9.2007 and Rs.18,056/- was paid before Court and as such only a sum of Rs.48,056/- only has been received till date. All the remaining cheques issued by the defendant are lying dishonoured with the plaintiff. The plaintiff had been serving notice of demand of the cheques whenever presented and dishonoured by the Bank of the defendant and the defendant had been assuring the plaintiff that he shall be clearing the amount of the cheques very soon but avoided to clear the outstanding amount on one pretext or the other. The defendant had been making various calls and promises but failed to adhere to the promises made by him from time to time and as such the plaintiff was forced to file complaint under Section 138 of Negotiable Instruments Act in the Court and was left with no other alternative to file suit for the recovery of the balance amount of the cheque and interest due and is claiming the same by way of the present suit, hence the suit.”

9. The case of the appellant/defendant was that he had paid the complete amount of the subject bills and that the cheques which were dishonoured were only given as security but were wrongly retained by the respondent/plaintiff and not returned to the appellant/defendant. The suit was therefore prayed to be dismissed.

10. After pleadings were complete, the trial court on 20.1.2012 framed the following issues:-

- “1. Whether the plaintiff is entitled to recover the suit amount, as prayed for? OPP
2. Whether the suit of the plaintiff is barred by provisions of Section 20 CPC? OPD
3. Relief.”

11. As already stated above the suit was decreed by the trial court and judgment of the trial court has been upheld by the first appellate court. Both the courts have made the following salient observations for decreeing of the suit:-

(i) Cheques were admittedly given by the appellant/defendant and which were dishonoured, and if the cheques were given only as security then there was no reason why if the appellant/defendant had made payment of the complete amount that the appellant/defendant would not have asked for returning back of the cheques allegedly given as security i.e appellant/defendant never wrote any letter or sent any legal notice to the respondent/plaintiff that the security cheques be returned back to the appellant/defendant because the appellant/defendant had made the complete payment. The position becomes further accentuated against the appellant/defendant because even after compromise in the two cheques cases under Section 138 of the Negotiable Instruments Act, neither in such proceedings was it recorded that the balance six cheques were given as security and not to be paid and further nor was any communication issued even thereafter to return the six dishonoured cheques

allegedly on the ground of the appellant/defendant that they were security cheques only.

(ii) The fact that the dishonoured cheques were only given as security was not so stated in a reply/notice by the appellant/defendant, although appellant/defendant had received a legal notice from the respondent/plaintiff with respect to dishonour of the cheques and seeking payment of the amounts.

(iii) Appellant/defendant admitted to maintaining of books of accounts but he did not produce such books of accounts and therefore adverse presumption was to be raised against the appellant/defendant with respect to goods having been supplied to the appellant/defendant and payment not having been made with respect to such goods supplied.

12. The second appeal under Section 100 CPC is entertained only if there is a substantial question of law. This is all the more so when there are concurrent judgments of both the courts below against the appellant/defendant. Issues of appreciation of evidence cannot be a matter of substantial question of law unless the findings of the courts below are grossly perverse or grossly illegal. Once evidence is led by both the parties, and such evidence is appreciated, and the courts below have come to a conclusion on the basis of preponderance of probability, such findings cannot be disturbed because

appreciation of evidence does not result in raising of a substantial question of law.

13. Learned counsel for the appellant/defendant with reference to an ‘admission’ of PW1 in his cross-examination sought to argue the fact that the bill number 294 at serial numbers 8 as contained in paragraph 2 of the plaint is a duplication of the bill number 296 at serial number 9, however, it is seen that the courts below have referred to the fact that the witness PW1 not remembering as to goods not being supplied under bill number 294 cannot be equalled to an admission of non-supply of goods under bill number 294, inasmuch as, the bill number 294 was of July, 2006 and the cross-examination of this witness was conducted after a long gap of seven years later in the year 2013. In any case, the entire issue would have been sorted out if the appellant/defendant would have filed his books of accounts showing the complete details of transactions with respect to receipt of goods and payments under different dates, if the payments were made, but the appellant/defendant failed to do so.

14. Learned counsel for the appellant/defendant next argued that appellant/defendant has paid the complete due amount and for which attention of this Court was invited to various bank drafts stated in the affidavit by way of evidence filed by the appellant/defendant, but it is seen that admittedly none of

these bank drafts were got proved by either filing the statement of account from the bank or by summoning the bank to prove these bank drafts having been encashed in the account of the respondent/plaintiff or filing of the books of accounts maintained by the appellant/defendant himself. I fail to understand as to if really the demand drafts stated in the affidavit by way of evidence filed by the appellant/defendant would be for clearing of the amount due with respect to the bills in the suit, then why the appellant/defendant failed to get proved the drafts/bank statement or to file his books of accounts. Obviously, this is because there would have been various other transactions between the parties for these demand drafts having been paid to the respondent/plaintiff. I do not agree with the argument urged on behalf of the appellant/defendant that 'not remembering' with respect to receiving a bank draft by PW1 is equal to payment being made by the appellant/defendant to the respondent/plaintiff under the bank drafts.

15. There is therefore no merit in this Regular Second Appeal. No substantial question of law arises. The present second appeal and the pending applications are accordingly dismissed.

OCTOBER 17, 2016

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VALMIKI J. MEHTA, J