IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.482 OF 2017

Vishwas Shivaji Nyahale,
Age 68 years, Occupation Business,
R/o. 13, Swami Nagar, Nakane,
Tq. Dist. Dhule. **...Appellant**
(Orig.Deft.)

VERSUS

Mahadev Dnyaba Vibhute,
Age 81 years, Occupation Agriculture
and Business, R/o Backside of
Manohar Talkies, Amarnagar,
Dhule. **...Respondent**
(Orig.Plff.)

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Mr. S. P. Brahme and Mr. A. R. Syed, Advocates for appellant.
Mr. S. P. Shah, Advocate for respondent.

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WITH CA/9296/2017 IN SA/482/2017
WITH CA/10382/2019 IN SA/482/2017

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CORAM : SMT.VIBHA KANKANWADI, J.
Date : 19-09-2019.

ORDER :

1. Present appeal has been filed by original defendant challenging the Judgment and decree passed by learned District Judge-5, Dhule in Civil Appeal No.173 of 2012, dated 16-11-2016, thereby the appeal came to be allowed against him and the decree passed in Special Civil Suit No.108 of 2007 by learned Civil Judge, Senior Division, Dhule dated 18-11-2009 was set aside.

2. Heard learned advocate Mr. S. P. Brahme for appellant and

learned advocate Mr. S. P. Shah for respondent. It has been vehemently submitted on behalf of the appellant that, though the learned Trial Court had dismissed the suit filed by the respondent which was for recovery of amount of Rs.5,00,000/- together with interest, yet the learned First Appellate Court on the same set of facts and evidence, has reversed the decree passed by the learned Trial Court. The learned First Appellate Court failed to consider the evidence properly. The original plaintiff had contended that, he had advanced loan of Rs.5,00,000/- to the defendant by way of cash and then it was stated that, the defendant had executed a receipt. In fact, the receipt could not have been exhibited, it was treated as promissory note and it was in fact was on a insufficiently stamped paper. When the plaintiff had allegedly given loan of the unaccounted money it cannot be stated that, it was a “legally enforceable debt or liability”. Learned First Appellate Court discarded the defence that was taken by the defendant that, the impugned cheque was in fact issued by the defendant towards another transaction by which the plaintiff had agreed to sell a plot to the defendant. Learned First Appellate Court ought to have considered that, the said cheque which was issued by the defendant, was towards the said incomplete transaction and it has been misused by the plaintiff. The learned Trial Court had rightly dismissed the suit, however it has been wrongly decreed by the First Appellate Court. Hence, substantial questions of law are arising in this case.

3. Per contra, the learned advocate appearing for the respondents submitted that, since the Trial Court had not considered the evidence properly, appeal was filed and in the appeal the First Appellate court has considered the evidence properly. The evidence of plaintiff and his witness was more trustworthy than the defence taken by the defendant. Defendant admitted that, he had issued the said cheque but according to him it was blank, and therefore, the burden was on the defendant to prove that, it was blank cheque which he could not prove. It has been rightly observed by the First Appellate Court that, the defence raised by the defendant appears to be improbable. The receipt Exhibit 36 was duly proved by the plaintiff by examining the attesting witness, and therefore, the defendant ought to have refuted the said evidence in order to support his defence. A well reasoned and legally sound Judgment has been given by the First Appellate Court which requires no interference so also now no substantial question of law can be said to be arising.

4. At the outset it is to be noted that, the plaintiff had come with a case that, he had advanced hand loan of Rs.5,00,000/- on 24-07-2004 to the defendant. That amount was given by him in cash to the defendant. By way of refund, defendant issued cheque for Rs.2,25,000/- on 08-06-2005 which was deposited by the plaintiff for

encashment, however it was dishonoured. Thereafter, notice was issued by the plaintiff on 06-07-2005 to the defendant and when defendant failed to pay the amount, criminal case under Section 138 of the Negotiable Instruments Act was filed by the plaintiff against the defendant and it was pending, when the suit was filed. For recovery of the said amount, the suit was filed.

5. In the defence, defendant contended in the written statement that, he has not taken any loan from plaintiff. On the contrary there was an agreement to sale dated 24-12-2002 between him and plaintiff in respect of plot at Dhule, and he had paid earnest amount of Rs.2000/-. At that time he had handed over blank cheque to the plaintiff as a security for the transaction. He could not complete the transaction, and therefore, plaintiff sold the said plot to somebody else. He, therefore, asked plaintiff to refund the earnest amount to which the plaintiff had assured him that he would pay Rs.75,000/- but then plaintiff misused the cheque and filed false suit.

6. Plaintiff has examined himself as well as one witness PW.2 Dagdu Ukha Patil to support his contention, whereas the defendant has also examined himself to support his contention. On the basis of the evidence and after hearing both sides, the learned Trial Court had dismissed the suit on 18-11-2009, however the learned First Appellate Court has decreed the same.

7. The point that was tried to be raised by the appellant is that,

there is no concurrent finding, and therefore, it gives rise to substantial questions of law. Merely because there are no concurrent findings, it cannot be said that, it gives rise to substantial questions of law automatically. So also even if there would have been concurrent findings, yet it would be the duty of this Court to consider whether substantial questions of law as contemplated under Section 100 of Code of Civil procedure are arising in this case. No doubt the same set of evidence were appreciated by the First Appellate Court, yet it is required to be seen as to whether the said appreciation of evidence and consideration of law points by the First Appellate Court are on sound basis. As regards the facts are concerned, those have been narrated and it is supported by plaintiff as well as his witness PW.2 Dagdu Patil that the said amount of Rs.5,00,000/- was advanced in cash. As regards the capacity of the plaintiff to lend that much amount is concerned, it appears that, it was not in dispute and the said fact had come on record. Merely because he was not paying the income tax, that will not automatically result in amount of Rs.5,00,000/- being unaccounted amount. When Exhibit 36 was exhibited it appears that, no objection was taken on behalf of the defendant. Whether it was a receipt or a promissory note or bond, ought to have been the point raised by the defendant at the time when the document was exhibited. The said receipt as it is so stated in the plaint, has been executed on a stamp paper of Rs.100/-. The execution of the same appears to be not in dispute by the defendant as it appears the signature of the defendant so also the attesting witness to the said receipt i.e. P.W.2 Dagdu Patil has been examined. There was no such fact in his cross examination which would disbelieve him. The said receipt is also signed by another witness viz. Murlidhar Sadashiv Lokare and his signature has been identified by P.W.2 Dagdu. The onus had then shifted on the defendant to rebut the said evidence that was led by the plaintiff. As regards the exhibiting of the document is concerned now the point is raised that, it was on a insufficiently stamped document. But in view of Section 34 of the Bombay Stamp Act, the defendant i.e. present appellant is estopped from raising that point as he had not raised the said point when the document was exhibited. In fact when the document was exhibited, the defendant was absent, and thereafter also there was no attempt on the part of the defendant to take the written objection to that effect. It also appears from the Judgment of the First Appellate Court that, the said point was not taken before the First Appellate Court, under such circumstance it cannot be taken for the first time in second appeal. When the objection itself was not raised at the relevant time, we cannot go into the aspect as to whether that document is a promissory note or a receipt or anything else. The ratio laid down in ***R. V. E. Venkatachala Gounder v/s. Arulmigu Viswesaraswami & V. P. Temple and another, 2003 (8) SCC 752 (paragraph 20)*** where it was observed as follows would be helpful to clarify the legal position on this point:

"20...... *The objections as to admissibility of documents in evidence may be classified into two classes:-(i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof* *sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior Court*."

Thus, now the only fact that is required to be taken into consideration is that, by that document Exhibit 36, the defendant had acknowledged that he had received amount of Rs.5,00,000/- from the plaintiff and then he was bound to repay the same.

8. Another point that goes against the defendant is that, he has not disputed issuance of cheque. According to him he had given a blank cheque, thereby it can be said that, he had given permission to the plaintiff to fill in the blanks, if at all the said defence is accepted. The learned first Appellate Court has rightly stated that, the defence that has been taken is improbable. It is hard to believe that, when plot was agreed to be sold, the earnest amount that could be expected would be Rs.2000/- only. If the blank cheque was to be given as security then why amount was not written on the cheque

for treating it to be the earnest amount. Further as per the defence the said agreement had taken place on 24-12-2002, the further details of the said agreement as to when the sale deed was to be completed etc., and even the ultimate price i.e consideration has not been stated. When those details of the agreement were not given, it cannot be stated that, there is any point in that defence. Defendant says that, in the year 2005 he came to know about the fact that plaintiff has sold the said plot to somebody else and then he asked for the defendant for earnest amount. He says that plaintiff had agreed to refund Rs.75,000/-. When according to him he had given only Rs.2,000/- to plaintiff as earnest amount, why plaintiff would agree to give him Rs.75,000/-, that too when he could not complete the transaction? We can not find any answer to this obvious question. This appears to be an improbable fact.

9. When the issuance of cheque is admitted then definitely Section 118 of the Negotiable Instruments Act would come into play and there will be then presumption. Even if in absence of document Exhibit 36 plaintiff has proved that, he had advanced the said amount and then it is coupled with the cheque which was admittedly signed by the defendant. Therefore, the learned First Appellate Court has appreciated the evidence properly and so also the legal points involved in the same have been considered properly. Therefore, no substantial question of law can be said to be arising in this case. The second appeal stands disposed of as not admitted.

10. It appears from order dated 08-01-2019 that, the appellant had deposited amount of Rs.2,50,000/- in Criminal Court in view of the fact that defendant i.e. present appellant was convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and the appeal is pending. That amount would be considered if at all any proceedings are there still pending. But in view of the said order passed by this Court on 08-01-2019 further amount of Rs.2,50,000/- was directed to be deposited in this Court. If this amount is deposited then it be given to the present respondent and accordingly the stay Application No.9296 of 2017 stands disposed of as well as Civil Application No.10382 of 2019 for withdrawal of amount stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.