

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

In re

OM P. BAKSHI d/b/a Imported  
Auto Parts

Case No. 89-10250 K

Debtor

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NARENDRA NATH KALIA

Plaintiff

-vs-

AP 91-1238 K

OM P. BAKSHI, d/b/a Imported  
Auto Parts

Defendant

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Buffalo, New York 14202

Attorney for the Plaintiff

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Hamburg, New York 14075

Attorneys for the Defendant

In this Adversary Proceeding Dr. Narendra Kalia (plaintiff) attempts to establish that over \$30,000 in loans he extended to Om Bakshi (debtor) should not be discharged in Bakshi's chapter 7 case, because such debts were the result of fraud, and are non-dischargeable under 11 U.S.C. § 523(a)(2). Kalia is a college professor; Bakshi owned an auto parts store. The debts in question were partly business and partly personal.

Trial began on September 21, 1992 and continued on various dates thereafter. The last post-trial memoranda were received on February 17, 1993, whereupon the matter was taken under submission.

Dozens of exhibits were received into evidence. The testimony and exhibits establish that many, many loans and extensions were granted by the plaintiff to the debtor between 1982 and 1986 and many payments were made on the debts. The parties are both Hindu, and it was explained to the Court that their method of manifesting the loans was that of a "countercheck," in a fashion used in India. The "countercheck" method involved the debtor's issuance (at the time of each separate loan or each consolidation loan or renewal or extension) of a series of post-dated checks representing the agreed schedule of repayment. No promissory notes or other evidence of debt were ever used as between these parties. If the debtor knew that a given check would be dishonored if it were to be deposited on the date contemplated, he would typically notify the plaintiff as that date approached, and would <sup>ask</sup> the plaintiff to forebear the deposit; often they would agree to new terms, and the debtor would exchange a new series of post-dated checks for those remaining from the old series.

The parties were friends. Thousands of dollars were loaned and repaid in this fashion over the years. Ultimately, after a falling-out in September 1985, the parties attempted to agree upon the total outstanding balance and terms for its

repayment. Thus they agreed that nearly \$31,000 was owing and the debtor issued a series of "counterchecks" that (on their face) would retire the principal amount of the remaining debt plus interest only for a few months.<sup>1</sup>

If any records other than check stubs and canceled checks were retained by either party to evidence the various transfers of money back and forth, they were neither alluded to nor offered into evidence. It is also undisputed that the debtor never issued any written financial statements of any sort to the plaintiff, and the plaintiff does not seriously dispute the debtor's testimony that no such statements were ever requested.

Each side has had its own expert examine the dates and amounts of the dozens of transactions negotiated by check.<sup>2</sup> The debtor's expert testified in support of the debtor's representation that the interest rate on these loans was at least thirty-six (36%) percent per year (and therefore usurious) and the plaintiff's expert interpreted the figures to the contrary. In light of the Court's holding, it is not necessary to consider the debtor's

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<sup>1</sup>It is the debtor's testimony that these checks were not intended to be deposited because the interest rate was in dispute, and that new checks would be issued after a new interest rate was agreed upon.

<sup>2</sup>It appears that some loans and some repayments were made in cash, and no authoritative records exist thereof, except for some cash deposits to Kalia's bank account by Bakshi as payments on account.

affirmative defense of usury.

It appears that there might have been between thirty and thirty-five separate loans of varying amounts and durations, several of which the parties agree were paid in full. The total loans by check over the years in question were nearly \$40,000 and it is clear that the defendant paid over \$25,000 back to the plaintiff.

The present dispute surrounds the last series of checks, issued in September of 1985. The checks consisted of a number of \$380 "interest only" payments, dated November 5, 1985, December 5, 1985, January 5, 1986, February 9, 1986, and March 5, 1986, and then a series of much larger checks which bore the memo "loan and interest" but which characterization the plaintiff disputes: \$6,325 dated May 1, 1986, \$6,129.83 dated May 1, 1987, \$4,875 dated May 1, 1988, \$3,496 dated November 1, 1988 and \$10,000 dated March 1, 1989. By the end of February of 1986 the bank had closed this checking account because of repeated overdrafts. The plaintiff learned this on June 19, 1986 when he attempted to negotiate the \$6,325 check dated May 1, 1986. The debtor made no further payments. Thus, the plaintiff was unpaid over \$30,000 by the time the debtor filed his chapter 13 petition on February 6, 1989, which was converted to chapter 7 on April 29, 1991. (What happened between June of 1986 and February of 1989 between these parties is not in evidence.)

During the years involved in the transactions between the

parties, the debtor owned an auto parts business. Some of the loans in question were business loans and some were personal loans. The plaintiff's assertion of fraud is based upon his allegations that: (1) the debtor made many false representations to the plaintiff regarding his business and personal situation, and (2) the plaintiff would not have made the loans but for the false representations. Thus the plaintiff claims that at various times the debtor had represented to him that the inventory of the business was not encumbered, that the debtor owed no other loans, that tight cash flow caused the debtor to miss out on lucrative business opportunities, that with capital he could take advantage of those opportunities, that wealthy family members would help the debtor to repay Kalia if he had any problems repaying Kalia, that the debtor had legal problems and would go to jail if he didn't have monetary help, that his "children were starving" and other representations. The debtor flatly denies having made such representations.

Tellingly, the debtor's counsel elicited a somewhat different account from the plaintiff on cross-examination regarding the basis of the plaintiff's various decisions to lend. The plaintiff admitted on cross-examination that although the plaintiff spent substantial time visiting with the debtor at the debtor's place of business (as well as the debtor's home), he never examined or asked to examine the inventory or the books and records of the business; he gave the loans "as a friend"; he had promised the

debtor that "as business grows I would help him"; he never asked for financial statements, financing agreements, profit and loss statements, written guarantees, security agreements, or any proof of ability to repay; he knew the debtor's father and also the debtor's brother (a successful physician); and, the loans were loans to "a friend." Even on redirect examination on the question of why plaintiff did not ask for some proof or assurance of repayment, the plaintiff volunteered an answer that went beyond that elicited (somewhat to his own counsel's chagrin) and made it very clear that he was motivated principally by his belief that he was loaning money "to a friend."

The Court believes that this is dispositive of the matter. Assuming, but not deciding, that the debtor made falsely optimistic statements about his business prospects, Kalia has failed to carry his burden of proving that those representations played any part, significant or otherwise, in his decision to lend. Furthermore, although plaintiff's counsel argued in closing and in his memorandum that the debtor was a manipulating businessman who acted in reckless disregard of the status of his accounts and therefore in reckless disregard of the rights of the plaintiff to whom he owed a bond of trust, a special relationship not unlike that of "family," the Court finds that the plaintiff has failed to carry the burden of proving, by a fair preponderance of the

evidence,<sup>3</sup> that any loan or extension or renewal of credit in the case at Bar resulted from any intentional or reckless misrepresentations by the debtor or any connivance or skulduggery by the debtor, whether actual or "constructive" (resulting from any supposed relationship of trust or of confidence).<sup>4</sup> The Court finds that Kalia made the loans to Bakshi out of friendship and the belief that Bakshi would not fail to repay him.

None of the check-issuance cases cited by the plaintiff are pertinent to the issuance of the checks in this case, for the checks in this case were mere promises to pay; they were like a "coupon book" or a series of promissory notes. They were not intentional or reckless overdrafts of a checking account in the normal sense. An inability to perform a promise to repay "a friend" is not fraud.<sup>5</sup> If Bakshi had the ability to perform during the three years between the closing of the account in February of 1986 and the filing of his Chapter 13 petition in 1989, no evidence thereof has been offered.

The Court also finds that Kalia's effort to paint Bakshi

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<sup>3</sup>*Grogan v. Garner*, 498 U.S. 279 (1991).

<sup>4</sup>That Kalia might fervently believe that Bakshi victimized him is not "proof" of that proposition.

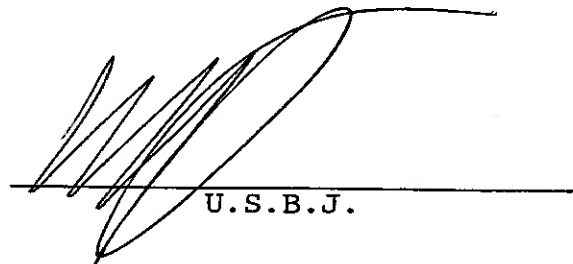
<sup>5</sup>It seems that in the culture shared by the parties, a breach of friendship might constitute "fraud." It is the law of the State of New York and 11 U.S.C. § 523(a)(2), however, that governs the transactions at bar.

as a devious conniver, preying on Kalia's innocence and trust, totally fails of proof. Kalia is intelligent and sophisticated. Bakshi's demeanor and testimony did not bespeak dishonesty.

Kalia's Complaint is dismissed on the merits. The debt is discharged.

SO ORDERED.

Dated: Buffalo, New York  
March 2, 1993



U.S.B.J.