

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

+ **RFA No.856/2018**

% ***16th October, 2018***

SH. DAYA RAM

..... Appellant

Through: Mr. M.K. Singh, Advocate.

versus

SH. KEHAR SINGH

..... 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. No.43442/2018(exemption)

1. Exemption allowed subject to just exceptions.
C.M. stands disposed of.

RFA No.856/2018 and C.M. No.43441/2018(stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the Judgment of the Trial Court dated 03.07.2018 by which the trial court has decreed the suit for recovery of Rs. 20 lakhs given

by the respondent/plaintiff to the appellant/defendant as a loan, and this loan amount was secured by the appellant/defendant vide cheque no. 013992 dated 05.03.2011, and this cheque was dishonoured resulting in the filing of the subject suit.

3. The facts of the case are that, the respondent/plaintiff filed the subject suit pleading that he gave a loan of Rs. 20 lakhs to the appellant/defendant for construction of the appellant's house as also for the tent business being run by the appellant/defendant. It was further pleaded that the appellant/defendant in part-payment, first, gave a cheque of Rs. 3 lakhs on 28.02.2009 which was dishonoured with the remarks 'Funds Insufficient'. Thereafter, another cheque of Rs. 14 lakhs was given by the appellant/defendant to the respondent/plaintiff on 30.08.2009 and the same was also dishonoured on presentation. Ultimately, the subject cheque of Rs. 20 lakhs was given by the appellant/defendant to the respondent/plaintiff on 05.03.2011, and when the same was deposited with the bank, it was returned with the remarks 'Funds Insufficient'. After serving the Legal Notice dated 22.03.2011, the subject suit was filed for recovery of the loan granted of Rs. 20 lakhs alongwith interest @ 12% per annum.

4. Appellant/Defendant contested the suit and pleaded that he had, in fact, had not given the subject cheque to the respondent/plaintiff (Mr. Kehar Singh), but to one Mr. Vijay Singh, who had agreed to assist the appellant/defendant to purchase of a shop for opening of a tent house business. It was pleaded that the respondent/plaintiff, in connivance with Sh. Vijay Singh, had misused the blank cheque given by the appellant/defendant to Mr. Vijay Singh. The appellant/defendant, however, admitted that he had taken various loans from the respondent/plaintiff prior to 23.12.2008 but stated that all such loans stood repaid. The suit was, therefore, prayed to be dismissed.

5. After the pleadings were complete, the trial court framed issues and parties led evidence, and these aspects are recorded in paras 5 to 7 of the impugned judgment, which read as under:-

“ **ISSUES**

5. On the basis of the pleadings, following issues were settled on 28.07.2014:-

(1) Whether the plaintiff is entitled to recover amount of Rs. 20 lacs as claimed from defendant? OPP.

(2) Whether the cheque no. 013992 dated 02.03.2011 was infact the blank, undated cheque given by the defendant to Vijay Singh? OPD.

(3) If yes to issue no.1, Whether the plaintiff is entitled to interest on the said amount, keeping in view the pecuniary jurisdiction of this court? OPP.

(4) Relief.

Plaintiff Evidence

6. In order to prove its case, plaintiff has examined himself as PW1. He has tendered his evidence by way of affidavit Ex.PW1/1 and relied upon the following documents:-

1. The cheque dated 05.03.2011 as Ex.PW1/A.
2. The return memo dated 07.03.2011 as Ex.PW1/B.
3. The copy of legal notice/demand notice as Ex.PW1/C.
4. The postal receipts as Ex.PW1/D & E.

Defendant Evidence

7. In order to prove its case defendant has examined himself as DW1 and Sh. Ashruddin Khan as DW2. Both these witnesses have tendered their evidence by way of affidavit Ex.DW1/A and DW1/B. DW1 has relied upon following documents:-

1. Copy of complaint dated 23.12.2010 as Mark X.
2. Ex.DW1/ Y.
3. Copy of complaint dated 18.09.2010 as mark A.
4. Complaint dated 11.08.2011 as Mark B.”

6. The trial court has decided the issues, as against the appellant/defendant, by observing that the appellant/defendant admitted his signatures on the cheque. The appellant/defendant did not lodge any police complaint stating that Mr. Vijay Singh was not authorized to retain the cheque and that allegedly, the cheque given by

the appellant/defendant to Mr. Vijay Singh was illegally handed over by Mr. Vijay Singh to the respondent/plaintiff. The trial court also records that in the written statement, as well as in the affidavit by way of evidence filed by the appellant/defendant, it is not stated as to when the appellant/defendant gave the subject cheque to Mr. Vijay Singh for purchase of the property i.e. no date or month or year is mentioned of the alleged handing over of the cheque by the appellant/defendant to Mr. Vijay Singh. The Trial court has also discarded the testimony of DW-2, Mr. Ashruddin Khan, on the ground as there was no plea in the written statement of appellant/defendant that the subject cheque was handed over to the respondent/plaintiff in the presence of Mr. Ashruddin Khan. The trial court has further held that the complaint dated 11.08.2011, made by the appellant/defendant to the police, which was proved as Ex.DW1/2 in the affidavit by way of evidence of the appellant/defendant, was de-exhibited and marked as Mark A. It is pertinent to note that even if this Court takes this police complaint to be a proven document, it seems that this is a convenient police complaint for creating a story of handing over the cheque to Mr. Vijay Singh only after the subject cheque was dishonoured by the bank of

the appellant/defendant on 07.03.2011. Also, it is noted that the cheque has been dishonoured not because of instructions of 'Stop Payment', and which would have been the case if Vijay Singh had illegally retained the cheque, but that the same dishonoured because of 'Funds Insufficient'.

7. The relevant observations of the trial court for rejecting the defence of the appellant/defendant are contained in paras 9.1 to 9.5 of the impugned judgment and these paras read as under:-

“9.1 The onus to prove this issue is upon the defendant. The defence of the defendant is that he has issued a blank said cheque i.e. Ex.PW1/1 cheque in question to one Sh. Vijay Singh as he has promised him to buy a property at cheaper rates. It is further alleged that the cheque has been misused by the plaintiff in connivance with Vijay Singh and has filled the amount of Rs. 20,00,000/- without any basis.

9.2 Defendant in order to prove his case has examined himself as DW-1 and Sh. Ashruddin Khan as DW-2.

9.3 DW-1 during his cross-examination has stated that he has not filed any case against the plaintiff on account of misuser of cheque in question. He further admitted that he has not lodged any case before the court of law against Vijay Singh except one complaint at PS Mangol Puri. He admitted his signatures on cheque in question and that it pertains to his account. He admitted that he has not made Vijay Singh as a witness in his defence. He further admitted that he has not made any written complaint to his bank regarding the stop payment of cheque in question on account of cheque by Vijay Singh.

9.4. DW-1 in his entire affidavit has not stated as to when he has handed over the cheque to Vijay Singh for purchase of the property. No date, month, year has been mentioned when the said cheque was issued and as to why he issued the blank cheque to

Vijay Singh. Though DW-2 in his affidavit Ex.DW2/A has deposed that he knows that the blank cheque signed by defendant has been given to Vijay Singh for purchase of a shop for the tent house business, however, he has not stated specifically on which date, month, year, said cheque was given and why the blank cheque was given instead of it being filled with certain amount. He has not mentioned the number of cheque and its detail in the affidavit and for what purpose the cheque was given. DW-2 admitted that he does not know Vijay Singh and that no writing work was done in his presence. He deposed that he does not know the cheque number. He admitted that he has come to the Court at the instance of Daya Ram. From the testimony of DW-2, it is evident that he is an interested witness who has deposed at the behest of the defendant. In the entire WS or affidavit of DW-1, there is no plea that blank cheque was handed over to Vijay Singh in the presence of Ashruddin, hence, no reliance can be placed upon the testimony of DW-2 Ashruddin.

9.5 Except Mark A, no other document has been filed by the defendant to show that he has taken any action against Vijay Singh for misuser of the cheque. Defendant has not even summoned the original record from PS or filed the original complaint. No evidence has been lead by the defendant to prove that the cheque in question was handed over to Vijay Singh. Accordingly, this issue is decided against the defendant and in favour of the plaintiff.

ISSUES NO.1 AND 3.

(1) Whether the plaintiff is entitled to recover amount of Rs.20 lacs as claimed from defendant? OPP.

(3) If yes to issue no.1, Whether the plaintiff is entitled to interest on the said amount, keeping in view the pecuniary jurisdiction of this court? OPP.

These issues are taken together as they are interconnected. The onus to prove these issues is on plaintiff. The defendant has admitted that he had cordial relations with the plaintiff. Defendant has also admitted that he had taken certain loan from plaintiff in the year 2008. Though defendant has stated that he had repaid the loan, however, no document has been filed by him to prove his defence. On the contrary, the case of the plaintiff is that defendant had taken the loan of Rs. 20,00,000/- from him in the year 2008 which he has not repaid. Further case of the plaintiff is that defendant had issued two cheques of Rs. 3 lacs and 14 lacs and

thereafter, one cheque of Rs. 20 lacs i.e. the cheque in question towards the payment of his liability.”

(Underlining Added)

8. Learned counsel for the appellant/defendant first sought to argue that the cheque could not be looked into because the cheque contained overwriting, however, he conceded that no such plea was taken in the written statement. Even if I accept the oral plea to consider this defence which was not taken, it is seen that the suit is decided after trial i.e. evidence was led by both the parties, and that the suit was for seeking return of a loan secured by a cheque, but the cause of action is not based on the cheque itself but the loan granted is proved by giving of the cheque. Even if there are some alleged interpolations in this cheque, the fact of the matter is that the cheque is admittedly signed by the appellant/defendant, and there is no reason why a blank signed cheque of the appellant/defendant would have been in possession of the respondent/plaintiff, unless the cheque was given as a security for the loan, and this indeed is the case of the respondent/plaintiff.

9. In view of the aforesaid discussion, it is seen that the cheque indubitably bears the signatures of the appellant/defendant.

Further, there was never any police complaint made to the police or to Mr. Vijay Singh or to any other person with respect to the subject cheque being wrongly in the possession of Sh. Vijay Singh or the respondent/plaintiff. Also, the cheque has been dishonoured not because the appellant had stopped payment, which would have happened if Sh. Vijay Singh was wrongly withholding the cheque, but the cheque has been dishonoured on account of insufficient funds.

10. There is no merit in the appeal. Dismissed.

OCTOBER 16, 2018
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VALMIKI J. MEHTA, J