

IN THE COURT OF SH. ARUN SUKHIJA,
ADDITIONAL DISTRICT JUDGE – 07, (CENTRAL DISTRICT)
TIS HAZARI COURTS, DELHI.

SUIT NO.:- 156/2020

UNIQUE CASE ID NO.:- 10652/2016

IN THE MATTER OF :-

Sh. Desh Raj (Desha)
S/o Late Rampat
R/o V.P.O. Khera Khurd,
Pana Udyan, Delhi-110082.

....Plaintiff

VERSUS

Sh. Satya Pal Singh (Since Deceased)
Through his LR'S

- 1. Smt. Yogesh Rana**
W/o Sh. Satya Pal Singh
- 2. Sh. Vivek**
S/o Sh. Satya Pal Singh
- 3. Sh. Vikas**
S/o Sh. Satya Pal Singh
- 4. Sh. Vishal**
S/o Sh. Satya Pal Singh

ALL RESIDENTS OF:-
Lambi Gali, Shahbad,
Daulatpur, Delhi-110042.

....Defendants

SUIT FOR RECOVERY OF RS.14,86,100/- (RUPEES FOURTEEN LAKHS EIGHTY SIX THOUSAND ONE HUNDRED ONLY)

Date of institution of the Suit : 26/09/2008
Date on which Judgment was reserved : 10/06/2020
Date of Judgment : 10/07/2020

::- J U D G M E N T -::

By way of present judgment, this Court shall adjudicate upon suit for recovery of Rs.14,86,100/- (Rupees Fourteen Lakhs Eight Six Thousand One Hundred Only) filed by the plaintiff against the defendants.

The suit was filed by the plaintiff under Order XXXVII Civil Procedure Code but at the request of Ld. Counsel for the plaintiff, the present suit vide Order dated 27/09/2008, was directed to be treated as an ordinary suit.

The Ld. Predecessor of this Court, by means of Order dated 08.10.2018, has already rejected the suit against all the defendants, who were originally impleaded, except the defendant Shri Satyapal Singh. As per the said Order dated 08.10.2018, the defendants, in the present case now, represent deceased defendant Shri Satyapal Singh being their LR's and not in their individual capacity. Hereinafter, the reference to defendant be construed as "Satyapal Singh" and the reference to defendants be construed as "LR's of Satyapal Singh including Satyapal Singh"

CASE OF THE PLAINTIFF AS PER PLAINT

Succinctly, the necessary facts for just adjudication of the present suit, as stated in the plaint, are as under:-

- (a) The defendant had taken a friendly loan of Rs.10.00 Lakhs from the plaintiff and in discharge of his part liability, the defendant had issued two

cheques bearing no. 011879 and 011880, dated 27.09.2005 for Rs.4,65,000/- and Rs.5,00,000/- both drawn on Union Bank of India, Ochandi, Delhi-110039, in favour of plaintiff. The defendant also assured the plaintiff that the said cheques are good for payment and the same would be honoured on their presentation.

- (b) The plaintiff accordingly presented the said cheques for encashment with his bank i.e. The Delhi State Cooperative Bank Ltd., Samaypur, Delhi but the said cheques were returned unpaid by the banker of the defendant with the remarks 'insufficient funds' vide memo dated 01.10.2005. The plaintiff received the said information from his bank vide debit advice dated 03.10.2005. Thereafter, the plaintiff tried to contact the defendant, but the defendant intentionally and deliberately avoided to meet the plaintiff.
- (c) The plaintiff got issued a Legal Notice dated 06.10.2005 through his counsel to defendant but the defendant in spite of service of Notice failed to pay the due amount. Hence, the plaintiff was constrained to file a complaint under Section 138 of N.I. Act.
- (d) The plaintiff has been repeatedly visiting the defendants and requesting them to repay the loan amount but the defendants have been deferring the matter on one pretext or the other. Thus, the defendants are liable to pay a sum of Rs.9,65,000/- towards dishonoured cheque amount and Rs.5,21,100/- towards interest @ 18% p.a. w.e.f. 27.9.2005 to 24.9.2008 totalling to Rs.14,86,100/- with future and pendentelite interest @ 18% p.a. to the plaintiff from the date of filing of the present suit till realization.

CASE OF THE DEFENDANTS AS PER WRITTEN STATEMENT

Succinctly, the case of the defendants is as under:-

- (a) The suit of the plaintiff is misconceived and mis-framed. The suit does not disclose any cause of action against the defendants including the deceased Shri Satyapal Singh. The plaintiff has not approached the Court with clean hands and has concealed the material and relevant facts.
- (b) The plaintiff was a family friend of defendant and resided in nearby village at Shahbad Daulatpur, Delhi and has mostly visited the poultry farm house at Gannaur, Sonapat, Haryana with the defendants.
- (c) In April-May 2005, the defendant planned to construct a steel and concrete poultry farm shed at his poultry farm at Gannaur, Sonapat, Haryana. For this, the defendant tried to find a suitable person/Contractor for construction of poultry farm shed and lastly find a suitable person/ Contractor named Desha for the purpose of construction and under whose supervision the work was to be done. The said “Desha” was introduced to the defendant by the plaintiff Sh. Deshraj, who had good relation with the defendant and his family. On relying upon the plaintiff, the defendant negotiated with the Contractor named “Desha” and it was fixed that the work had to be done within six months for the consideration of Rs.4,65,000/- and most of the material, to be used in construction of shed, was to be of steel. It was also decided that the payment will be made in months of September, 2005. Further, the plaintiff, Sh. Deshraj, took every type of guarantee regarding the fine quality of work on behalf of the Contractor namely Desha.
- (d) The Contractor named Desha has started the construction work in the months of August, which is too late from the schedule time and only concrete work had to be started. When enquiries by the defendant about progress of work of steel shed, the Contractor, Sh. Desha said that the steel

price goes very high, and it is not in his limit to do work within the said consideration amount of Rs.4,65,000/-. It was also told by the defendant to the Contractor that the cheque of Rs.4,65,000/- had already been reappeared in the name of Contractor, Sh. Desha, as per schedule time of payment in months of September. But the Contractor showed his inability to do work with the amount because the steel price is still going to increase day by day.

- (e) The defendant again agreed to increase his amount of contract upto Rs.5,00,000/-, after being pressurized by the plaintiff and directed that the work of construction of steel shed must be completed within time and the payment schedule shall be remained same as like before.
- (f) At the end of September 2005, when the payment schedule was due for payment and the defendant had prepared another cheque of Rs.5,00,000/- in the name of Desha, bearing no. 011880 dated 27.9.2005, and handed over the same to one Sh. Desha. On the next day of handing-over of cheque to Sh. Desha, the above named Contractor again stopped the work on the pretext of more inflation of steel price and tried to adopt same practice as like before when the amount was increased from Rs.4,65,000/- to Rs.5,00,000/-, and demanded that cheque must be of Rs.6,00,000/-. On seeing the behavior of above named Contractor, the defendant declined his demand to increase the price upto Rs.6,00,000/- and demanded his cheque of Rs.5,00,000/- back and the same was handed-over back to defendant and paid in cash the requisite amount for the work done by Desha. By doing this both the cheque bearing no. 011879 amounting Rs.4,65,000/- and cheque bearing no. 011880 amounting to Rs.5,00,000/- become idle and left in the drawer of almirah of Ganaur Poultry Farm House.

- (g) As the plaintiff was a family friend of defendants and resided in nearby village at Shahbad Daulatpur, Delhi and have mostly visited the poultry farm house at Gannaur, Sonapat, Haryana with the defendants. After sometime, the plaintiff again approached the defendant and took over two cheques bearing no. 011879 & 011880 dated 27.09.2005 and assured that the plaintiff would manage the said Contractor Sh. Desha and work either to be done in Rs.4,65,000/- or Rs.5,00,000/-. By this, the above said two cheques went in possession of plaintiff. After some time when enquired by defendant about the said cheques and construction work, the plaintiff stated that the matter will be sorted out very soon and every time he delayed the matter on one pretext or another.
- (h) As there was no problem until the plaintiff had good relation with the defendant but when the relation of plaintiff and defendant become sore, the plaintiff showed his true colour for taking revenge against the defendant and filed a case under Section 138 N.I. Act against the defendant on the basis of those cheque which was issued in the name of Contractor namely Desha and in possession of the plaintiff. It was also known to the defendant that as the plaintiff's name is Deshraj in his all documents and even bank account and the cheque was issued in the name of Contractor, Desha, so the plaintiff manipulated with the bank official and also in record or open a new bank account in name of "Desha". The suit of the plaintiff is an abuse of process of law and has been filed with an ulterior motive of harassing the defendant and to extort money from him.
- (i) On merits, the contents of the plaint have been denied. It has been prayed to dismiss the suit with exemplary costs.

REPLICATION AND ISSUES

The plaintiff filed replication and controverted the assertion made in the Written Statement filed by defendants and reiterated the contents of the Plaint.

From the pleadings of the parties, following issues were framed vide Order dated 10.08.2011:-

ISSUES

1. *Whether the suit in the present form as filed by the plaintiff as against the defendants is not maintainable? OPD*
2. *Whether the plaintiff is entitled for decree for sum of Rs.14,86,100/- as against the defendants as per prayer Clause (a) of the plaint? OPP*
3. *Whether the plaintiff is entitled for any interest as against the defendants if so, at what rate and for which period? OPP*
4. *Relief.*

EVIDENCE OF THE PLAINTIFF AND DEFENDANTS AND DOCUMENTS RELIED UPON BY THEM

The plaintiff, in order to prove his case, led plaintiff's evidence and got examined himself as PW-1. PW-1 has filed his evidence by way of affidavit wherein he reiterated and reaffirmed the contents of the plaint. PW-1 in his testimony has relied upon the documents:-

1. Photocopy of his passbook is **Ex.PW-1/1 (OSR)**.
2. Certified copy of cheque no. 011879 dated 27/09/05 **Ex.PW-1/2**.
3. Certified copy of cheque no. 011880 dated 27/09/05 **Ex.PW-1/3**.
4. Certified copy of returning memo of cheque bearing no. 011879 is **Ex.PW-1/4**.

5. Certified copy of returning memo of cheque bearing no. 011880 is **Ex.PW-1/5**.
6. Certified copy of debit advice pertaining to cheque no. 011879 and 011880, both dated 03.10.05 are **Ex.PW-1/6 and Ex.PW-1/7**.
7. Certified copy of Notice dated 06/10/05 is **Ex.PW-1/8**.
8. Certified copy of postal and UPC receipts are **Ex.PW-1/9 and Ex.PW-1/10** respectively.
9. Certified copy of return of envelope is **Ex.PW-1/11**.
10. Certified copy of complaint dated 25/10/2005 is **Ex.PW-1/12**.

During cross-examination of PW-1, photocopy of driving licence of Desh Raj was exhibited as Ex.PW1/DA1 (OSR).

The plaintiff also got examined Sh. Mahabir Singh and Sh. Darshan as PW-2 and PW-3, who have filed their respective evidence by way of affidavits, which are Ex.PW-2/A and Ex.PW-3/A respectively.

The plaintiff also got examined summoned witness Sh. Deepak Deshwal, Banking Assistant, Delhi State Co-operative Bank, Khera Khurd, Delhi-82 as PW-4, who brought the summoned record i.e. (1) Statement of Account Ex.PW-4/1, (2) Account Opening Form Ex.PW4/2 (2 pages – Colly.), (3) The affidavit submitted by Sh .Desh Raj with account opening form is Ex.PW4/2-A, (4) Copy of Election ID card submitted with the account opening form is Ex.PW4/2-B and (5) Certificate as Ex.PW4/3 regarding deposit of cheque no. 11879 and 11880 by Sh. Desh Raj and its return on the ground of insufficient funds.

On the other hand, the defendants have examined the witness Sh.Vishal Rana (Son of the deceased defendant) as DW-1, who filed his evidence by way of affidavit Ex.DW-1/A.

This Court heard final arguments, as advanced by Ld. Counsel for the parties through video conferencing. I have perused the material available on record and also the written submissions filed by Ld. Counsel for the parties.

ISSUEWISE FINDINGS

ISSUES NO.1 TO 3

1. *Whether the suit in the present form as filed by the plaintiff as against the defendants is not maintainable? OPD*
2. *Whether the plaintiff is entitled for decree for sum of Rs.14,86,100/- as against the defendants as per prayer Clause (a) of the plaint? OPP*
3. *Whether the plaintiff is entitled for any interest as against the defendants if so, at what rate and for which period? OPP*

The aforesaid issues are interrelated and interconnected with each other and accordingly, they are decided together.

ARGUMENTS OF THE DEFENDANTS

1. During cross-examination of PW-1, on 04.09.2012 the plaintiff (PW-1) stated that “I have given my affidavit in Co-operative Society Bank, Khera Khurd at the time of opening account there indicating my name Deshraj @ Desha. I have no other document except this affidavit to show that I am also known as Desha. Vol. in my village I am called by name of Desha.” At that time, the plaintiff sought some time for showing the documents in which the name of plaintiff showed as Desha on dated 04.09.2012. It is submitted by the Ld. Counsel for Defendant that no affidavit was given at the time of opening the account on 08.07.2005 and argued as under:-

- i. On 03.01.2014, the PW-1 stated as “I have not brought any document in which my name is Desha Vol. I do not have any such document but I had given an affidavit in the Bank that I am also known by the name Desha. Further, I do not remember the date on which I submitted the affidavit in the bank.”
- ii. On specifically asked by this Hon'ble Court through court question about “Whether the affidavit was given by you before presentation of the two cheques which are in question in this case or at the time of presentation of the two cheques.” The PW-1 answered as “I do not remember. Probably I had given the affidavit before presentation of the two cheques which are subject matter of this case.” Further, the PW-1 stated that “I do not remember from where and when I have bought this so called affidavit. I do not remember from where I got attested that affidavit. I have told to the bank that since my name is Deshraj but I also called by the name of Desha in my village.”
- iii. The plaintiff's name in the govt. record as well as bank opening form and bank account is Deshraj. The passbook produced by the plaintiff bear the name as Deshraj. The reason of is that the bank account was not opened with the name of Desha but only Deshraj, so, the cheque named with Desha cannot be encashed in the account of Deshraj. But, being the bank located in the premises of plaintiff in village Khera Khurd and the plaintiff have good relation with the bank officials, they managed to present the above said two cheques with the name of Desha, in the account of Deshraj. The same fact has clearly being admitted by the plaintiff in his cross-examination that he presented the

above said affidavit for adding the name Desha alongwith his name Deshraj just before presentation of the above said two cheques.

- iv. The idea of filling of affidavit came in the knowledge of plaintiff during his cross-examination in complaint case under Section 138 of N.I. Act before the Ld. MM., when a question was raised that how the cheque bearing the name of Desha can be encashed in the account holder bearing name Deshraj. Then, the plaintiff/complainant sought some time to produce the record from the concerned bank, located in his premises at Khera Khurd, Delhi and only then, he managed to file an affidavit with the bank official showing his name as Desha. This fact is proved from the conduct/business of the bank that if there is any affidavit about addition of name as Desha in the bank account of Deshraj , the bank must issue Bank Return Memo showing the name as Desha instead of Deshraj, but the bank official issued the Bank Return Memo in name of Deshraj only. Accordingly, the counsel for the complainant/ plaintiff issued a legal notice under section 138 of N.I. Act to Sh. Satya Pal Singh showing his client's name as Deshraj but not as Desha.
- v. Further, when the premises of the plaintiff was let-out to the bank, the Bank Agreement also contains the name as Deshraj instead of Desha. In the cross-examination of PW-1, he stated as "in my agreement with the bank for lease of the premises, my name is mentioned as Desh Raj and the name Desha is not mentioned therein. The first agreement expired after 5 years and thereafter I have executed the second agreement with the bank for 5 years. In the second agreement also, my

name is mentioned as Deshraj not as Desha. I have never requested the bank to change my name in the agreement from Desh Raj to Desha.”

- vi. As per legal notice, plaint and evidence affidavit, the plaintiff mentioned that the loan amount was Rs. 10,00,000/-, but while deposing as PW-1, he stated that he had given Rs. 9,65,000/- to Sh. Satyapal Singh. When this fact was asked by the Hon'ble Court through court question, the plaintiff stated as “I had given him Rs. 9,65,000/- in cash and I got purchased a buffalo for him from Sh. Mahavir S/o Sh. Khazan Singh Village Khera Kalan for Rs. 35,000/-. Sh. Satyapal had not paid the consideration for the buffalo and it was paid by me. Therefore, the total amount was Rs. 10,00,000/-.” He further stated that “the fact regarding Rs. 35,000/- has not been mentioned by me in the plaint, in my affidavit, in my legal notice or in the case under section 138 NI Act.”
- vii. The above said deposition of the plaintiff is again contradictory with the deposition of plaintiff as CW-1 in the complaint case on 10.04.2012 as “I had given Rs. 9.65 lacs to the accused after withdrawing the same from my bank and the next date he took Rs. 35,000/- from me. The withdrawal is reflected in my passbook and I produced the same. I had informed about this fact to my counsel.”
- viii. Thus, in one statement, the plaintiff stated that Rs. 35,000/- paid to Sh. Mahavir Singh directly and in another statement, he paid Rs. 35,000/- to Sh. Satyapal Singh just after withdrawal of the amount.
- ix. The plaintiff / PW-1 further deposed on a court question about an entry in the passbook at point A and B. The court question was “on 17 September there is entry at point A regarding withdrawal of Rs.

9,65,000/- and on 01st Oct. at Point B the amount of Rs. 9,65,000/- is again credited to your account. This shows that you again deposited the amount of Rs. 9,65,000/- on 01st October after withdrawing the same on 17th Sept. and therefore the story built up by you regarding withdrawal of the amount from the bank and giving the same to Sh. Satyapal is falsified.” The PW-1 replied as “It is incorrect. I do not remember how the amount had come to my account on 01st October.”

2. The PW-2 Sh. Mahavir Singh deposed through an affidavit which was altered after signing by Sh. Mahavir Singh and got attested from the Oath Commissioner. This fact has been rightly observed by the Court through court observation as “fluid has been applied and correction has been done.” Further, on the other side if the affidavit is read in true sense, the PW-2 deposed in para no. 6 of his affidavit that he alongwith plaintiff went to the defendant’s house and during discussion the PW-2 came to know that the defendant had taken a loan of Rs. 9,65,000/- from the plaintiff, but the defendant showed his inability to pay the loan, then the PW-2 feared that his amount is not easy to recover from the deceased Satyapal, so, while returning from Shahbad Daulatpur, he stressed for making him the payment from Desha. The Ld. Counsel for the defendant has addressed the following arguments on this aspect:-

- i. In para no. 6 of his affidavit, PW-2 stated about discussion at defendants house at Shahbad Daulatpur and while returning stated as “I accompanied the plaintiff Sh. Desha and went to his home and during the discussions I came to know that he has already taken a loan of Rs. 9,65,000/- from the plaintiff Sh. Desha and he also made his demand of

his loan to Late Sh. Satya Pal but he told to Sh. Desha that due to some loss in his business he is unable to make any payment. I feared that my amount is not easy to recover from Deceased Satyapal so while returning from Shahbad Daulatpur I stressed for making me the payment from Sh. Desha.”

Herein, as per version of plaintiff, evidence affidavit and cross-examination of PW-1 i.e. Sh. Deshraj, he advanced the alleged loan of Rs. 9,65,000/- on 17.09.2005, after withdrawing the same from bank account, for a week, with interest of bank rate, and presented the cheque on 27.09.2005 for encashment in his bank at Khera Khurd, so, for the sake of argument, there was no occasion for the plaintiff i.e. Deshraj to visit the house of defendant Sh. Satyapal Singh from demanding his money as Sh. Satyapal had already issued, (alleged, as per version of plaintiff) the cheque amount of Rs. 4,65,000/- and 5,00,000/- for dated 27.09.2005 to Desha, while the PW-2 stated in para 6 of his affidavit that he alongwith PW-1 went to the house of defendant Sh. Satyapal Singh where PW-1 demanding his loan amount of Rs. 9.65 Lakhs from Sh. Satyapal and Sh. Satyapal showed his inability to pay the loan amount due to financial loss. This fact can only be happened after dishonored of the cheque and not before that as per version of the plaintiff, the defendant issued two cheques in favour of plaintiff for discharging his liability. It is in-presumable that before dishonoring of the cheque, the plaintiff demanded his loan amount from the defendant in anticipation. It is interesting that all had happened within a week from the date of advancement of alleged loan and before dishonor of the cheques. Now, as per the version of PW-2, he was along

with PW-1 and after returning from the house of defendant i.e. Satyapal Singh, at the time after bouncing of the cheque on 27.09.2005, he received Rs. 35,000/- as per version of the PW-1 and PW-2, from PW-1 at his house, not at the time, as mentioned in the evidence affidavit and cross-examination, but after 03.10.2005 when the complainant/ plaintiff received an information about dishonor of cheque vide Debit Advice dated 03.10.2005. Only after this date, the plaintiff visited the house of the defendant. However, in actual, no such things happened, as mentioned about the defendant viz. advancement of loan, visiting of house, purchasing of buffalo etc.

- ii. In para no. 7 of his affidavit, PW-2 stated that on reaching at home, Sh. Desha made him the payment of Rs. 35,000/-, as promised by him.
- iii. Thus, it is clear from the affidavit of PW-2 that the alleged payment of Rs. 35,000/- was paid by the plaintiff to PW-2 at his home at Village Khera Khurd and at that time, Sh. Satyapal was not present at defendant's house.
- iv. On the other hand, the PW-1 i.e. plaintiff stated in his deposition in his cross-examination as "he told me that I should pay Rs. 35,000/- to Sh. Mahavir for the buffalo. I paid Rs. 35,000/- to Sh. Mahavir in presence of Sh. Satyapal and the remaining amount of loan that is Rs. 9,65,000/- was given by me to Sh. Satyapal."
- v. Further, at no point of time or occasion, the defendant made any request or directed the plaintiff for alleged payment of Rs. 35,000/- to Sh. Mahavir Singh. So, there is no liability of any type on defendant towards Rs. 35,000/- to the plaintiff. The plaintiff just concocted a story to cover-up an amount of Rs. 10 Lakhs, which was mentioned in legal

notice by the counsel. However, there is not a single proof of selling and purchasing of the buffalo in the plaint, legal notice, criminal complaint etc. The story is beyond the pleading.

3. The PW-3 Sh. Darshan, who is also a shopkeeper of plywood, operated from the premises of the plaintiff. The PW-3 is an interested witness who deposed on behalf of the plaintiff, as guided by the plaintiff. But one fact, as he stated in his affidavit, is totally contradictory with the statement of PW-1 i.e. plaintiff. Herein, the PW-3, in his affidavit, categorically stated in para no. 6 that the alleged amount of Rs. 9,65,000/- was given to deceased Satyapal on 20.09.2005 in shape of cash. However, the plaintiff i.e. PW-1 stated in his cross-examination as “I had myself withdrawn the amount from the bank, vol. Satyapal was with me and I handed over the cash to him at the shop of Sh. Darshan.” The actual date of withdrawal or allegedly handing over the amount was 17.09.2005. Thus, the two-witnesses deposed against each other and are not able to give the correct date of allegedly handing-over of the amount to defendant. The PW-3 also could not explain about various facts, as mentioned in the affidavit, which were even not told by him to the Typist. Further, he deposed contradictory against the facts, as mentioned in his affidavit.
4. The PW-4 Sh. Deepak Deswal, Banking Assistant, Delhi State Co-operative Bank, Khera Khurd, Delhi, brought the documents as Ex.PW-4/1, Ex.PW-4/2, Ex.PW-4/2A, Ex.PW-4/2B and Ex.PW-4/3. The Ld. Counsel for the defendant has addressed the following arguments on this aspect:-
 - i. The Ex. PW-4/1 i.e. Statement of Account is objected by Ld. counsel for the defendant on the ground that the document is not certified under Section 2 of Banker’s Book of the bank and therefore, not admissible in

evidence. However, the Hon'ble Court observed that the objection will be considered at the stage of final argument.

- ii. As per Section 2 (8)(a) of the said Act, except the certified copy, no document can be exhibited before the Court. The certified copy can be a copy of original record duly subscribed and dated by the Principal Accountant or Manager of the bank with his name and official title. The record brought by the witness was not subscribed signed and dated by the Principal Accountant or Manager of the bank.
- iii. So, Ex. PW-4/1 is not a certified copy as per The Banker's Book Evidence Act, 1891.
- iv. The PW-4 while deposing about the account opening form an affidavit as well as the documents brought by him, stated as "It is correct that in all the document brought by me today name of the plaintiff is mentioned as Deshraj and not as Desha..... It is correct that name of the payee of the cheque is not mentioned in Ex-PW-4/3.....It is correct that account was opened on 08.07.2005 as per Ex-PW-4/2 whereas the affidavit Ex-PW-4/2A is dated 10.09.2005, it is correct that the account was opened on 08.07.2005 as per EX-PW-4/2whereas the affidavit Ex-PW-4/2A is dated 10.09.2005.....it is correct that election I-Card Ex-PW-4/2B is in the name of Mr. Deshraj and the alias Desha is not mentioned in Ex-PW-4/2B. I cannot tell the registration no. of the notary public who attested Ex-PW-4/2A. I cannot tell the reason why an affidavit 10.09.2005 that is after opening of account on 08.07.2005 was accepted. I cannot say whether the Ex-PW-4/2A was duly stamp with the stamp of Rs. 3 to be affixed by the notary public at the time of attestation of the affidavit".

- v. The PW-4 further deposed in his cross-examination as “it is wrong to suggest that PW-4/2A was not submitted at the time of opening of the account and it is further wrong to suggest that it has been inserted in the record subsequently after filling of the suit to show that plaintiff is also known as Sh. Deshraj.” The most important fact in his deposition as “it is wrong to suggest that as on 10.09.2005 there was no reason or occasion for the plaintiff to submit the affidavit dated 10.09.2005 to show that he is also known as Desha.....It is wrong to suggest that the documents has been inserted later on at the instance of plaintiff.”
5. It is crystal clear that the plaintiff opened an account in a bank which was being run from his premises on 08.07.2005 with the actual name as Deshraj. On 10.09.2005, he allegedly filed an affidavit (basically inserted on some later date), attested from a Notary Public without any registration number of Notary Public and without stamped with the Bank Manager showing that he is also known as Desha. However, there was no reason at that point of time for the plaintiff that he should insert his name as Desha because as per version of the plaintiff, till that date, no cheque was issued to the plaintiff in name of Desha by the defendant. However, at that time, the cheques were in possession of plaintiff i.e. Dehsraj. And even not a single transaction or entry has ever happened with the plaintiff in the name of Desha before allegedly getting the cheque in the name of Desha and also not even a single transaction has happened in the name of Desha after getting the above said cheque from the defendant.
6. As mentioned above, the account was opened on 08.07.2005, affidavit was inserted on 10.09.2007, the plaintiff withdrawal an amount of Rs. 9,65,000/- on 17.09.2005 and allegedly paid the same amount of Rs. 9,65,000/- to the

defendant on the same day i.e. 17.09.2005. The plaintiff in his plaint states that he advanced a loan of Rs. 10.00 Lakhs to the defendant with interest, which was paid to the plaintiff on 17.09.2005, as per version of the plaintiff, and the defendant, for discharging his legal debt liability, issued two cheques of Rs. 4,65,000/- and Rs. 5,00,000/- on 27.09.2005 and the same cheques were presented for encashment on 01.10.2005.

FINDINGS AND CONCLUSIONS OF THE COURT

The Exhibit PW-4/1 i.e. Statement of Account of plaintiff, which was brought by PW-4 i.e. official of The Delhi State Co-Operative Bank Ltd. was objected to while exhibiting the said document on the ground that the same was not certified under the Banker's Books Evidence Act. No doubt, the said Statement of Account was not certified as per the Banker's Books Evidence Act, but the same is attested by the then Manger of The Delhi State Co-operative Bank Ltd. and during the entire cross-examination, it is not disputed that the said Statement of Account is manipulated, concocted and doctored. Furthermore, during the course of arguments, Ld. counsel for defendants has relied upon the said Statement of Account, specifically entry dated 01.10.2005, whereby, there was credit entry of Rs.9,65,000/- through clearance. Furthermore, the plaintiff had already produced the copy of his Passbook i.e. Exhibit PW-1/1 and during the exhibition of the said Passbook, the plaintiff had produced the original Passbook. There is no difference in the entries in the Passbook and the Statement of Account. For the reasons stated above, the Statement of Account i.e. Exhibit PW-4/1, would also be read in evidence.

As per Section 103 of the Indian Evidence Act, the burden of proof, as to particular fact, would lie upon a person who wishes the Court to believe in its existence and as per Section 106 of the Indian Evidence Act, when any fact is specifically within the knowledge of any person, the burden of proving that fact is upon him. The facts pleaded in paras no.4 to 9 of the Preliminary objection of the written statement are particularly and specifically in the knowledge of defendants.

The defendants have pleaded in para no. 4 of the preliminary objections in the Written Statement that in April and May, 2005, defendant planned to construct a steel and concrete poultry farm shed at his poultry farm, Ganaur, Sonipat, Haryana. It is further pleaded that for the said construction, defendant has found-out a suitable person/Contractor namely Desha and said Desha was introduced to defendant by the plaintiff Sh. Deshraj. It is further averred that the plaintiff was having good relationship with defendant and his family and a consideration of Rs.4,65,000/- was fixed and negotiated with the said Contractor namely Desha and it was agreed that the payment will be made in the month of September, 2005. It is further averred that the plaintiff took every type of guarantee regarding the fine quality of work on behalf of Contractor namely Desha.

The aforesaid facts are indigestible and unimaginable as no prudent person and more-so, the Contractor would like to accept the condition that the entire payment will be received by him after completion of the work in the month of September, 2005. It is unthinkable and unimaginable that the Contractor, who was not only to cater the material but also the labour expenses, would take the entire amount after about 4-5 months from the alleged day of negotiations and in between, he would not take single penny. This Court also fails to understand that why Sh. Deshraj i.e. the plaintiff would take all types of guarantee including fine quality of work. The plaintiff Sh. Deshraj was neither the agent for bringing the

Contractor for the defendant nor having any control on the alleged Contractor namely “Desha”. At best, the Plaintiff could have given the assurance to the deceased defendant that he had seen the work of the Contractor and he had found that the alleged Contractor namely Desha used to give quality work.

As per para no. 5 of the preliminary objections of the Written Statement, it is stated by defendants that the Contractor namely Desha had started the construction work in the month of August 2005, which is too late from the scheduled time and only concrete work was started.

One fails to understand that as per para no.4, when the work was negotiated in the month of April-May 2005, then, why the defendant had waited till August, 2005 for starting of the work. It is not disputed by defendants that they are the residents of Delhi. The work was to be carried-out in Ganaur Poultry Farm, Haryana. The distance between Ganaur and Delhi was about 55-60 Kms. It is highly improbable that a person who is a resident of Delhi would have not taken any address or phone number or the contact number of the alleged Contractor namely Desha, who was to work in Ganuar, Haryana which is far place from the resident of defendants.

It is further stated in para no. 5 of the preliminary objections of the Written Statement that only concrete work was only started and when deceased defendant asked the Contractor about the progress of the work of steel shed, then, the Contractor has denied to do the work on the consideration of Rs. 4,65,000/-. This Court fails to effectively understand, what the defendants want to convey from the following sentence, which is part & parcel of para no.5 of the preliminary objection of the Written Statement of defendants:-

“....It was also told by the defendant no.1 to the Contractor that the cheque of Rs.4,65,000/- had already been re appeared in the name

of Contractor, Sh. Desha, as per schedule time of payment in months of September... ”

It appears that the defendants want to convey that cheque in the sum of Rs.4,65,000/- had already been prepared as per schedule time of payment for month of September. The said story also appears to be indigestible. As discussed above, the Contractor was required to pay to the labours as well as for the material and generally they are paid daily or weekly. The Contractor cannot wait for the entire payment till the completion/conclusion of the work. In para no. 4, the defendants have themselves alleged that the completion of work would take about 5-6 months. Even if, it is believed that the entire payment to the Contractor was to be made only after the completion of the work, as initially agreed between the parties, then, the work was only started in the month of August, 2005 and calculating the period of five to six months from the said period, the amount was required to be paid in the month of January- February, 2006. It is very strange that the alleged Contractor namely Desha had not started the work for around three to four months, but still the schedule of payment and that too, for the entire amount remained the same i.e. month of September, 2005 and that too 27.09.2005, which bears the date of cheques.

The defendants have also failed to point-out in entire Written Statement and evidence that when the cheque of Rs. 4,65,000/- was given to the alleged Contractor “Sh. Desha” of September, 2005. If the cheque was given initially in the month of April-May, 2005 for month of September 2005, then, naturally any prudent person would insist the Contractor to start the work as he had already given the post-dated cheque and it cannot be expected of the Contractor to run away from the work after receiving the post-dated cheque. The deceased defendant must have chased and followed the Contractor to expedite the work, which was to

be done by the alleged Desha and for this purpose, the deceased defendant ought to have taken/known the entire particulars i.e. address, phone number, mobile number, etc. of the Contractor namely “Desha”. There is neither oral nor documentary evidence, which has been produced by the defendant that deceased defendant or any family member of the deceased defendant had contacted Sh. Desha to start the work immediately in the month of April-May, 2005, when the negotiations of the construction work was done by defendant with the alleged Contractor “Desha”.

If the defendant wants to alleged that cheque of Rs.4,65,000/- was given by deceased defendant to the alleged Contractor Shri Desha in the month of August/September 2005, then, the said story would also be unimaginable and indigestible for the simple reason, the work was to be completed within a period of 5-6 months and the work was only started in the month of August, 2005 and which implies that the work was to be completed in the month of January, 2006/ February, 2006. It is not expected from any prudent person to hand-over the cheque of entire consideration amount to the Contractor and thereafter, run after and chase him for completion of the work and more-so when the defendant himself was resident of Delhi which is about 55 kms from the work place. The story built-up by the defendants does not appear to be plausible and rationale. The existence of the said story appears to be highly improbable.

Again in para no. 6 of the Written Statement, the defendants have come-out with the story that the amount was increased from Rs. 4,65,000/- to Rs. 5,00,000/- when the plaintiff had pressurized the defendant. One fails to understand that plaintiff was having good relationship with defendant and he had no concern, whatsoever, in the work in question, then, why plaintiff had pressurized the defendant. It was the prerogative of defendant to get the work done from the

alleged Contractor namely Desha. The plaintiff, at the best, can give suggestions being having friendly relations, but where was the question of pressurizing the deceased defendant to enhance the alleged amount from Rs.4,65,000/- to Rs.5,00,000/-.

The defendants have further stated that the payment schedule had remained same when the work was stopped. The work was not started for about 3-4 months after initial deal in the alleged month(s) of April-May 2005, then, no prudent person would pay the amount in advance. At the first instance for about 3-4 months, the alleged Contractor namely Desha was to work without payment of consideration amount and suddenly, in the month(s) of August/September 2005, the entire agreed payment was stated to have been made in advance by cheque. The alleged fact does not inspire any confidence to this Court. The facts, as pleaded by the defendants, are oxymoron that they cannot stand against each other. Moreover, no prudent person would accept such condition. More-so, when a person was seeing that the work was not started for about 3-4 months and when the work was started, the Contractor has demanded to increase the amount to the tune of Rs. 35,000/- on the alleged ground of increase in the steel prices. The work ought to have taken 5-6 months and no prudent person would like to give the entire amount in advance, more-so, where the Contractor was time and again betraying his words and demanding more & more amount for completing the work.

In para no. 7, it is submitted by the defendants that in the end of month of September 2005, the defendants have prepared another cheque of Rs.5,00,000/- bearing no. 011880, dated 27.09.2005 and handed-over the same to one Desha. The defendants were required to plead the exact date as “the end of the month” can be construed as 27.09.2005 i.e. date of the cheque or it may be 28.09.2005 to 30.09.2005. The important fact, as per the pleading, is the date when cheque was

handed-over to alleged Desha, who was Contractor, as per the defendants. The tone and tenor of the said para appears to reveal that the said cheque was given on 27.09.2005 when the cheque was prepared.

In para no. 7, it is further stated that after taking cheque of Rs. 5.00 Lakhs, the said Contractor, on the very next day, again stopped the work on the pretext of more inflation of steel price. It is submitted by defendants that the said Contractor namely Desha had demanded Rs. 6.00 Lakhs instead of Rs. 5.00 Lakhs, which story appears to be indigestible.

The alleged story of giving the amount of Rs.5,00,000/- by cheque also does not seem to be plausible and rationale in the given facts and circumstances. Moreover, on 27.09.2005, the said Contractor had taken cheque of Rs. 5.00 Lakhs. If alleged Contractor namely Desha was having any intention to increase the amount of Rs. 5.00 Lakhs to Rs. 6.00 Lakhs, he ought to have asked for the cheque of Rs.6,00,000/- on 27.09.2005 instead of Rs.5,00,000/- or the Contractor ought to have got cleared the said cheque and after getting the said amount, thereafter, he ought to have asked the defendants that now the steel prices have gone up and he requires Rs.1.00 Lakh more. It is admitted fact that the Contractor had only started the concrete work, then, it was the Contractor, who was in advantageous situation after getting the said cheque honoured and thereafter, to demand Rs.1,00,000/-. Furthermore, the Contractor was to work for another 4-5 months for completion of work and it cannot be expected from a normal prudent person to have returned the said cheque when only the concrete work was started.

The further story, which was built-up by the defendants, is that defendant declined the demand to increase the price upto Rs. 6.00 Lakhs and both the cheques of Rs. 4,65,000/- and Rs. 5.00 Lakhs were taken by the defendant. It is

further stated that the said cheques became idle and left in the drawer of the Almirah at Ganaur Poultry Farm.

All the transactions, as per defendant, were over with the alleged Contractor namely “Desha” and the said cheques were not even required for the purpose of negotiation. More-so, when the defendant was seeing the conduct of the Contractor namely Desha for last 4 months that the Contractor, first of all, had not started the work for about 3-4 months and thereafter, time and again, he was stopping the work and pressurizing defendant to increase the amount of Contract. The Contract amount was increased by Rs. 35,000/- and entire agreed amount was also paid in advance through cheque, still the Contractor was not happy and the defendant has declined the request of the Contractor to further increase the amount to Rs. 6.00 Lakhs from Rs.5,00,000/-. In these circumstances, the said cheques were not at all required by defendant and the prudent and rationale person was expected to turn-up or destroy the said cheques immediately. Furthermore, no reasonable and prudent person would again like to give the work to such kind of Contractor, who had betrayed the defendant repeatedly time and again and whose accounts were settled by the defendant. Moreover, as per the version of defendants, the alleged Contractor namely Desha had not stood on his own word and he had been building-up the pressure on defendant time and again for increasing the Contract amount and on 27.09.2005, cheque for an amount of Rs. 5.00 Lakhs was given to him, but on the very next day, he has stopped the working without negotiating and presenting the cheque with the banker.

The story of keeping of the cheques in Almirah at Ganaur poultry farm appears to be also very strange as the Contract between the alleged Contractor namely Desha was already terminated by the defendant himself after settling the accounts when he had demanded to increase amount of Rs.6,00,000/- from

Rs.5,00,000/-. The defendant no. 1 was the resident of Delhi and no prudent person would like to keep the cheques in the poultry farm, which was still under construction, as per the version of defendants. The defendants have further stated that some amount was given in cash to the Contractor namely “Desha”. Seeing the conduct of the Contractor i.e. alleged “Desha”, the defendant ought to have taken the receipt of full and final payment through cash, but no such receipt was produced by the defendants before this Court.

In para no. 8 of the Written Statement, it is submitted by the defendants that plaintiff after sometime approached defendant no. 1 and took-over the said two cheques of Rs. 4,65,000/- and Rs. 5,00,000/-. First of all, the said pleading is very vague in the context of the facts of this case. The word “after sometime” is totally vague. The Contract of the alleged Contractor namely Desha was already terminated on 28.09.2005 after settling accounts, as per version of defendants. The word “after sometime”, may be three, four, five, fifteen days or may be one month from the said date and the pleading and the evidence of defendants is totally bereft of particulars as to on which day, the plaintiff had approached the defendant and took-over the said cheques. It was incumbent upon the defendants to have pleaded the exact date when the plaintiff had approached the defendant and this is more-so for the reason that as per the Court record on 01.10.2005, the banker of defendant had dishonoured the said cheques. As per version of defendants, Sh. Desha, Contractor had returned the cheque on 28.09.2005. The pleading of the defendants is that after sometime, the plaintiff had approached the defendant. The word “after sometime” cannot be taken as next day from 28.09.2005, as earlier the defendants have used “next day” while returning of the cheque by the Contractor namely Desha and who stopped the defendants to have stated the exact date when the plaintiff had taken the Cheques. The perusal of record reveals that presentation of

the cheques in the account of defendant was done on 01.10.2005 as there are Dishonor Memos of that date and it means that the cheques were in possession of the plaintiff prior to 01.10.2005 and the cheques bore the date of 27.09.2005. Therefore, it was incumbent upon the defendants to come out with specific date when the plaintiff has taken-over the possession of the said cheques. The Dishonor Memo was already pleaded in the Legal Notice and the same is also part & parcel of the record. In spite of the same, the defendants have not pleaded on which particular day, the plaintiff has come to Ganaur for taking the alleged cheques of Rs. 4,65,000/- or Rs. 5,00,000/-. The further story, which was built-up by the defendants that both the cheques were given to the plaintiff as the plaintiff had assured the defendant that he will manage the work either for Rs. 4,65,000/- or Rs. 5,00,000/-. The said story also does not inspire confidence of this Court for the reason that it was already agreed between the Contractor and defendant that price has been increased from Rs. 4,65,000/- to Rs. 5,00,000/-. When the Contractor and defendant no. 1 have already agreed for Rs. 5,00,000/-, then, where was the question for making the alleged Contractor agree for Rs. 4,65,000/-. The further question arises that a person, who had betrayed at least 3-4 times i.e. alleged Contractor namely Desha had betrayed the defendant, then, why defendant would like to pay the entire amount even thereafter when the work was likely to be completed by January-February, 2006.

In para no. 9 of the preliminary objections of the Written Statement, the defendants have come out with the plea that the relation between plaintiff and defendant became sore. The defendants have failed to point-out that at what time and what was the moment when the said relations became sore. As per the defendants, the same became sore when the plaintiff filed the case under Section 138 of the Negotiable Instruments Act against the defendant on the basis of

aforesaid cheques. The said cheques were presented in the account of defendant on 01.10.2005 as the Bank of India had dishonored the cheques on the ground of insufficiency of fund vide their Memo dated 01.10.2005. The Delhi Co-Operative Bank Ltd., which was the banker of plaintiff, had given the Return Memo dated 03.10.2005 to the plaintiff and the plaintiff had given Notice dated 06.10.2005 to defendant, wherein, it was specifically pointed-out that a friendly loan was given to the defendant and on that account, the defendant had issued two cheques. The said Notice was sent through UPC and Registered Post. As per the Report, the Registered Post was refused by the defendant and it means, the same bears the correct address of defendant and the defendant had deliberately refused to receive the said Notice. The said Notice was deemed to be served on defendant. The UPC was also served on defendant. The provision of Section 27 of General Clauses Act would be squarely applicable in the present case.

It is settled law that if the plaintiff, before filing the suit, makes serious assertion in the Notice to the defendant, then the defendant must not remain silent by ignoring to reply, if he does so, an adverse inference may be raised against him. In *Metropolis Travels and Resorts (I) Pvt. Ltd. Vs. Sumit Kalra & Anr. 98 (2002) DLT 573 (DB)*, wherein, Hon'ble Division Bench of our Hon'ble High Court quoted with approval the authority *Kalu Ram Vs. Sita Ram, 1980 RLR (Note) 44*, of our own Hon'ble High Court which is as follows:-

"Observations of Kalu Ram's case (supra) apply on all force to the facts of this case. In the case in hand also despite receipt of notice respondent did not care to reply nor refuted the averments of demand of the amount on the basis of the invoices / bills in question. But the learned Trial Court failed to draw inference against the respondents."

(Portion bolded in order to highlight)

The defendant ought to have jumped on his chair when the said Notice was received by him as he was aware about the fact that the Contractor namely “Desha” had betrayed him and he had not issued the cheques for the plaintiff, but for the alleged Contractor namely “Desha”. The defendant ought to have taken immediate action against the plaintiff for playing the fraud and defendant ought to have lodged the criminal complaint against the plaintiff for such dishonest intention to present the said cheques in his own account instead of handing-over the same to the alleged Contractor namely “Desha”, as per the version of defendant.

The defendant had remained silent despite service of Legal Notice. A prudent person is expected not to remain silent even after service of the Legal Notice dated 06.10.2005 more-so, when the defendant was sure that plaintiff had played the alleged fraud upon him. A prudent person ought to have taken immediate action for such betrayal, but no such action has been taken by the defendant. On the contrary, the Legal Notice, which was tendered through registered post, was refused by defendant. The defendant was aware about the entire facts i.e. Desha was the Contractor and not the plaintiff and in these circumstances, the plaintiff was expected to have located the original Contractor namely Desha and with his help he could have made a very strong case against the Plaintiff. In view of the facts and circumstances of this case, the adverse inference is required to be taken against defendant, for the reasons, as stated hereinabove.

Furthermore, the defendant has remained cool as a cucumber and such kind of conduct done by the defendant speaks the volumes that alleged story, which was built-up by the defendant from paras no. 4 to 9 of preliminary objections of the Written Statement, is nothing but concoction and fabrication with the fictitious Contractor namely “Desha”. The defendant himself was aware about the fact that

the name of plaintiff was not only Deshraj but Desha also as he had family and friendly relations with him. In order to take the advantage of the fact that the cheques were drawn in the name of Desha and not Deshraj, the defendant had tried to build-up a story, as alleged in paras no.4 to 9, which falls flat on its face and for the reasons stated hereinabove, the same is totally unimaginable and indigestible story.

Moreover, DW-1 the son of defendant, has filed self-serving affidavit in support of the alleged story, which was built-up, but there is no independent evidence except self-serving affidavit. The plaintiff is able to demolish the same in the cross-examination as it appears from cross-examination of DW-1 that he was not having the knowledge of the facts, as alleged in paras no.4 to 9 of the Preliminary objection of the Written Statement. The defendants have failed to produce or even able to try to bring on record any evidence of alleged Contractor namely “Desha”. It is unbelievable that the defendants have no knowledge of the whereabouts of the alleged Contractor and more so, the alleged Contractor namely “Desha” came in contact in the month of April-May, 2005 and worked in the month of August, 2005 and September, 2005 and the dispute between plaintiff and defendant has arisen within the period of 10 days when the Contract with alleged Contractor “Desha” was terminated and accounts were settled. The plaintiff had given Legal Notice dated 06.10.2005 to defendant. As per defendant, the alleged Desha had worked for about one month and had only started concrete work, then, no plausible and reasonable prudent person would accept that any of the defendants were not having any whereabouts of the alleged Contractor namely Desha. The defendants have also failed to bring the Statement of Account of defendant Satyapal Singh that he was maintaining the sufficient balance of

Rs.5,00,000/- or even Rs.4,65,000/- as on 27.09.2005 (the date of the cheques in question) to be paid to the alleged Contractor namely “Desha”.

The entire arguments of the defendants are based upon the fact that plaintiff has not been able to prove that he is also called by the name of “Desha”. In my considered view, the plaintiff has already given the affidavit to his banker on 10.09.2005 that his name is Deshraj @ Desha. No doubt that Delhi State Co-operative Bank Ltd. is within the premises of plaintiff, but that does not mean that official of the banker namely PW-4 would be disbelieved only on this ground itself. The landlord and tenant relationship of the plaintiff with the said banker cannot be construed as the customer and banker relationship between them. The banker and customer relationship stands on totally different footing.

The Ex.PW4-2A clearly reveals that the affidavit is of much prior date from 27.09.2005, which bears the date of cheques in question. The witness PW-4, nowhere, admitted that the said affidavit dated 10.09.2005 was given after the dishonor of the cheques or at the time of presentation of the cheques. The suggestion was given to PW-4 that affidavit was inserted specifically after filing of the suit, but he has denied the said suggestion. The testimony of PW-4 clearly shows that in the villages, the persons are generally called with their nick names and in this case also, the word “Desha” can be the nick name of Deshraj as “Desha” contains alphabets of “Desh” from the plaintiff’s name Deshraj and alphabet “a” is added to word “Desh”. This Court believes that person is having its nick name and specifically in the villages, the people are also given their nick names. The name Desha from the name Deshraj cannot be ruled out in the facts and circumstances of the present case. There is no dispute between the parties that plaintiff and defendant were well known to each other. There is also no dispute that the cheques bear the signatures of defendant. It is also not disputed that the

cheques were in the name of Desha. It is satisfaction of the banker, which was required while sending the cheques for clearance that Deshraj and Desha is one and the same person. The banker of the plaintiff had already taken the affidavit dated 10.09.2005 that Desha is known as Deshraj. If the Affidavit was not in order, then, the banker could have taken the fresh Affidavit, but the banker was satisfied with the said affidavit and ultimate satisfaction is of the banker, who is collecting the cheque on behalf of the customer.

In addition to this, the plaintiff has already produced PW-2 and PW-3, who were not only known to the defendant but also to the plaintiff and they specifically deposed that plaintiff is also known by the name of Desha. PW-3 had categorically stated that the deceased Satyapal had taken a loan of Rs.9,65,000/- from Desha, which was paid in cash after taking the same from the bank. Ex.PW1/1, as relied upon by the plaintiff, shows that an amount of Rs.9,65,000/- was withdrawn by the plaintiff from his bank.

The Ld. Counsel for defendants has argued that what was the need of giving two cheques of the same date i.e. 27.09.2005 when one cheque could have served the purpose. It was the prerogative of deceased defendant to give two cheques or one cheque and the plaintiff cannot insist upon him to give single cheque. Moreover, the alleged story of the Contractor “Desha” had already fallen flat on its face. The plaintiff has stated in the cross-examination that defendant had told him if there was less balance in his account, then one of the cheques could be withheld. The said explanation seems to be plausible and reasonable explanation.

The Ld. counsel for defendants has further argued that when the defendant had asked for loan of Rs.10,00,000/-, then, why the plaintiff had given him Rs.9,65,000/-. It is further argued that during the cross-examination, the plaintiff has stated that the defendant had told him to pay Rs.35,000/- to Sh. Mahavir for the

Buffalo and he paid Rs.35,000/- to Sh. Mahavir in the presence of Sh. Satyapal and remaining amount of Rs.9,65,000/- was given to the defendant.

In the Legal Notice, evidence by way of affidavit and entire pleading of suit and complaint case, there is no explanation that why the cheques of Rs.9,65,000/- were given and not of Rs.10,00,000/- when it was alleged that the loan was given for Rs.10,00,000/-. The Ld. counsel for defendants has argued that there are various contradictions during cross-examination of PW-2 Shri Mahavir and PW-1 i.e. plaintiff regarding the payment of Rs.35,000/- to Shri Mahavir i.e. PW-2. The perusal of the record reveals that there are certain contradictions in the testimonies of plaintiff and Shri Mahavir as far as payment of Rs.35,000/- to Shri Mahavir, however, the plaintiff has not claimed the said amount in the pleading i.e. suit filed by him. The plaintiff has claimed a sum of Rs.9,65,000/- and not the said amount of Rs.35,000/-. The principle of Falsus in Uno and Flusus in Omnibus i.e. False in one, false in all is not applicable in India.

Ld. Counsel for the plaintiff has also relied upon the presumption under Section 118(g) of the Negotiable Instruments Act, 1881 i.e. the holder of a negotiable instrument is a holder in due course and also relied upon Section 139 about the presumption of the legal liability under the cheque. Sections 8 and 9 of the Negotiable Instruments Act, 1881 are reproduced as under:-

“8. “Holder”.— the “holder” of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

9. “Holder in due course”.—“ *Holder in due course*” means any person, who, for consideration, became the possessor of a promissory note, bill of exchange or cheque if payable to bearer,

or the payee or indorsee/ endorsee thereof,

if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.”

Ld. counsel for the defendant has relied upon the judgment titled as **“Gemini Vs. Chandran” Crl. A No. 282 of 1999-B, decided on 14.07.2006**, passed by Hon’ble Kerala High Court and submitted that vide elaborating various judgments of Hon’ble Apex Court held that the cheque must be “IN HIS OWN NAME”. Paras no.26 and 29 of the said Judgment were relied upon and the same are reproduced as under:-

“26. ..it is also relevant to note that the “holder’s” entitlement to possession of the cheque and to the recovery or receipt of the amount etc., must be “IN HIS OWN NAME”. That means, even if a person has certain right to possess the cheque and to receive or recover the amount etc., such mere right may not suffice to bring him within the sweep of section 8 of the Act, unless such entitlement is “in his own name” and not in any other person’s name. That means any and every entitlement is not enough, but it must be entitlement in his own name.

27. The mere possession of a cheque by a person or even his entitlement to the possession thereof or even his right to receive or recover the amount will not satisfy the requirement under Section 8, unless such entitlement is IN HIS OWN NAME and not on behalf of another.”

As already held hereinabove, the plaintiff is Deshraj and he is also called with his nick name Desha and the same is basically one and the same person i.e. it

can be said that the said cheques were in his own name. Merely the cheques in the name of “Desha” would not change the character of the cheque in his own name. Furthermore, I have profit to refer the relevant portions of paras no. 6 to 8 of the Judgment of our own Hon’ble High Court passed in ***RFA No. 605/2017 titled as Khem Singh Vs. Dinesh Bhatia decided on 11th July, 2017***, which are as follows:-

“6. The main issue was that whether the appellant/defendant had taken a loan from the respondent/plaintiff and given the subject cheque to the respondent/plaintiff or whether the subject cheque was given by the appellant/defendant to one Sh. Rakesh Arora. This aspect is discussed and dealt with correctly by the court below in paras 10 to 13 of the impugned judgment, and these paras, which this Court adopts, read as under:-

“10.....

11.....

12. Dishonour memo Ex.PW-1/B embodies the reason of dishonor as “Insufficiency of funds” and not any difference of signatures or signatures on cheques Ex.PW-1/A to be not of the account holder. No law prescribes that the writing in the body of the cheque is necessarily to be the drawer of said cheque. In the fact of the matter, from the foregoing discussions, the defendant has failed to prove that he had delivered cheque Ex.PW-1/A to said Sh. Rakesh Arora for security for availing loan from financial institution or that it was misused by said Sh. Rakesh Arora and/or given to plaintiff as alleged by defendant/DW-1. Cheques Ex.PW-1/A bears the signatures of defendant. Presumption in favour of holder under Section 139 of Negotiable Instrument Act, 1881, (in short N.I. Act), impels me to presume that the holder of the cheque i.e, the plaintiff received the cheque of the nature referred to in Section 138 of NI Act for the discharge, in whole or in part, of any debt or other liability of defendant/DW-1. Such rebuttable presumption in favour of plaintiff/PW-1 has not been rebutted by the defendant/DW-1

by adducing relevant evidence. Mere no mention of loan in Income Tax liability towards plaintiff would not entitle defendant to wriggle out from his liability towards plaintiff for payment to aforesaid loan. In fact, from the appreciation of the testimony of defendant/DW-1, as aforesaid, it is clear that defendant/DW-1 is not a reliable witness as in his version in affidavit Ex.DW-1/A is not a reliable witness as in his version in affidavit Ex.DW-1/A he asserted of having signed the cheques Ex.PW-1/A but in cross-examination had altogether denied the signatures at Point –X and Y on Ex.PW-1/A to be of him.”

7. A civil case is decided on preponderance and balance of probabilities. After both the parties complete their pleadings and lead evidence, the entire cases of the respective parties are thereafter put in a scale, and it is decided in whose favour the scale is tilted, i.e the civil suit is decided by preponderance and balance of probabilities. In the present case it is seen that the cheque admittedly bears the signatures of the appellant/defendant. Further, the court below rightly notes that if the case of the appellant/defendant was that the cheque was given to Sh. Rakesh Arora with whom there were various litigations, the appellant/defendant had to prove the same, but the appellant/defendant led no evidence whatsoever with respect to the alleged litigations between the appellant/defendant and Sh. Rakesh Arora.

8. I would like to add that once a cheque is dishonored, a liability arises as a cheque has to be presumed to have been given for consideration. Also, in terms of Section 114 of the Indian Evidence Act, 1872 illustration (i) if a document creating an obligation is in the hands of the obligor, the obligation stands discharged and meaning thereby the opposite is also equally true that if the instrument, i.e banking instrument in this case, is not in the hands of the appellant/defendant, it means that the banking instrument was with the respondent/plaintiff for discharge of the liability of the appellant/defendant. I would also like to add another reason for disbelieving the case of the appellant/defendant because this story is

not believable that he gave the cheque to Sh. Rakesh Kumar who had promised to get loans for the appellant/defendant and his family from financial institutions as why would a cheque be required for taking loans from a financial institution.”

I have also profit to refer the relevant portions of paras no. 4 and 5 of the Judgment of our own Hon’ble High Court passed in ***RSA No. 391-93/2006 titled as Jawala Industries VS. Murari Lal Mangal decided on 23rd April, 2014***, which are as follows:-

“4.....The relevant observations of the first appellate court are contained in paras 9 to 13 of the impugned judgment and which read as under:-

“9. The defendant being holder of the cheque which was issued by plaintiff in their name is holder of the same for consideration as also deposed by the plaintiff Under Section 139 of the Negotiable Instruments Act which raised presumption that the cheque was drawn for consideration. As discussed, the cheque was drawn for consideration. As discussed, the defendant failed to rebut that presumption as neither they proved on record that they are holder in due course of the cheque in question as opined in the case of Braja Kishore Dikshit v. Puma Chandra Panda reported in AIR 1957 Orissa 153 which laid down as under:-

“Three conditions are necessary to be holder in due course. Firstly he must be a holder for consideration, secondly the instrument must have been transferred to him before it becomes overdue, and thirdly he must be a transferee in good faith, and that he should not have any reason to believe that there was any defect in the title of the transferor,

Nor the defendants could rebut presumption of consideration as none of the defendants that is partners of the defendant no. 1 came forward to depose and relied upon attorney holder

who was not competent to answer the complex issues as were raised by the defendant themselves by production of Shri Dharam Chand Handa in their defence.

10.....

11.....

12.....

13.....

5. I generally agree with the aforesaid conclusions of the first appellate court because firstly it is not disputed that the cheque was of the respondent-plaintiff, secondly it is not in dispute that the cheque was encashed from the account of the respondent-plaintiff and in favour of defendant no.1/appellant no.1, thirdly merely because the cheque is filled in the hand of Dharam Chand Handa cannot take away the fact that the cheque was encashed by the appellant no.1/defendant no.1. To the aforesaid aspects, I must add that the appellants-defendants have failed to prove satisfactory reason as to why necessary precautions were not taken by the appellants/defendants if the cheque was given for investment purposes to them by Dharam Chand Handa though the same was not of the account of Dharam Chand Handa but of the account of the respondent-plaintiff. Therefore, it is clear that the respondent-plaintiff had given a loan of Rs.1,00,000/- to the appellants-defendants, which they failed to repay, and therefore the suit has been rightly decreed by the first appellate court.”

It is well settled law that Civil Cases are decided on the touchstone of the preponderance of probabilities and not on the basis beyond reasonable doubt and I am of the considered view that the plaintiff has been able to prove on record by sufficient, cogent and authentic evidence that the plaintiff had given the loan to the deceased defendant Shri Satyapal Singh and who had given the cheques of Rs.9,65,000/- in discharge of his liability.

The plaintiff has claimed the interest at the rate of 18% p.a. w.e.f. from 27.09.2005 to 24.09.2008. The plaintiff has himself claimed that it was a friendly

loan and now, the plaintiff is claiming interest @ 18% p.a. and in my view, the same is excessive in the facts and circumstances of the present case. The Hon'ble Division Bench of Hon'ble High Court of Delhi in the case of ***Pt. Munshi Ram & Associates (P) Ltd. V. DDA, 2010 SCC Online Del 2444*** has held that higher rates of interest, which are against public policy, can be struck down by the Court by finding such rates of interest to be against the public policy. Any Contract, which is against the public policy, is void under Section 23 of the Indian Contract Act, 1872. The said Judgment was also relied upon by the Hon'ble Single Bench of the Hon'ble High Court in the case bearing ***R.F.A. No.823 of 2004 titled as Shri Sanjay Mittal Versus Sunil Jain decided on 07.12.2018***. The Hon'ble Single Bench has granted the interest @ 9% p.a. instead of 24% per annum i.e. 2% per month.

In view of the facts and circumstances of the present case, the interest of justice would be served if the plaintiff is granted simple rate of interest @ 9% p.a. from 27.09.2005 till 24.09.2008.

Section-34 CPC postulates and envisages the pendent-lite interest at any rate, not exceeding 6% and future interest at any rate, not exceeding the rate, at which nationalized banks advance loan. Keeping in mind the mandate of the said proposition, the interest of justice would be served if the plaintiff is granted pendent-lite simple rate of interest @ 6% per annum and future simple rate of interest @ 9% per annum till its realization.

The defendant Shri Satyapal Singh had already expired during the pendency of the case and present decree is passed against the defendants being the LR's of deceased defendant Shri Satyapal Singh and not in their individual capacity and same will be executable in terms of Section 52 of CPC, 1908.

Accordingly, issues no.1 to 3 are decided in the aforesaid terms, in favour of the plaintiff and against defendants.

RELIEF

From the discussions, as adumbrated hereinabove, I hereby pass the following

FINAL ORDER

- a. A decree of Rs.9,65,000/- is passed in favour of the plaintiff and against the defendants along-with simple rate of interest @ 9% p.a. from 27.09.2005 till 24.09.2008. The plaintiff is also granted pendent-lite simple rate of interest @ 6% per annum and future simple rate of interest @ 9% per annum till its realization and the same is also payable by the defendants.
- b. The cost of the suit is also awarded in favour of the plaintiff and against the defendants.
- c. It is made clear that the defendant Shri Satyapal Singh had already expired during the pendency of the case and present decree is passed against the defendants being the LR's of deceased defendant Shri Satyapal Singh and not in their individual capacity and same will be executable in terms of Section 52 of CPC, 1908.

Decree-sheet be prepared accordingly.

File be consigned to Record Room after due compliance.

**Announced through Video Conference on
this 10th day of July, 2020.**

ARUN
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by ARUN SUKHIJA
Date: 2020.07.10
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(ARUN SUKHIJA)
ADJ-07 (Central)
Tis Hazari Courts, Delhi

Suit no. 156/2020 (ID no. 10652/16)
Des Raj
Vs.
Satya Pal through LRs

10.07.2020

The Judgment has been pronounced through cisco webex video conferencing.

Present: Sh. Vineet Rana Ld. proxy Counsel for the plaintiff.
None for the defendant.

The Ahlmad has sent the meeting ID, however, even after waiting for five minutes, none has appeared on behalf of defendant.

Vide Separate Judgment announced through video conference the suit of the Plaintiff is decreed in terms of the Judgment. Decree Sheet be prepared accordingly.

File be consigned to record room after due-compliance.

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(Arun Sukhija)

ADJ-07/Central/Tis Hazari Courts,
Delhi/10.07.2020