

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

% **Date of decision: 12th September, 2018.**

+ **RSA 175/2017 & CM No.24021/2017 (for stay)**

RANBIR SINGH **Appellant**

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

Versus

SAJANTI RAM **Respondent**

Through: Mr. C.M. Sharma, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment [dated 18th February, 2017 in RCA No.196/2016 (Unique ID No.02402C0034422016) of the Court of Additional District Judge, Shahdara] allowing the First Appeal filed by the respondent / plaintiff against the judgment and decree [dated 25th April, 2016 in Civil Suit No.275/2010 (Unique ID No.02403C0221442010) of the Court of Additional Civil Judge, Shahdara] of dismissal of suit filed by the respondent / plaintiff against the appellant / defendant for recovery of Rs.1,25,000/- along with interest and costs. Resultantly, vide the impugned judgment, a decree has been passed in favour of the respondent / plaintiff and against the appellant / defendant for recovery of Rs.1,25,000/- with interest.

2. The appeal came up first before this Court on 12th July, 2017, when, without expressing satisfaction that the appeal entails a substantial question of law and without framing a substantial question of law, notice of the appeal

was issued and subject to the appellant depositing 50% of the decretal amount in this Court, execution stayed. Vide subsequent order dated 3rd November, 2017, the trial court record was requisitioned.

3. The counsel for the appellant / defendant and the counsel for the respondent / plaintiff have been heard and the Suit Court record requisitioned perused.

4. On enquiry from the counsel for the appellant / defendant as to what is the substantial question of law that arises in this appeal, the counsel for the appellant / defendant states that the First Appellate Court has allowed the appeal of the respondent / plaintiff and passed a decree in favour of the respondent / plaintiff and against the appellant / defendant referring to, in para 13 of the impugned judgment, Section 139 of the Negotiable Instruments Act, 1881 (NI Act) and which is but a presumption of the cheque having been given in discharge of antecedent liability. It is argued that on the basis of the said presumption alone, the suit of the respondent / plaintiff against the appellant / defendant for recovery of money on the basis of a cheque for the suit amount, could not have been decreed.

5. I have enquired from the counsel for the appellant / defendant, what evidence did the appellant / defendant lead to rebut the presumption.

6. The counsel for the appellant / defendant states (i) that the respondent / plaintiff instituted the suit pleading having advanced a loan of Rs.1,25,000/- for a period of six months to the appellant / defendant and further pleading that the appellant / defendant in repayment of the loan had issued a post dated cheque for Rs.1,25,000/- and which cheque was

dishonoured; (ii) that the appellant / defendant contested the suit by filing a written statement denying any financial transaction with the respondent / plaintiff and pleading that one Chhote Lal, who is a relative of the respondent / plaintiff, had taken the said blank cheque from the appellant / defendant as a security and the said Chhote Lal had subsequently informed the appellant / defendant that he had lost the said cheque; (iii) that the appellant / defendant was not aware as to how the said cheque fell into the hands of respondent / plaintiff; (iv) that in the course of the evidence, it was admitted by the respondent / plaintiff that Chhote Lal is the brother of the brother of the wife of the respondent / plaintiff; (v) that the respondent / plaintiff claimed that he was possessed of the sum of Rs.1,25,000/- loaned to the appellant / defendant, owing to having collected a “Committee” operated by one Om Prakash; (vi) that the respondent / plaintiff further admitted that he had not reflected the said money in his income tax returns; (vii) that the respondent / plaintiff, appellant / defendant and Chhote Lal aforesaid are all “*beldars*” i.e. masons and in fact the appellant / defendant had given the aforesaid blank signed cheque to Chhote Lal as security for a loan of Rs.8,000/- taken by the appellant / defendant from the said Chhote Lal and which loan has been repaid; (viii) that the appellant / defendant examined Om Prakash from whom the respondent / plaintiff claimed to have picked up the ‘Committee’ but the said Om Prakash appearing as DW3 deposed as under:

**“DW3 Statement of Sh. Om Prakash, S/o Sh. Ratan Lal, R/o B-4/380,
Nand Nagri, Delhi.**

ON SA

I am summon witness in the present case. I do not run committee. I am working in MCD as Beldar. I do not know anything about present case. It is correct that I have been summoned in the present case.

XXXXXX by Sh. C.M. Sharma, counsel for the plaintiff.

I do not know Ranvir Singh (defendant). I never meet with Ranvir Singh even I cannot identify Ranvir Singh on today. It is wrong to suggest that I am having friendly relation with Ranbir Singh due to which I am appearing as witness on today.

RO&AC

Sd/-

(Bhawani Sharma)

ACJ/CCJ/ARC (Shahdara), KKD, Delhi

22.11.2014”

and, (ix) that the respondent / plaintiff, in cross-examination of the said Om Prakash, did not even suggest that the amount of which loan was claimed to have been given by the respondent / plaintiff, was received by the respondent / plaintiff in a ‘committee’ operated by Chhote Lal.

7. I have enquired from the counsel for the appellant / defendant, what is the evidence of loan of Rs.8,000/- claimed to have been taken by appellant/defendant from Chhote Lal and whether the appellant / defendant examined Chhote Lal as his witness.

8. The counsel for the appellant / defendant states that though Chhote Lal was not examined and there is no document with respect to the said loan but the appellant / defendant in his evidence has deposed so.

9. I have further enquired from the counsel for the appellant / defendant, whether the appellant / defendant proved the date on which he claims he was informed by Chhote Lal of loss of cheque and whether the appellant / defendant examined any witness from his bank for proving having stopped payment of the said cheque and whether the appellant / defendant lodged any other complaint with any other authority of loss of the cheque.

10. The answer to all the questions is in the negative.

11. The counsel for the appellant / defendant however contends that it was for the respondent / plaintiff to establish before the Court the antecedent debt in discharge whereof the cheque on which the suit was filed was issued and the respondent / plaintiff has utterly failed to, by evidence, establish the antecedent debt. It is further argued that it emerges that the transaction which the respondent / plaintiff claims, was not disclosed to income tax authorities. Reliance is placed on the dicta of a Single Judge of the Bombay High Court in *Sanjay Mishra Vs. Kanishka Kapoor @ Nikki* 2009 SCC OnLine Bom 290 where it was held that liability to repay unaccounted cash is not a legally enforceable liability within the meaning of explanation to Section 138 of the NI Act and reliance therein was placed on *Dalmia Cement (Bharat) Ltd. Vs. Galaxy Traders & Agencies Ltd.* (2001) 6 SCC 463.

12. I have enquired from the counsel for the appellant / defendant, whether the appellant / defendant is an income tax assessee and had shown the transaction claimed with Chhote Lal in his income tax return.

13. The counsel for the appellant / defendant states that appellant / defendant is not an income tax assessee and thus the question of appellant / defendant showing the transaction with Chhote Lal in the income tax returns did not arise. It is however stated that the respondent / plaintiff admitted being an income tax assessee.

14. I have further enquired from the counsel for the appellant / defendant, under which provision of the income tax laws, such loan transactions are required to be reflected in the income tax returns.

15. The counsel for the appellant / defendant draws attention to the judgment aforesaid of the Bombay High Court where reference is made to Section 271D of the Income Tax Act, 1961.

16. The Bombay High Court in the judgment aforesaid in a Revision Petition against dismissal of a complaint under Section 138 of the NI Act was concerned with a loan of Rs.15 lacs. In fact, the counsel for the appellant / defendant is not aware whether any further challenge was made to the judgment aforesaid of the Bombay High Court or whether the same has been relied upon in any other judgments.

17. The High Court of Bombay in *Sanjay Mishra* supra relied on *Krishna Janardhan Bhat Vs. Dattatraya G. Hegde* (2008) 4 SCC 54 laying down that “Existence of legally recoverable debt is not a matter of presumption

under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability”. The High Court of Bombay, in view of the said judgment of the Supreme Court, reasoned that even if presumption is not rebutted, in order to attract Section 138 of the Negotiable Instruments Act, the debt has to be a “legally enforceable debt,” as is clear from the explanation to Section 138 which provides that for the purposes of the said Section, the debt or other liability means a legally enforceable debt or other liability.

18. ***Krishna Janardhan Bhat*** supra, relying whereon the High Court of Bombay in ***Sanjay Mishra*** reasoned as aforesaid, was a judgment of two Hon’ble Judges of the Supreme Court. Subsequent judgment of three Hon’ble Judges of the Supreme Court, in ***Rangappa Vs. Sri Mohan*** (2010) 11 SCC 441 held that the observations in ***Krishna Janardhan Bhat*** to the effect that the “existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act” and that “it merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability” are in conflict with the statutory provisions as well as an established line of precedents of the Supreme Court. Referring to a plethora of past judgments, it was held that the presumption mandated by Section 139 does indeed include the existence of a legally enforceable debt or liability and to that extent the observations to the contrary in ***Krishna Janardhan Bhat*** were not correct. It was reiterated that “there is an initial presumption which favours the complainant” and it was reasoned that (i) Section 139 is an example of a reverse onus clause that had been included in furtherance of the legislative objective of

improving the credibility of negotiable instruments; (ii) while Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation; (iii) that the test of proportionality should guide the construction and interpretation of reverse onus clauses; (iv) when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of preponderance of probabilities; and, (v) therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail.

19. Thus, the edifice of *Krishna Janardhan Bhat*, on which *Sanjay Mishra* was premised, is no longer good law and for this reason alone *Sanjay Mishra* supra cannot today be relied on as good law.

20. Not only so, a subsequent dicta of the Bombay High Court in *Krishna P. Morajkar Vs. Joe Ferrao* 2013 SCC OnLine Bom 862 disagreed with *Sanjay Mishra* supra to the extent laying down that liability to repay an unaccounted cash amount admittedly not disclosed in the Income Tax Return cannot be a legally recoverable liability, reasoning (i) that there is no prohibition in the Income Tax Act or in any other law on recovery of amounts not disclosed in Income Tax Returns; (ii) the entire scheme of the Income Tax Act is for ensuring that all amounts are accounted for; (iii) if some amounts are not accounted for, the person would be visited with the penalty or at times even prosecution under the Income Tax Act, but it does not mean that the borrower can refuse to pay the amount which he has borrowed, simply because there is some infraction of the provisions of the

Income Tax Act; (iv) infraction of provisions of Income Tax Act would be a matter between the Revenue and the defaulter and advantage thereof cannot be taken by the borrower; (v) to say, that an amount not disclosed in the Income Tax Returns becomes irrecoverable, would itself defeat the provisions of Section 138 of the Negotiable Instruments Act; (vi) moreover, the moment a person seeks to recover through a cheque an amount advanced in cash, it gets accounted for in the system and the Revenue Authorities can keep a track of that and if necessary tax the person; and, (vii) to brand an amount which is not shown in Income Tax Act as unaccounted money would be too farfetched and amounts to reading an additional requirement in Section 138 of the Negotiable Instruments Act, and legislating that such amounts becomes irrecoverable.

21. **Krishna P. Morajkar** supra was also followed by the High Court of Madras in **A. Arun Kumar Vs. R. Moorthy** 2017 SCC OnLine Mad 1353.

22. Reliance by the counsel for the appellant on **Sanjay Mishra** supra, without checking the aforesaid developments in law, is thus faulty and the counsels, before citing a judgment in the Court, ought to take care.

23. I respectfully concur with the dicta of the Bombay High Court in **Krishna P. Morajkar** supra followed in **A. Arun Kumar** supra and I am unable to agree with **Sanjay Mishra** supra.

24. It cannot also be lost sight of, that this Court is exercising jurisdiction under Section 100 of the CPC and which jurisdiction was considerably curtailed vide the amendment of the CPC with effect from 1976. As recently held by the Supreme Court in **Surat Singh Vs. Siri Bhagwan** (2018) 4 SCC

562 and *Vijay Arjun Bhagat Vs. Nana Laxman Tapkire* 2018 SCC OnLine SC 518 even a notice of Second Appeal under Section 100 CPC cannot be issued without framing a substantial question of law.

25. “Substantial question of law” is not a word/phrase of art and has been interpreted in various dicta of the Supreme Court. It has been held in *Veerayee Ammal Vs. Seenii Ammal* (2002) 1 SCC 134 that merely because on appreciation of evidence another view is also possible, would not clothe the High Court to assume jurisdiction on issue of fact framed by the Trial Court by terming the question as a substantial question of law. As far back as in *Sir Chunilal V. Mehta Vs. Century Spinning and Manufacturing Co. Ltd.* AIR 1962 SC 1314 reiterated in *Kashmir Singh Vs. Harnam Singh* (2008) 12 SCC 796, it was held that the proper test for determining whether a question of law raised in a case is substantial, is whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense it is not finally settled or is not far from difficulty or calls for discussion of alternative views; if the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles, it would not be a substantial question of law. It was further held that it is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last Court of fact being the first Appellate Court. Mere appreciation of facts, documentary evidence was held to be not raising a question of law. Even in *Santosh Hazari Vs. Purushottam Tiwari* (2001) 3 SCC 179 it was held:

“To be “substantial” a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned.”

26. Mention may also be made of ***Hero Vinoth Vs. Sheshammal*** (2006) 5 SCC 545 holding as under:

“24. The principles relating to Section 100 CPC, relevant for this case, may be summarised thus:-

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some

of the well-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence;(ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to “decision based on no evidence”, it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

27. Supreme Court, in ***Damodar Lal Vs. Sohan Devi*** (2016) 3 SCC 78, referring to ***Kulwant Kaur Vs. Gurdial Singh Mann*** (2001) 4 SCC 262, ***Gurvachan Kaur Vs. Salikram*** (2010) 15 SCC 530 and ***S.R. Tewari Vs. Union of India*** (2013) 6 SCC 602 held, (a) that the First Appellate Court under Section 96 CPC is the last Court of facts; (b) the High Court in Second Appeal under Section 100 CPC cannot interfere with findings of fact recorded by the First Appellate Court under Section 96 CPC; (c) the findings of fact of First Appellate Court can be challenged in Second Appeal on the ground that the said findings are based on no evidence or are perverse; (d) even if the finding of fact is wrong, that by itself will not constitute a question of law; the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjunctures and surmises; (e) if to a reasonable man, the conclusion on the facts in evidence made by the Courts below is possible, there is no perversity; (f) inadequacy of evidence or a different reading of evidence is not perversity; (g) Code of Civil Procedure (Amendment) Act, 1976 introduced a definite restriction on the exercise of jurisdiction in a Second Appeal; (h) where it is found that findings stand vitiated on wrong test and on the basis of assumptions and conjunctures and resultantly there is an element of perversity involved therein, will the High

RSA 175/2017 Page 12 of 14

Court be within its jurisdiction to deal with the issue; this is however only in the event such a fact is brought to light explicitly; (i) the findings of fact recorded by Court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant / inadmissible material or if the findings is against the weight of evidence or if the finding so outrageously defies logic as to suffer from vice of irrationality; (j) however if there is some evidence on record which is acceptable and which could be relied upon, the conclusion would not be treated as perverse and the findings will not be interfered with.

28. It thus emerges that if there is even little evidence on the basis of which the last Court of Facts has decided, the Second Appellate Court cannot, by labelling the judgment of the First Appellate Court as perverse, seize jurisdiction over matters of fact.

29. As far as the argument of the counsel for the appellant / defendant with respect to testimony of Om Prakash is concerned, the counsel for the appellant / defendant also admits that running of such committees, though rampant in the society, is prohibited by law. Om Prakash, when summoned as a witness by the appellant / defendant, thus could not be expected to incriminate himself by admitting operating a 'committee' or by admitting that the respondent / plaintiff had at the contemporaneous time of loan received money from the 'committee'. The evidence of Om Prakash thus does not rebut the presumption, even if the test of proportionality laid down in *Rangappa* supra is applied.

30. The First Appellate Court has also rightly reasoned, that (a) the appellant/defendant, in cross-examination of respondent/plaintiff, did not

elicit the parentage or address of Om Prakash; (b) the appellant/defendant, after commencing his evidence, sought permission to file additional list of witnesses naming one Om Prakash and which permission was granted; (c) that from denial of Om Prakash examined, that he was running/operating 'Committee', it was clear that the 'Om Prakash' examined was not the 'Om Prakash' deposed of by respondent/plaintiff; (d) that the appellant/defendant, while seeking permission to file additional list of witnesses had claimed that on making enquiries he had found 'Om Prakash' "who was running committee"; and, (e) however 'Om Prakash' who was examined, denied that he was running 'Committee'. It is thus evident that rejection by First Appellate court, of testimony of Om Prakash examined by appellant/defendant, is not without any reason.

31. I am thus of the view that this Second Appeal does not entail any substantial question of law and has no merit to be heard further.

32. Resultantly, the appeal is dismissed.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 12, 2018

'gsr'/pp..