

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

919 FIRST APPEAL NO.289 OF 2019

Sachin Shashikant Ghotankar,
Age 40 years, Occupation Business,
R/o Plot No.14, Kasliwal Estate,
Deshmukhnagar, Shivajinagar Road,
Aurangabad Dist. Aurangabad. ...Appellant.

VERSUS

Baburao s/o Pandurang Kale,
Age 45 years, Occupation Money Lender,
R/o Shivshankar Colony, Aurangabad
Dist. Aurangabad. ...Respondent.

...
Advocate for Appellant : Mr. Bolkar Yogesh B.
Advocate for Respondent : Mr. Narendra D. Sonavane
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 19-06-2019.

ORAL ORDER :

1. Present appeal has been filed by the original defendant challenging the Judgment and decree passed in Summary Civil Suit No.109 of 2016 by 5th Jt. Civil Judge, Junior Division, Aurangabad, dated 09-01-2018, whereby the suit for recovery of amount of Rs.90,000/- came to be decreed against him.
2. Present respondent is the original plaintiff who had filed the said

suit contending that, defendant is his friend. On the friendly request of defendant, plaintiff had extended hand loan of Rs.90,000/- in February 2016, in order to fulfill the urgent financial needs of the defendant. It is stated that, defendant had agreed to repay the said amount within a period of month, and therefore, after a months period, when plaintiff demanded the amount, defendant issued cheque drawn on his account kept with Union Bank of India, Aurangabad Branch, bearing No.000436 dated 10-03-2016, for Rs.90,000/-. The said cheque was presented by the plaintiff for encashment with his banker Lokvikas Nagri Sahakari Bank Ltd. Garkheda Branch, Aurangabad. The said cheque came to be dishonoured for the reasons insufficient funds. Thereafter, plaintiff issued notice on 06-02-2016 to the defendant which was served on the defendant on 14-02-2016. At that time the defendant requested to the plaintiff for arrangements to be made and accordingly the plaintiff was waiting for the response from the defendant. Again he made request on 11-01-2016 but then at that time the defendant denied and therefore the suit was filed.

3. Suit summons was served under Order 37 Rule 2 of Code of Civil Procedure on the defendant. He caused his appearance but did

not obtain leave to defend. Thereafter, the matter proceeded ex-parte against him. Plaintiff has adduced evidence in the form of affidavit of examination-in-chief and documentary evidence in respect of cheque, cheque return written memo, demand notice and envelope regarding postal endorsement. Taking into consideration the said evidence, the learned Trial Court has decreed the suit. Defendant has been directed to pay amount of Rs.90,000/- together with interest @ of 6 % per annum from the date of the suit till actual realization of the entire amount.

4. Heard learned advocate Mr. Bolkar Yogesh B. for appellant and Mr. Narendra Sonavane for the respondent.

5. Taking into consideration the submissions, following points are arising for determination. Findings and reasons for the same are as follows ;

- (i) Whether defendant owed amount of Rs.90,000/- to plaintiff ?
- (ii) Whether plaintiff is entitled to get the amount together with interest ?
- (iii) Whether interference is required in the Judgment and decree passed by learned Trial Court ?

6. All the points are taken up together for discussion for the sake of convenience and to avoid repetition. It has been submitted on behalf of the appellant that, perusal of the impugned Judgment would show that, no reasons has been assigned by the learned Trial Judge and whatever evidence was produced by plaintiff, has been accepted as it is. There was no cogent evidence led by the plaintiff to prove that, he had extended amount of Rs.90,000/- to the defendant. Per contra, the learned advocate for the respondent submitted that, there is no error either in law or on facts in the impugned Judgment.

7. It is to be noted that, the suit summons was issued under Order 37 Rule 2 of Code of Civil Procedure. That means, it was a summons for Judgment and as it was a summary suit, it was for the defendant to obtain leave to defend if he had the intention to defend the suit. It has been tried to be contended by the appellant that, due to the communication gap between him and his advocate, he could not remain present. However, it is to be noted that, he is not giving a cogent reason as well as any evidence in the form of the fact that, he was contacting his advocate in between. When the suit summons was for Judgment and no dispute has been raised in

respect of the service of summons, the defendant could not have afforded to be lethargic.

8. As regards the case of the plaintiff is concerned, it is supported by his affidavit in chief. Since the defendant has not appeared and contested, the contents of the affidavit in chief has gone unchallenged on record. Secondly when the plaintiff has produced the cheque which as per his evidence was issued by the defendant in his favour then definitely it raises a presumption under Section 118 of the Negotiable Instruments Act. It will not be out of place to mention here that, while submitting the arguments the learned advocate for the appellant has made a statement that, plaintiff had filed complaint under Section 138 of Negotiable Instruments Act after the notice was served on the defendant but then he has withdrawn that complaint. Though this may be a fact, defendant cannot derive any advantage from the withdrawal of the complaint by the plaintiff because it is a wish of plaintiff whether to proceed ahead with the complaint or not. That does not estop the civil Court dealing with the matter from invoking the presumption under Section 118 of the Evidence Act. The further evidence is in the form of cheque return memo, demand notice and no formal proof can be

said to be required to prove those documents. Therefore, from the evidence that was adduced and in absence of the defendant-appellant to show that, there was some cogent reason him to remain absent, no fault can be found with the impugned Judgment. The points are answered accordingly. No interference is required. Hence, following order.

ORDER

- 1) First Appeal is dismissed.
- 2) No order as to costs.
- 3) Decree be drawn accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.