

R-292

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

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Date of Judgment: 10.5.2011

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R.S.A.No. 33/2008

SHRI AJAY TALWAR Appellant

Through: None.

Versus

SHRI IQBAL SIDIQUE 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 and the judgment and decree dated 10.12.2007 which had reversed the finding of the trial judge dated 11.8.2005. Vide judgment and decree dated 11.8.2005 the suit filed by the plaintiff Ajay Talwar seeking recovery of Rs.64,800/- against the defendant had been decreed for a sum of Rs.60,000/- along with interest 6% per annum. The impugned

judgment had dismissed the suit.

2. The case of the plaintiff is that the parties were known to one another and in May 2004 the defendant approached the plaintiff for financial assistance; he had given a loan Rs.60,000/- for a period of 5-6 months; this was on 25.5.2004 in the presence of a witness. Receipt of this loan was acknowledged by the plaintiff. He agreed to repay the said amount within a period of five months. However the loan was not returned. On 25.10.2004 a cheque in the sum of Rs.60,000/- drawn on Punjab National Bank, Yamuna Vihar, Delhi was issued by the defendant in lieu of the payment against the loan. The same was dishonoured. In spite of requests payment was not made by the defendant. On 10.12.2004 legal notice was sent to the defendant but to no avail.

3. Defendant had contested the suit. It was stated that the defendant was having some transactions with Chaman Lal from whom he had borrowed money and the same had been paid back to him; during the transaction Chaman Lal has taken some blank signed cheques from the defendant; which had not been returned. Defendant does not even know the plaintiff; the suit of the plaintiff is filed on forged and fabricated documents. It was liable to be dismissed.

4. On the pleadings of the parties the following five

issues were framed;

- 1. Whether the plaintiff is entitled to a decree of Rs.64,800/- as prayed for? OPP*
- 2. Whether the plaintiff is entitled to any interest as claimed for? OPP*
- 3. Whether the suit of the plaintiff is without any cause of action? OPD*
- 4. Whether the defendant has issued the said cheques to Sh.Chaman Lal or to the plaintiff? OPD*
- 5. Relief claimed.*

5. Oral and documentary evidence was led. Plaintiff was held entitled to the relief claimed for by him. Suit was decreed. In appeal this finding was set aside. Suit of the plaintiff was dismissed.

6. This is a second appeal. It has been admitted and on 10.3.2010 the following substantial question of law was formulated:

“Whether findings of the Appellate Court are perverse on facts and law?”

7. The matter is on Board. On 05.5.2011 a request had been made on behalf of the appellant that counsel Mr.Sanjeev Joshi is out of station. Thereafter the matter has been adjourned for next date i.e. 06.5.2011. Since then it has been remained on Board.

8. None has appeared for the parties.

9. The impugned judgment had after re-appreciation of the
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oral and documentary evidence held as under:

"8. I have carefully perused the pleadings in the suit. It is contended at para 5 that after the expiry of period of five months, the defendant did not return the loan amount. The defendant showed his inability to repay the money in cash immediately but issued a cheque bearing number 667058 dated 25.10.2004. This pleading unequivocally puts forth that the cheque was issued after five months i.e. on 25.10.2004. The portion of this pleading is very important to gather the date of issue of cheque.

9. As per the pleading, the cheque was issued on 25.10.2004 after persistent demand where the defendant failed to re-pay the loan after five month, the cheque came to be issued.

10 I have also perused the documentary evidence at Ex. PW-1/1. The same is a receipt dated 25.05.2004, when the plaintiff extended the loan to the defendant. In the receipt, which is typed one, I see the typed writing that the defendant received Rs.60,000/- on 25.05.2004, for a period of five months against an advance cheque bearing number 667058 dated 25.10.2004. From the documentary evidence, it is clear that a post-dated cheque was issued on 25.05.2004. The pleadings in the suit at para 5 contradicts the documentary evidence. The testimony of PW-1 which is filed by way of an affidavit is in variance with the pleadings. The affidavit of Ajay Talwar, Ex.P-1 shows that after expiry of five months, the cheque was issued. Hence, I find contradictory evidence by PW-1 as opposed to the documentary evidence regarding the date of issuance of cheque.

11 With this variance in pleadings and the evidence adduced by way of affidavit and the documentary evidence at Ex.PW-1/2, the presumption u/s 118 of the NI Act, is to be viewed. The case of the appellant is that he has issued a cheque to one Chaman Lal who is examined as PW-2. The cross-examination of Chaman Lal shows that he admitted that he encashed a cheque for a sum of Rs.13,100/- at the same time, he denied a suggestion that the defendant gave his three cheques bearing numbers 667056 to 58

dated 21.06.2004, 21.07.2004 and 21.08.2004 for a sum of Rs.13,100/-, 12,700/- & 12,000/- respectively. He also denied the suggestion that the two cheques remained with him. He admits that the defendant in the trial court below had certain monetary transaction with him. He also expressed ignorance by saying that he does not remember as to when the cheque in question was given. He further deposed that it could be after 2-3 months and the cheque was given in his presence. If the cheque was given in his presence, it was on the date of Ex.PW-1/1 which is 25.05.2004. It is not after 2-3 months as per his oral testimony,. The document shows that it was given on the same day of the initial transaction. The pleadings at para 5 of the plaint is otherwise. Therefore, the testimony of PW-2 is unreliable to support the case of PW-1 despite there being a rebuttable presumption in his favour.

12 I have also carefully examined the very document on which the entire claim was based, namely the cheque at Ex.PW-1/2. It initially bore the date 21.08.2000 written in blue ink but subsequently altered bearing the date as 25.10.2004, which correction is in black ink. The other contents are in blue ink. Though, the signatures are admitted, the material alterations on negotiable instrument at Ex.PW-1/2 is flagrantly visible to the naked eye. Section 87 of the NI Act, cannot be ignored. Effect of material alteration-Any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alternation and does not consent thereto, unless it was made in order to carry out the common intention of the original parties. Keeping in view the above legal provision, the same is subject to Sections 20, 49, 86 and 125 of the Act. Section 20 deals with if it is signed and so delivered either only in bank or having returned incomplete negotiable instrument, it binds the author. Section 49 deals with endorsement in blank. Section 86 deals with bill of exchange. Section 120 deals with estoppels against denying the original validity of the instrument. Therefore, the material alterations

found on the cheque considering the estoppels cannot be treated as fatal to the case of the plaintiff in the trial court. In view of the above, the cheque at Ex.PW-1/2 cannot be questioned by the defendant. However, considering the fact that the documentary evidence at Ex.PW-1/1 being in total variance with para 5 of the plaint, the say of DW-1 at para 3 of the affidavit, wherein he had stated that he had transaction with Chaman Lal, is to be viewed. I have already noted the cross-examination of Chaman Lal, himself wherein he admitted that he had certain transactions with the defendant. In the cross-examination, it is found that he had signed the receipt in the office of Chaman Lal. He denied a suggestion that he knew the plaintiff and that he issued the cheque in favour of the plaintiff. In view of the above evidence of DW-1 who stated that he had no privity of contract and the plaintiff having not examined any independent witness to the transaction, the probability of the case suggest that the cheque was issued to Chaman Lal, since the pleadings at para 5 and the contents at point C to C in Ex. PW-1/1 are in total conflict. The evidence adduced is totally in variance. Therefore, though the findings on issue number 4 have not been properly appreciated. Hence the findings on issue number 4 is hereby altered and held in favour of the defendant.

13 *The findings of Ld. court below on issues 1 & 2 is based on the premise that the cheque was issued in favour of the plaintiff upon the findings on issue number 4. Having now held issue number 4 in favour of the defendant, the findings on issue number 1 & 2 of the court below remains not sustainable in law. Consequently, it is to be held that the presumption under Section 118 and 139 of the NI Act, have been successfully rebutted by the defendant in the trial court. Therefore, the findings on issues 1 & 2 are altered holding that the plaintiff failed to pay the transactions as alleged in the plaint since the documentary evidence at Ex.PW-1/1 and the legal notices issues are in total contradictions with the plaint allegations. Consequently, I am to*

hold that the plaintiff was not entitled to any relief. For the aforesaid reasons, I passed the following order:-

ORDER

The appeal is allowed. The judgment and decree in suit No. 10/2005 dated 11.08.2005 passed by the Ld. Civil Judge, is hereby set aside.

Consequently, the suit of the plaintiff in the court below stands admitted."

10. There is no perversity in this finding. The substantial question of law is answered in favour of the respondent and against the appellant. Appeal is dismissed.

INDERMEET KAUR, J.

MAY 10, 2011
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