

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.453 OF 2015
WITH
CIVIL APPLICATION NO.1684 OF 2014

Santoshmal Tarachand Kothari Appellant-Org. Defendant
V/s.
Mrunal Vitthal Wable Respondent-Org. Plaintiff

ALONG WITH
SECOND APPEAL NO.278 OF 2017

Mrunal Vitthal Wable Appellant-Org. Plaintiff
V/s.
Santoshmal Tarachand Kothari Respondent-Org. Defendant

Mr. Abhijit M. Adagule for the Appellant in SA/453/2015 and for the Respondent in SA/278/2017.

Mr. Kalpesh U. Patil for the Respondent in SA/453/2015 and for the Appellant in SA/278/2017.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 12TH JUNE, 2018.

P.C. :

1. Heard learned counsel for both the parties.
2. These two cross Appeals have been filed against the 'Judgment and Order' dated 11th March 2014 passed by the Ad-Hoc District Judge-2, Pune, in Civil Appeal No.32 of 2013. The said Civil Appeal was preferred by the Original Plaintiff, challenging the 'Judgment and Decree' passed by the Joint Civil Judge, Senior Division, Pune, on 30th October 2012 in

Special Civil Suit No.643 of 2010, which was filed by the Plaintiff for recovery of the amount of Rs.4,95,000/- with interest thereon @ 12% p.a. from the date of issuance of the cheques till the institution of the Suit, totally for the amount of Rs.6,62,298/-, with further interest @ 12% p.a. from the date of institution of the Suit till realization of the amount.

3. It was the case of the Plaintiff that her husband was working as 'Assistant Engineer' in the Irrigation Department of Government of Maharashtra. When he was posted at Shirur, he was acquainted with the Defendant, who is the 'Civil Contractor' and works with the Irrigation Department. Defendant used to visit the residence of the Plaintiff along with her husband. Sometime in the month of May, 2006, the Defendant requested the Plaintiff to accommodate him with a hand-loan, as he was in financial crunch. The Plaintiff advanced an amount of Rs.4,95,000/- to the Defendant. Towards repayment thereof, Defendant issued three cheques; the first cheque was dated 30th October 2006 for Rs.2,25,000/-; the second Cheque was dated 23rd January 2007 for Rs.2,00,000/-; and the third cheque was dated 3rd March 2007 for Rs.70,000/-. However, as those cheques came to be dishonoured, the Plaintiff has filed the Suit for recovery of the said amount.

4. The said Suit was resisted by the Defendant, denying all the allegations made therein, including that he has taken the hand-loan of Rs.4,95,000/- from the Plaintiff and the cheques were issued towards

repayment of the said loan. It was the contention of the Defendant that, in the year 2004, he came in contact with one Vithal Shelke, who is brother-in-law of Plaintiff's husband. Son of Vithal Shelke, by name Amit, was in need of work on contract basis. The Defendant assigned the work to Amit and it was agreed between the Defendant and Amit that Defendant will make payment towards the work in stages after Amit completes the work. By way of security, Defendant had handed over three cheques to Vithal Shelke. When Amit stopped the work, Defendant called upon Vithal Shelke to return those three cheques, but Vithal Shelke avoided to do so on one pretext or the other and thereafter, by misusing those cheques, the present Suit and Criminal Complaint under Section 138 of the Negotiable Instruments Act, 1881, was filed. It was contended that the said Criminal Case is already decided and the Defendant is acquitted therein.

5. On these respective pleadings, the Trial Court framed the requisite issues. In support of her case, Plaintiff examined herself and her husband Vithal Wable. As against it, the Defendant examined himself alone.

6. In the light of this evidence on record, the Trial Court was pleased to hold that, there was no evidence proving on record that the Plaintiff was in a position to pay the amount of Rs.4,95,000/- as 'hand-loan' to the Defendant. It was further held that, the documentary evidence does not

show that she has shown in her Income Tax Return that she has given this amount to the Defendant. Conversely, the Trial Court found that, the evidence of the Defendant proves that these cheques were issued as security towards the work, which was to be done by Amit Shelke and those cheques were misused. In this respect, the Trial Court also found that the Plaintiff has not produced any evidence to show that, in her Bank Account, she was having the suit amount of Rs.4,95,000/- during the said period. As a result, the Trial Court was pleased to dismiss the Suit in its entirety.

7. The Plaintiff has challenged this 'Judgment' in the Appeal. The first Appellate Court was, however, pleased to rely upon the presumption laid down in Section 118(a) of the Negotiable Instruments Act, 1881, and, by relying thereupon, held that, it was for the Defendant to rebut the presumption. The Defendant has, however, not done so; neither he has replied the 'Demand Notice', nor he has examined Amit Shelke as his witness. Therefore, it was held that, the presumption has remained unrebutted on record. Hence, the Trial Court has committed an error in dismissing the Suit. The first Appellate Court has, therefore, decreed the Suit and directed the Defendant to pay the amount of Rs.4,95,000/- to the Plaintiff, along with interest thereon @ 7% p.a. from the date of institution of the Suit till realization.

8. Against this 'Judgment' of the first Appellant Court, the Plaintiff

has filed the Second Appeal bearing No.453 of 2015, only on the count that, the first Appellate Court has not awarded the interest from the date of issuance of the cheques, but only from the date of institution of the Suit and, therefore, to that extent, the interference is warranted in the impugned Judgment.

9. Whereas, Defendant has challenged this 'Judgment' of the first Appellate Court on the count that, merely on the basis of the presumption in law, which, from the facts on record, stands rebutted, as the Appellate Court has decreed the Suit, the said 'Judgment' is liable to be set aside.

10. As it is, there is no substantial question of law involved in the present Appeal, because everything depends entirely on the appreciation of evidence on record. The Trial Court has, while dismissing the Suit, not taken into consideration the presumption, which prevails in respect of the 'negotiable instrument', like the Cheque, and which is laid down in Section 118(a) of the Negotiable Instruments Act, 1881, and which clearly provides that,

“Until the contrary is proved, it shall be presumed that every 'negotiable instrument' was made or drawn for consideration and that every such 'instrument', when it has been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration.”

11. It may be true that, this presumption is rebutted, though the word used in the Section is "*shall*", but then, the rebuttal evidence has to be strong and convincing, as it is a presumption in law. Here in the case, though the Defendant says that the cheques were issued as security for the work, which was to be done by Amit Shelke, this specific case is put up for the first time in the written statement, no reply was given to the 'Demand Notice' issued by the Plaintiff and no explanation is offered as to why the Defendant kept quiet and not raised this contention at the very first opportunity, which was given to him. Moreover, though the Defendant has contended that those cheques were issued for the work to be done by Amit Shelke, Amit Shelke or his father Vithal Shelke were not examined as witnesses. Conversely, it is admitted by the Defendant in his cross-examination that, after August, 2007, Amit Shelke has stopped to do the work. Despite that, Defendant had not issued any letter to Amit Shelke till the date, for return of the said cheques. He has also not called upon his father Vithal Shelke to return those cheques, which were kept with him. Moreover, if Amit Shelke has stopped doing the work after August, 2007 itself, then there is no reason as to why some of those cheques were issued subsequent thereto. Therefore, it has to be held that, there was sufficient and cogent evidence led by the Defendant to rebut the presumption laid down in Section 118(a) of the Negotiable Instruments Act, 1881, to prove that the cheques were issued without any consideration.

12. In view of this presumption, it was not at all necessary for the Plaintiff to prove that these cheques were issued for consideration towards re-payment of the hand-loan. The entire burden was on the Defendant to rebut it and Defendant has not adduced any convincing and cogent evidence to prove that those cheques were issued, not for repayment of the hand-loan, i.e. for consideration, but as a security for the work to be done by Amit Shelke.

13. The Trial Court has, therefore, committed an error in dismissing the Suit, which error is corrected by the Appellate Court on proper appreciation of the evidence on record. Therefore, on this score, there is no substantial question of law being involved, the Appeal cannot be admitted. Therefore, the Appeal filed by the Defendant, being Second Appeal No.453 of 2015 is devoid of merits and hence, stands dismissed.

14. As regards the counter Appeal filed by the Plaintiff, being Second Appeal No.278 of 2017, the Plaintiff is claiming the interest from the date of issuance of the cheques and at the rate of 12% p.a. It may be true that, the first Appellate Court was justified in reducing the rate of interest from 12% to 7%, but so far as the direction of the first Appellate Court for payment of interest from the date of institution of the Suit, in my considered opinion, in the absence of any discussion to that effect in the entire Judgment, the first Appellate Court was not legally correct in

directing the payment of interest @ 7% p.a. from the date of institution of the Suit. Therefore, to that extent, the Appeal preferred by the Plaintiff is allowed and the order of the Appellate Court is modified to the extent that the payment of interest @ 7% p.a. would be from the date of issuance of the cheques.

15. At this stage, learned counsel for the Plaintiff submits that the amount of Rs.2,00,000/-, which was deposited by the Defendant in the Trial Court, as per the order passed by this Court, be now paid to her, with interest accrued thereon. The necessary direction is issued to that effect and ordered accordingly.

16. At this stage, learned counsel for the Defendant seeks extension of the stay granted in this Appeal for withdrawal of the said amount and also for execution of the 'Decree'. In my considered opinion, as there is no substantial question of law involved and the Appeal is dismissed, the prayer for extension of the stay cannot be entertained and hence, is rejected.

17. In view of the dismissal of Second Appeal No.453 of 2015, Civil Application No.1684 of 2014 pending in the said Appeal, does not survive and the same is disposed off as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]