* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **RFA No. 605/2017 & CM Nos.23774-75/2017**

% **11th July, 2017**

KHEM SINGH ..... Appellant

Through: Ms.Padma Priya, Adv. Appellant in person.

versus

DINESH BHATIA ..... Respondent

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This regular first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed against the impugned judgment of the trial court dated 18.2.2017 which has decreed the suit for recovery of Rs.4 lacs with interest at 12% per annum. The suit was filed for recovery of money on account of loan having been granted by the respondent/plaintiff to the appellant/defendant and which loan was secured by a cheque. Since the loan was not repaid and the cheque was dishonored on presentation, the subject suit came to be filed.

2. The facts of the case are that the respondent/plaintiff gave two loans in cash of Rs. 2 lacs each to the appellant/defendant on

15.3.2012 and 30.3.2012. The appellant/defendant in the month of January 2013 issued a post dated cheque of Rs. 4 lacs bearing no.048993 dated 1.4.2013 drawn on ICICI Bank, Gurgaon, for discharging his liability but this cheque was dishonored and returned with the remarks *"insufficient funds"*. Respondent/plaintiff after serving a legal notice dated 13.6.2013, and which failed to yield desired result, filed the subject suit.

3. Appellant/defendant filed the written statement and contended that the appellant/defendant did not give the cheque to the respondent/plaintiff but the subject cheque was given to one Sh. Rakesh Arora with whom the appellant/defendant was having various disputes. It is pleaded that the cheque was given to Sh. Rakesh Arora as security because Sh. Rakesh Arora stated that he would secure some loan from some financial institution for the appellant/defendant and his family members. It is stated that when the appellant/defendant received a legal notice he replied to the same that the cheque in question was not given to the respondent/plaintiff but given to Sh. Rakesh Arora. It was accordingly prayed that the suit be dismissed.

4. Trial court after completion of pleadings framed the following issues:-

> *"1) Whether there existed privity of contract between the parties to the suit? OPP*
>
> *2) Whether the plaintiff is entitled for recovery of sum claimed from defendant? OPP*
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> *3) Whether the plaintiff is entitled to any interest? If so, at what rate and for which period?OPP*
>
> *4) Relief."*

5. Evidence was led by both the parties and the aspects with respect to leading of evidence by the parties are referred to in paras 5 and 6 of the impugned judgment and these paras read as under:-

> "5. In evidence, plaintiff examined himself as PW-1 vide affidavit Ex. PW-1/1. PW-1 relied upon documents i.e., (i) cheque bearing no. 048993, dated 01.04.2013, drawn on ICICI Bank, Gurgaon Branch exhibited as Ex.PW-1/A; (ii) cheque returning memo dated 03.06.2013 exhibited as Ex.PW-1/B; (iii) legal demand notice exhibited as Ex. PW-1/C; (iv) courier receipt exhibited as Ex PW-1/D; and (v) proof of delivery exhibited as Ex PW-1/E. PW-1 was cross-examined.
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> 6. Defendant examined himself as DW-1 vide affidavit Ex DW-1/A. DW-1 relied upon documents i.e., (i) legal notice dated 03.06.2013 and postal receipts exhibited as Ex.DW-1/1 and Ex. DW-1/2; (ii) reply dated 06.07.2013 of Sh. Rakesh Arora exhibited as Ex DW-1/3; (iii) complaint dated 03.06.2013, filed against Sh. Rakesh Arora and its postal receipt exhibited as Ex DW-1/4 and Ex DW-1/5; (v) reply dated 26.06.2013 and its postal receipts exhibited as Ex DW-1/6 to DW-1/9; (vi) response of Sh. Rakesh Arora, dated 06.07.2013 and its envelope exhibited as Ex DW-1/10 and Ex DW-1/11. DW-1 was cross-examined."

6. The main issue was that whether the appellant/defendant had taken a loan from the respondent/plaintiff and given the subject cheque to the respondent/plaintiff or whether the subject cheque was given by the appellant/defendant to one Sh. Rakesh Arora. This aspect is discussed and dealt with correctly by the court below in paras 10 to

13 of the impugned judgment, and these paras, which this Court adopts, read as under:-

> "10. In Ex.DW-1/A in Para 9, the defendant had *inter-alia* asserted that:-
> ***"the writing of the deponent (defendant) on the said cheque, in the shape of signatures, is available on the said cheque, which is already Ex.PW-1/A at point 'A' but the column of drawee, date amount in words and figures, were blank, when the said cheque was took away by said Sh. Rakesh Arora in the manner as mentioned hereinabove."***
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> Earlier, in notices Ex.DW-1/1 and complaint Ex.DW-1/3, it was the stand of defendant that defendant had given to said Sh. Rakesh Arora cheque Ex.PW-1/A having blanks at the columns of Rupees in writing and figure, where the figure of the intended drawing amount is used to be mentioned. Though in the affidavit Ex.DW-1/A, the defendant admitted his signatures on the cheque Ex.PW-1/A but when DW-1 was cross-examined by plaintiff's Counsel and the cheque Ex.PW-1/A was put before DW-1, then defendant/DW-1 point blank denied signatures at portions then marked as X and Y on cheque Ex.PW-1/A to be not belonging to him. DW-1 further elicited that before dishonor of cheque Ex.PW1/A, he did not report the matter to police nor filed complaint before any authority. When police did not register any First Information Report on complaint of DW-1, DW-1 did not file any complaint case before Magisterial Court against plaintiff or Sh. Rakesh Arora for misuse of Cheques Ex.PW-1/A. DW-1 has testified the fact of his signatures on cheques Ex.PW-1/A in contradiction, as elicited above. Even, DW-1 did not report the matter to police before dishonor of the cheque nor did he file any complaint case against said Sh. Rakesh Arora for any misuse of cheque Ex. PW-1/A. Written statement of defendant is bereft of material facts as to on which date, month or year and at what place the defendant ever entrusted the cheques including cheque Ex.PW-1/A to said Sh. Rakesh Arora and to all those facts and their complete details as to how defendant was induced by said Sh. Rakesh Arora to deliver those cheques including Ex.PW-1/A.
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> 11. It is own assertion of the defendant/DW-1 that he had been dragged into litigation by said Sh. Rakesh Arora but neither defendant/DW-1 has pleaded the complete particulars of said litigation(s) nor proved the same. The precedents relied upon by defendant, detailed in the earlier part of the judgment, are of raising of presumption of adverse inference for non-production of relevant documents/evidence by a party in terms of illustration (g) of Section 114 of Evidence Act. In the fact of the matter, it is the defendant/DW-1, who did not plead nor proved any other litigation with regard to the alleged misuse of issued cheques purportedly for security for availing loan from financial institution, by said Sh. Rakesh Arora. Fact situation impels me to draw adverse inference against the defendant in the fact of the matter accordingly. Relied upon precedents are no help to defendant for carving out adverse inference against the plaintiff for non-production of the account books and Income Tax Returns as in his deposition in cross-examination PW-1 himself stated of having not shown the loan of Rs.4 Lakhs given by him to defendant in his Income Tax Return. PW-1

elicited that he had sold one property from where he had received the money and out of that he had paid Rs.4 Lakhs as loan to defendant. He has further elicited the description of said sold property to be :-

"**B-581, Ganesh Nagar-II, Shakarpur, Delhi-92.**"

12. Dishonour memo Ex.PW-1/B embodies the reason of dishonor as "***Insufficiency of funds***" and not any difference of signatures or signatures on cheques Ex.PW-1/A to be not of the account holder. No law prescribes that the writing in the body of the cheque is necessarily to be the drawer of said cheque. In the fact of the matter, from the foregoing discussions, the defendant has failed to prove that he had delivered cheque Ex.PW-1/A to said Sh. Rakesh Arora for security for availing loan from financial institution or that it was misused by said Sh. Rakesh Arora and/or given to plaintiff as alleged by defendant/DW-1. Cheques Ex.PW-1/A bears the signatures of defendant. Presumption in favour of holder under Section 139 of Negotiable Instrument Act, 1881, (in short NI Act), impels me to presume that the holder of the cheque i.e, the plaintiff received the cheque of the nature referred to in Section 138 of NI Act for the discharge, in whole or in part, of any debt or other liability of defendant/DW-1. Such rebuttable presumption in favour of plaintiff/PW-1 has not been rebutted by the defendant/DW-1 by adducing relevant evidence. Mere no mention of loan in Income Tax liability towards plaintiff would not entitle defendant to wriggle out from his liability towards plaintiff for payment to aforesaid loan. In fact, from the appreciation of the testimony of defendant/DW-1, as aforesaid, it is clear that defendant/DW-1 is not a reliable witness as in his version in affidavit Ex.DW-1/A is not a reliable witness as in his version in affidavit Ex.DW-1/A he asserted of having signed the cheques Ex.PW-1/A but in cross-examination had altogether denied the signatures at Point –X and Y on Ex.PW-1/A to be of him.

13. By preponderance of probabilities, the plaintiff has been able to prove of having advanced the friendly loan, as alleged to defendant and later having received the cheque Ex.PW-1/A in discharge of his liability, on presentation of which it was dishonored. Accordingly, there existed privity of contract between the parties to the suit. Plaintiff is entitled for the recovery of sum of Rs.4 Lakhs from defendant. Issues no-1 and 2 are decided in favour of plaintiff and against the defendant."

(underlining added)

7. A civil case is decided on preponderance and balance of probabilities. After both the parties complete their pleadings and lead evidence, the entire cases of the respective parties are thereafter put in a scale, and it is decided in whose favour the scale is tilted, i.e the civil suit is decided by preponderance and balance of probabilities. In the

present case it is seen that the cheque admittedly bears the signatures of the appellant/defendant. Further, the court below rightly notes that if the case of the appellant/defendant was that the cheque was given to Sh. Rakesh Arora with whom there were various litigations, the appellant/defendant had to prove the same, but the appellant/defendant led no evidence whatsoever with respect to the alleged litigations between the appellant/defendant and Sh. Rakesh Arora.

8. I would like to add that once a cheque is dishonored, a liability arises as a cheque has to be presumed to have been given for consideration. Also, in terms of Section 114 of the Indian Evidence Act, 1872 illustration (i) if a document creating an obligation is in the hands of the obligor, the obligation stands discharged and meaning thereby the opposite is also equally true that if the instrument, i.e banking instrument in this case, is not in the hands of the appellant/defendant, it means that the banking instrument was with the respondent/plaintiff for discharge of the liability of the appellant/defendant. I would also like to add another reason for disbelieving the case of the appellant/defendant because this story is not believable that he gave the cheque to Sh. Rakesh Kumar who had promised to get loans for the appellant/defendant and his family from

financial institutions as why would a cheque be required for taking loans from a financial institution.

9. Learned counsel for the appellant/defendant contended that the court below has granted a higher rate of interest of 12% per annum, and the court ought not to have granted interest at 12% per annum, however, even this argument is misconceived because in Delhi the Usurious Loans Act, 1918 has been amended by the Punjab Relief of Indebtness Act, 1934 and as per the provisions of this Act with respect to any unsecured loans the creditor is entitled to interest at 12½ % per annum. Therefore, I do not find any reason to interfere with the impugned judgment granting interest at 12% per annum.

10. Dismissed.

JULY 11, 2017/ ib **VALMIKI J. MEHTA, J**