

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

% *Date of Judgment: 26.11.2010*

+ **RSA No.160/2008**

MUNICIPAL CORPORATION OF DELHI

.....Appellant
Through: Mr.Saurabh Khanna for Mr.Gaurang
Kanth, Advocate.

Versus

M/S RISHI BUILDERS ENGINEERS & CONTRACTORS

.....Respondent
Through: None.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 28.02.2008 which had endorsed the finding of the Trial Judge dated 16.8.2003 whereby the suit of the plaintiff i.e. M/s Rishi Builders Engineers & Contractors seeking recovery of Rs.74,084/- along with interest @ 12% per annum from 01.01.1989 till 18.8.1994 and thereafter interest @ 6% per annum on the principal sum from 19.8.1994 till realization had been decreed.

2. This is a second appeal Court. Before this Court, it has been urged by learned counsel for the appellant that although issue no.1 which dealt with the alleged fraud which the defendant department had played upon the plaintiff, had placed the onus upon the plaintiff yet the discussion in the judgment shows that the onus had

in fact been put upon the defendant. Learned counsel for the
RSA No.160/2008

appellant has placed reliance upon a judgment of the Apex Court reported in (2010) 5 SCC 104 Shanti Budhiya Vesta Patel & Ors. Vs. Nirmala Jayprakash Tiwari & Ors. to substantiate a submission that whenever a fraud has been set up as a plea onus to discharge the fraud is always upon the party who sets up such a plea. There is no dispute to the proposition.

3. In the instant case, six issues have been framed. Issues no.1 and 3 were discussed together. They read as follows:

“1. Whether the defendant has played fraud and made payment of Rs.74,084/- vide cheque No.973097 to some fictitious person? OPP

.....

3. Whether the defendant has made the payment of Rs.74084/- vide cheque No.973097 dated 01.10.91 as full and final settlement with respect of work done by the plaintiff? OPD”

4. There were alternate onuses placed upon the parties; onus to discharge the first issue was on the plaintiff and onus to discharge issue no.3 was on the defendant. Oral and documentary evidence had been adverted to by the Trial Judge. The extract of the judgment and in the manner in which it had dealt with the said issues is herein reproduced below:

“Issue No.1 and 3

Both the issues are interconnected so are required to be decided together. DW-1 simply proved original cheque of Rs.74084/- bearing No.973097 dated 1.10.91 Ex.DW1.1 issued by defendant MCD in favour of plaintiff M/s Rishi Builders and the issue of cheque is not disputed. PW-1 in his statement has specifically denied any account in PNB, GT Road, Azadpur branch. From statements of PW-2 R.K.Pathak and DW-4 Piaray Lal it is proved that an account bearing no.1455 was opened in the name of plaintiff M/s Rishi Builders on 9.10.1991 in PNB Azadpur Branch through account opening application Ex.PW2/1 accompanied by specimen signature card Ex.PW2/2. This account was admittedly opened after nine days of issue of cheque and one day prior to receiving of the same from office of defendant on 9.10.1991 when a small amount and cheque book was got issued

on same day by holder. Cheque in question was deposited in this account on next day of opening of account on 10.10.91. The amount of this cheque was withdrawn on 12.10.1991 and thereafter no material transaction taken place in this account from the account holder. These facts clearly show that this account was opened only for the purposes of obtaining amount of cheque in question only. The rules of opening of this account were floated by bank officer as no introduction was taken from anyone before allowing its opening and even no document regarding the identification and genuineness of account holder was obtained by bank. Even account opening form does not contain photographs of its holder. Neither PW2 or DW4 were able to produce any documents submitted by account holder along with account opening form and thus presumption can be raised that no document was taken by bank before allowing opening of account. The version of DW4 that he verified the address of account holder and verified his antecedents by going at the address cannot be believed in absence of the written report and particulars of his visits and from which sources he got the same etc. This witness could not produce the relevant rules that in the year 1991 there was no necessity of taking any documents of identification and introduction of any responsible person while opening an account or he has right to do away those rules being branch manager. All these facts shows that bank officials were in connivance with the account holder in opening of account by any fictitious person in the name of plaintiff who can be termed as cheater or fraud.

The question also arises who has received this cheque from officer of defendant. Plaintiff has disputed the receipt of this cheque and alleged that receipt does not bear his signature. As per DW2 this cheque was received by or on behalf of plaintiff vide Ex.DW2/2 but he is unable to say about the identity of the person who actually received the same. Admittedly DW2 has not handed over the cheque to alleged representation of plaintiff but was given by Radhey Shyam dealing clerk who is still working in the office of defendant. This Rahdey Shyam is not examined by defendant who could tell about the actual identify of the received of cheque so adverse presumption has to be raised in such circumstances against defendant. DW2 even could not identify or read any word of signature put on the receipt to explain what was written on the revenue stamp. No identification proof was obtained by officials of defendant at the time of delivering cheque to alleged representative. does not contain the name of the person who received the cheque but simply name of firm is mentioned. DW2 is not certain whether the cheque was received by the plaintiff or any person as he was not posted at the relevant

time in the office concerned nor has dealt with the matter personally. From these facts there exists no ground to disbelieve the version of plaintiff that he has not received the cheque in question especially when no hand writing expert has been examined by defendant to tally the signature of proprietor of plaintiff with his admitted signature. In case where fraud or forgery is alleged the opinion of hand writing becomes very material and important evidence but non examination of any such expert also goes against defendant. This court is also unable to compare the signature of PW1 with the signatures on receipt of Ex.DW2/P1 which is not readable. Accordingly it is hereby held that cheque in question was handed over to some unauthorized and fictitious person by officials of defendant and real plaintiff could not get the payment of work done till date.

There are suspicion in such circumstances keeping in view the manner in which cheque was delivered to unauthorized person and account was opened in haste by floating the established norms and procedure that officials of MCD and PNB connived with alleged unknown cheater to deprive the plaintiff from his legitimate amount and to gain undue and illegal advantage. The payment was received by some fictitious person and not by real plaintiff so the amount of work done by plaintiff is still due payable by defendant. Payment of cheque amount to some fraud person does not amount to settlement of dues with plaintiff. These issues are thus decided against defendant and in favour of plaintiff. Defendant in these circumstances is liable to pay the full amount with interest to plaintiff which he was deprived due to fraud, negligent and inaction on the part of officials of defendant."

5. The discussion emanating clearly shows that the fraud alleged by the plaintiff had been proved by him. The plaintiff had been able to establish that on 09.10.2009 an account had been opened in the name of the plaintiff M/s Rishi Builders Engineers & Contractors in the Punjab National Bank, Azadpur Branch nine days after the issuance of the cheque and the cheque in question was deposited in the account on next day i.e. 10.10.1991; amount of the cheque was withdrawn on 12.10.1991; thereafter no material transaction had taken place in this account; clearly showing that this account had been opened only for the sole purpose of

obtaining this cheque amount in question. The account opening form and the other necessary documents were also found to be suspicious.

6. These fact findings were endorsed by the first Appeal Court. This Court is not a third fact finding Court and cannot re-examine and re-appreciate the facts. The substantial questions of law have been formulated in the memo of appeal in page 6A; none of them can be termed as a substantial question of law which has arisen in this case. No such substantial question of law having arisen, this Court cannot be vested with jurisdiction. Appeal is dismissed in limine.

INDERMEET KAUR, J.

NOVEMBER 26, 2010
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