

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

+ **RFA No. 126/2019**

% ***15th February, 2019***

PRIYARANJAN CHAUHAN Appellant

Through: Kunwar Arish Ali, Mr.
S.M.Prasad and Mr. Kapil
Garg, Advocates.

Versus

GAURAV GARG Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CM No. 6629/2019 (Exemption)

1. Exemption allowed subject to just exceptions.

CM stands disposed of.

RFA No. 126/2019 & CM No. 6628/2019 (stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.1 in the suit impugning the Judgment of the trial court dated 29.11.2018 by which the trial court has decreed the suit which was filed by the respondent/plaintiff for a sum of Rs. 8,60,000/- along with interest, for a lesser amount of Rs. 4,70,000/- along with interest at 12% per annum. The suit has been decreed on account of the amount decreed being the balance due for a friendly loan taken by the appellant/defendant no.1 from the respondent/plaintiff.

3. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that he had advanced a loan of Rs. 6,00,000/- to the appellant/defendant no.1, and the same was confirmed by the appellant/defendant no.1 by executing an Affidavit-cum-Undertaking dated 13.12.2007 for a sum of Rs. 6,00,000/- . It was pleaded that the appellant/defendant no.1 had issued a Cheque dated 14.11.2008 for a sum of Rs. 80,000/- in favour of the respondent/plaintiff, which was dishonoured twice. When the cheque was dishonoured for the second time, a Legal Notice dated 06.06.2009 was issued to the appellant/defendant no.1, and thereafter a complaint was filed under

Section 138 of the Negotiable Instruments Act, 1881. The appellant/defendant no.1 had deposited sums of Rs. 50,000/-, Rs. 40,000/- and Rs. 40,000/-, totaling to Rs. 1,30,000/- in the bank account of the respondent/plaintiff on three separate occasions i.e. December 2008, March 2009 and April 2009. The respondent/plaintiff has therefore filed the subject suit pleading that an amount of Rs. 6,00,000/- has to be recovered as the principal amount and an amount of Rs. 3,90,000/- as interest, and that since Rs. 1,30,000/- stands paid towards interest, now the balance amount due would be Rs. 8,60,000/- .

4. The appellant/defendant no.1 contested the suit and prayed for its dismissal. It was pleaded that the appellant/defendant no.1, in discharge of his liability, had issued three cheques totaling to Rs. 1,30,000/- . It was also pleaded that the amount of Rs. 18,500/- was paid in cash. It was further pleaded that for the liability of Rs. 1,70,000/-, demand drafts totaling to Rs. 1,70,000/- were paid. It was also pleaded that a cheque of Rs. 1,50,000/- was given to the respondent/plaintiff from the account of his brother, Sh. Ravi Ranjan Chouhan, and when this cheque bounced, the respondent/plaintiff filed

a complaint under Section 138 of the Negotiable Instruments Act against the brother, Sh. Ravi Ranjan Chauhan, and it is in settlement of this case, that the amount of Rs. 1,70,000/- was paid by two demand drafts. Therefore, it was pleaded by the appellant/defendant no.1 that out of the total amount of Rs. 4,10,000/-, he has repaid Rs. 3,18,500/-. The appellant/defendant no.1 pleaded that though in the Affidavit-cum-Undertaking, which was executed by him, a sum of Rs. 6,00,000/- was written in the blank space by him in hand, but the respondent/plaintiff had assured him that this amount would only be taken as Rs. 4,10,000/-.

5. The trial court framed the only issue as to the entitlement of the respondent/plaintiff to recover the suit amount.

6. Thereafter the parties led evidence, and these aspects are recorded in paras 5 and 6 of the impugned judgment, and these paras read as under:-

“5. In support of his case, the plaintiff has examined **2(two) witnesses** which are as under:-

(1) **PW-1 Sh. Gaurav Garg- the plaintiff himself.** In lieu of his examination-in-chief he has deposed by way of affidavit **Ex.PW1/A** wherein he has reiterated the case set forth in the plaint and has relied upon the following documents:

- i. **Ex.P1-** The affidavit-cum-undertaking and indemnity dated 13.12.2007.
- ii. **Ex.PW1/2-** Certified copies of the plaint of suit for declaration of affidavit-cum-undertaking and indemnity as null and void filed by the defendant Sh. Priya Ranjan Chauhan.
- iii. **Ex.PW1/3-** Judgment dated 04.07.2013 passed by Ms. Niti Phutela, Ld. Civil Judge (South)

(2) **PW-2 Sh. Amrish Kumar Sah-- Junior Judicial Assistant, Record Room (Civil, South) Saket, New Delhi.** In lieu of his examination-in-chief he has **deposed by way of affidavit Ex.PW2/A** wherein he has brought the summoned record i.e. case file bearing Suit No.CS74/11 titled “Priya Ranjan Chauhan Vs. Gaurav Garg, decided on 04.07.2013 by Ms. Niti Phutela, Ld. Civil Judge-01, South, Saket, New Delhi bearing Goshwara No. 206/13, Civil (South). He has relied upon following documents:

- i. **Ex.PW2/1-** The certified copy of the statement of DW-1 Sh. Gaurav Garg S/o Sh. Ramniwas Garg dated 11.02.2013, in CS No.74/11 (contains three pages)
- ii. **Ex.PW2/2-** The certified copy of original receiving i.e pay order bearing no.143176 of Rs.1,84,860/- in favour of Hutchison Essar Mobile Services Ltd. Dated 31.01.2007.

Both the witnesses were duly cross-examined by the defendants’ counsel and thereafter, PE was closed.

6. In the defence evidence, the defendants have examined two **witnesses** which are as under:

(1) **DW-1 Sh. Priya Ranjan Chauhan - defendant no.1 himself.** In lieu of his examination-in-chief he has deposed by way of affidavit **Ex.DW1/1** and has relied upon following document:

- i. **Mark DW1/A-** Copy of complaint dated 27.05.2009 written to SHO, P.S. Badarpur.
- (2) **DW-2 HC Anil Kumar-** He has produced the copy of DD entry No.52B dated 25.08.2009 as Ex.DW-2/A and order by which the said DD entry was destroyed as DW-2/B.”

7. In my opinion, the trial court has rightly relied upon the Affidavit-cum-Undertaking dated 13.12.2007/Ex.P1 that the loan amount taken by the appellant/defendant no.1 was of Rs. 6,00,000/- and not Rs. 4,10,000/- as contended by the appellant/defendant no. 1. The trial court has held that this Affidavit-cum-Undertaking has to be taken as final and the appellant/defendant no.1 is barred by the principle of *res judicata* from questioning the undertaking or the amount of Rs. 6,00,000/- taken as loan inasmuch as the appellant/defendant no.1 had questioned this very Undertaking in a civil suit filed by him, and that by the Judgment dated 04.07.2013 passed by the Ld. Civil Judge, Ms. Niti Phutela, the suit of the appellant/defendant no.1 questioning the validity of Undertaking was dismissed.

8. I may also note that though the appellant/defendant no.1 claimed that there was an agreement between the parties that the amount stated as Rs. 6,00,000/- in the Affidavit-cum-Undertaking would only be taken as Rs. 4,10,000/-, this contention is barred by Section 92 of the Indian Evidence Act, 1872 because once a document is taken as final, no oral evidence can be permitted to alter or modify

the terms of the written document. This is all the more so, because in the facts of the present case, the amount of Rs. 6,00,000/- is admittedly written in the hand of the appellant/defendant no.1 himself, in the blank space found in the Affidavit-cum-Undertaking. Therefore, the trial court has rightly concluded that the loan given was for an amount of Rs. 6,00,000/- to the appellant/defendant no.1.

9. As regards the issue of repayment, the trial court has held that since the respondent/plaintiff in his cross-examination admitted to receiving a sum of Rs. 1,30,000/-, this amount has to be deducted from the principal loan of Rs. 6,00,000/-, and therefore the respondent/plaintiff is only entitled to the amount of Rs. 4,70,000/- as the balance principal amount.

10. The trial court has rejected the defence of the appellant/defendant no.1 of making a payment of Rs. 18,500/- in cash because no evidence has been led with respect to proof of this payment of Rs. 18,500/-. Further, the trial court has held that the payment given for the settlement of the case pertaining to the Negotiable Instruments Act was for the settlement of the cheque issued by the brother of the appellant/defendant no.1 for his liability to

the respondent/plaintiff, and not for and by the appellant/defendant no.1, and therefore the payment made for settlement of the Negotiable Instruments Act case under Section 138 filed against the brother of the appellant/defendant no. 1 cannot be taken as discharge of liability of the appellant/defendant no. 1 towards the subject and different loan of Rs. 6,00,000/-. The trial court in my opinion has therefore rightly held against the appellant/defendant no.1 by observing as under:-

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“In nut shell the case of the plaintiff is that out of the total loan liability of Rs. 6 lacs admitted by the defendant vide affidavit cum undertaking dated 13.12.2007 Ex. P1, the defendant had only paid Rs.1,30,000/- and the rest of the amount has not been cleared till date on which substantial interest has also accrued.

On the other hand the two fold defence of the defendant is that; firstly that his liability was only to the extent of Rs. 4,10,000/- though it is stated to be Rs. 6 lacs in the affidavit Ex. P1. The same was written by him upon asking of the plaintiff and with an oral assurance that he will have to repay only Rs.4,10,000/-. Secondly, besides payment of Rs. 1,30,000/- by way of cheques, Rs. 18,500/- by way of cash, he has also paid Rs. 1,70,000/- to the plaintiff towards the dishonoured cheque of Rs. 1,50,000/- and upon payment of which the said complaint case was settled.

Now, as regards the first defence is concerned, the affidavit cum undertaking dated 13.12.2007 is an admitted document Ex. P1. Neither the defendant has denied his signatures nor his handwriting thereon. Important to note herein that the defendant had filed a civil suit bearing CS No. 74/11 titled as “Priya Ranjan Chauhan vs. Gaurav Garg” in the Court of Civil Judge (South) Saket seeking declaration that the affidavit cum undertaking dated 13.12.2007 i.e. (**Ex. P-1 herein**) be

declared null and void. After full blown trial, vide judgment dated 04.07.2013 passed by Ld. Civil Judge Ms. Niti Phutela, the said suit was dismissed. The said judgment attained finality in as much as admittedly no appeal against the same was preferred in any higher court. The relevant observations made in the said judgment as contained in para 19 & 26 is extracted and reproduced in here under:-

19. *In this regard it is relevant to mention that the plaintiff has admitted his signatures on Ex.PW1/1, he has even admitted that the words "Six Lack only 6,00,000/- (BASIC AMOUNT)" were written in his own handwriting and he had put his thumb impressions on the same. As per the rule of evidence which is encompassed in **Section 104 and Section 106 of Indian Evidence Act** that if any person is alleging a special fact that the onus to prove that fact is on the said person. Thus, it was for the plaintiff to prove that any fraud was played upon him or he was pressurized/forced to sign the document **Ex.PW1/1**. But the plaintiff failed to bring any witness in the witness box to show that some kind of fraud was played upon him.*

26. *Hence in view of the above said discussion it is evidence that plaintiff has failed to shed the burden placed upon his shoulders that he had not put his signatures on documents **Ex. PW 1/1** voluntarily and fraud was played upon him. While on the other hand the defendant has successfully proved that document **Ex. PW 1/1** was duly executed. Therefore, the present issue is decided against the plaintiff and in favour of defendant.*

Thus, this issue being settled by a competent court, it is no more open to the defendant to raise such a plea. It needs no gainsaying that the validity of document Ex. P1 was the sole issue in contention in the said suit and the same has been held against the defendant. That finding is re-sjudicata and cannot be re-agitated herein. Though one composite issue has been framed herein, however, it takes within its sweeps the outcome of the said litigation and the same is a very material fact. To sum up the agreement Ex. P1 is a valid document as per which the defendant had taken a loan of Rs. 6 lacs from the plaintiff.

Now, as regards to the payment made, the plaintiff's case is that in total he has paid Rs.1,30,000/- to the defendant by way of cheques, Rs.18,500/- in cash and further sum of Rs.1,70,000/- by way of demand drafts during settlement of the complaint case.

The plaintiff though have admitted the payment of Rs. 1,30,000/- but has claimed that the said payment was not made in partial payment towards the loan amount but the said payment was on account of interest accrued on the principle loan amount. However, during cross examination, PW-1 has categorically admitted that the said payment of Rs. 1,30,000/- was made by defendant No.1 as partial re-payment of the loan amount. Thus, in view of the said admission of the plaintiff, no further discussion on this aspect is required and it is held that the defendant has partially repaid the loan – to the tune of Rs.1,30,000/-. Further, regarding the payment of Rs.18,5000/- done in cash, there is no evidence to that effect led by the defendant. Even the said averment it is a bald one in as much as he has not even stated as to on which date he had given the said sum, in presence of whom and whether he had taken or even insisted for a receipt of the same. Thus, in the absence of their being a specific / detailed averment and evidence on this account, the bald averment of having paid to the plaintiff Rs 18,5000/- in cash holds no water.

Coming to the second defence that the payment of Rs. 1,70,000/- made in settlement of the complaint U/S 138 N I Act was towards this loan liability, the same also stands disproved. Admittedly, the said complaint case was filed by the plaintiff against the brother of defendant No.1 for a cheque issued to him by his brother. There is no evidence led by the defendant that the said cheque was issued by his brother in discharge of the loan liability of Rs. 6 lacs. And most importantly DW-1 during his cross examination has categorically admitted that the settlement made in the complaint case U/S 138 N I Act was with his brother and the payment was also made on his behalf. Thus, in view of the said admission the said defence falls flat and clinches the issue in favour of the plaintiff. To sum up, the outstanding loan liability of the defendants is Rs.4,70,000/- (Rs. 6,00,000/- – Rs. 1,30,000/- = Rs.4,70,000/-).”

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11. In view of the aforesaid discussion, the trial court has rightly held that the loan amount was of Rs. 6,00,000/-, and that the appellant/defendant no.1 had only repaid a sum of Rs. 1,30,000/- and

that the appellant/defendant no.1 did not pay any other amount as was contended by him. The Suit therefore has been rightly decreed for a sum of Rs. 4,70,000/- alongwith interest @ 12% per annum simple.

12. There is no merit in the appeal. Dismissed. All pending applications are also disposed of.

FEBRUARY 15, 2019/ib

VALMIKI J. MEHTA, J

