

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

% **Date of decision: 23rd May, 2016**

+ **RFA 510/2015**

YOGESH MEHRA **Appellant**

Through: Mr. Ramit Malhotra, Adv.

Versus

AMIT AGGARWAL **Respondent**

Through: Mr. Kamlesh Kumar, Mr. Narsh
Kumar Bansal and Mr. Anurag
Saxena, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) impugns the judgment and money decree dated 15th April, 2015 of the Court of the District & Sessions Judge (North), Rohini Courts, Delhi in CS No.43/2014 filed by the respondent/plaintiff under Order XXXVII of CPC, consequent to the dismissal of the application of the appellant/defendant for leave to defend.

2. Notice of the appeal was issued and subject to the appellant/defendant depositing a sum of Rs.5.90 lakhs in this Court, execution was stayed.

3. Upon the appellant/defendant not depositing the amount, vide order dated 6th April, 2016, the order of stay of execution was vacated, the appeal

admitted for hearing and posted for today for hearing. On enquiry, it is informed that the execution of the decree is underway.

4. The counsels have been heard and the Trial Court record requisitioned in this Court perused.

5. The respondent/plaintiff instituted the suit from which this appeal arises, pleading:

(i) that both, the respondent/plaintiff and the appellant/defendant are engaged in the same business, of financing of used cars and there have been several transactions between them and the appellant/defendant in discharge of his liability towards the respondent/plaintiff issued Cheque No.099331 dated 25th July, 2013 on the account maintained by him with Lok Vihar, New Delhi branch of Axis Bank in favour of the respondent/plaintiff for an amount of Rs.11,80,000/-;

(ii) that the said cheque was however, in the month of August, 2013, returned unpaid;

(iii) that the appellant/defendant upon being apprised thereof, again promised to pay but thereafter started avoiding the telephone calls of the respondent/plaintiff;

(iv) that however the appellant/defendant through SMS from his mobile phone admitted the fact that he had altered the date on the cheque and asked for some time to make the payment; the images taken from the mobile phone of the respondent/plaintiff were annexed to the plaint;

(v) that ultimately the respondent/plaintiff got issued a legal notice and in reply where to the appellant/defendant denied his liability against the cheque.

6. The appellant/defendant sought leave to defend pleading:

(a) that the respondent/defendant had tampered and misused the cheque;

(b) that the appellant/defendant had given to the respondent/plaintiff the cheque in question on 20th February, 2012 for a sum of Rs.1,80,000/-;

(c) that the said cheque was given as security with an understanding that the respondent/plaintiff would return the said cheque, after the payment of the said amount of Rs.1,80,000/-;

(d) that however the respondent/plaintiff failed to return the cheque

inspite of payment of the entire amount of Rs.1,80,000/- in cash in April, 2012 stating that the same had been mutilated and destroyed;

(e) that the appellant/defendant believed and trusted the respondent/plaintiff;

(f) that after about one and a half years i.e. from January, 2014, the respondent/plaintiff started harassing the appellant/defendant demanding money, even though the appellant/defendant had no liability;

(g) that the respondent/plaintiff in February, 2014 disclosed that the cheque aforesaid had not been mutilated and threatened the appellant/defendant on the basis thereof;

(h) that complaints dated 28th February, 2014 and 13th March, 2014 were made by the appellant/defendant in this respect;

(i) that the appellant/defendant also made enquiries from his Bank and the Bank vide letter dated 8th March, 2014 informed the appellant/defendant that the cheque for Rs.11,80,000/- had been returned on 26th August, 2013 for the reason of alteration/correction;

(j) that it is for this reason only that no proceedings under Section

138 of the Negotiable Instruments Act, 1881 had been filed by the respondent/plaintiff.

7. The learned District Judge, vide impugned judgment / order dated 15th April, 2015 has decreed the suit holding (I) that a bare perusal of the cheque did not show any sign of tampering, as the amount of Rs.11,80,000/- appeared in words as well as in figures and if the cheque was for Rs.1,80,000/-, then there was no space left to convert “One” to “Eleven”; (II) that though the respondent/plaintiff in the notice preceding the suit had referred to the admission of the appellant/defendant in the SMS but the appellant/defendant had baldly denied the same in reply thereto; (III) that the appellant/defendant in the SMS had clearly requested the respondent/plaintiff for time and had promised to pay Rs.11,80,000/- with interest; and, (IV) thus, the defence of the appellant/defendant was cock and bull story.

8. Though the appellant/defendant before the Trial Court did not place the letter dated 8th March, 2014 of the Bank on which the cheque was issued but has as Annexure-A-7 to the memorandum of appeal filed a copy of the said letter dated 8th March, 2014 of Axis Bank Ltd. on which the cheque was issued confirming that the subject cheque was returned for the reason “alter /

correct on instruments are prohibited in CTS”.

9. I have enquired from the counsel for the respondent/plaintiff whether it is correct and where is the cheque returning memo.

10. The counsel for the respondent/plaintiff states that the cheque returning memo would be on the Trial Court record.

11. However a perusal of the Trial Court record does not show any cheque returning memo to have been filed.

12. The counsel for the respondent/plaintiff states that he is neither able to state in affirmative nor in negative, whether the cheque was returned unpaid for the reason as borne out from the letter aforesaid of Axis Bank Ltd.

13. The learned ADJ failed to notice the said aspect, perhaps for the reason of the appellant/defendant having not placed the letter of Axis Bank Ltd. before the Trial Court and the counsel for the appellant/defendant not emphasising the said fact. I may in this regard notice that the emphasis of the counsel for the appellant/defendant during the hearing before this Court also is on the respondent/plaintiff having altered the cheque by converting it from one for Rs.1,80,000/- to one for Rs.11,80,000/-. On enquiry, as to how the said argument is plausible since the amount of the cheque is mentioned in words too, it is argued, though it is again not pleaded in the leave to defend

application that the amount of the cheque in words was left blank in the cheque when it was issued. Reliance is placed on *Kantipudi Lalitha Lakshmi Manohar Saraswathi Vs. Kantipudi Ramakrishna* MANU/AP/0178/1981, *Bank of India Vs. Madura Coats Ltd.* MANU/DE/1873/2008 and on *Jashbhai Motibhai Patel Vs. Hasmukhbhai Ravjibhai Patel* MANU/GJ/0146/1992 to contend that unconditional leave to defend should be granted when allegations of fraud and forgery are made and when there is a total denial of execution of the instrument on which the suit under Order 37 of CPC is based.

14. I have considered the controversy and am of the view that the learned ADJ erred in not noticing that there was nothing before him to show that the cheque, on the basis of which the suit under Order XXXVII of the CPC was filed, had not been dishonoured on the ground of insufficiency of funds in the bank account of the appellant/defendant on which the cheque was drawn and it was the plea though unsubstantiated but unrebutted by the appellant / defendant that the cheque had been returned unpaid for the reason of the same having been altered.

15. Once the cheque is returned unpaid for the reason of having been altered, the same in my opinion ceases to be a bill of exchange within the

meaning of Section 5 of the Negotiable Instruments Act, 1881 for suit under Order XXXVII CPC to be maintained thereon unless such alteration is established to have been made to carry out common intention of parties thereto. Had the learned ADJ noticed that the cheque had been returned unpaid for the reason of the Bank on which it was drawn having found the same to have been altered, the attention of the learned ADJ would have also gone to the effect thereof. Section 87 of the Negotiable Instruments Act, 1881 provides that any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties. It further provides that any such alteration, if made by an indorsee discharges his indorser from all liability to him in respect of the consideration thereof.

16. This Court in ***BPDL Investments (Pvt) Ltd. Vs. Maple Leaf Trading International (P) Ltd.*** 129 (2006) DLT 94 held that if there is a material alteration in a cheque then the cheque would become void and that for it to remain valid despite material alterations, the material alteration must be with the consent of the other party and unless it was made towards furtherance of a common intention. Finding that the date of the cheque had been altered

and relying on *K.M. Basappa Vs. Patel Marule Gowda* AIR 1951 Mysore 102, *Vakkalagadda Kondiah Vs. Channamsetty Pedda Pulliah* AIR 1960 AP 121, *Allampati Subba Reddy Vs. Neelapareddi* AIR 1966 AP 267 and *Jayantilal Goel Vs. Smt. Zubeda Khanum* AIR 1986 AP 120 it was held that insertion of a date where there was no date amounts to material alteration as contemplated by Section 87 and there being nothing to show that it was consensual, it was held that the same raised a triable issue whether the cheque had become void and accordingly leave to defend was allowed.

17. Here, not only the appellant/defendant is pleading alterations, but even the bank on which the cheque was drawn, has returned the cheque unpaid on the ground of material alterations therein.

18. Though the aforesaid applies on all fours to the facts of the present case entitling the judgment and decree under appeal to be set aside but mention may also be made of *Veera Exports Vs. T. Kalavathy* (2002) 1 SCC 97 holding that the question whether the drawer was a willing party to the alteration is a question of fact to be decided on evidence and to *Goyal Tax Fab Pvt. Ltd. Vs. Anil Kapoor* 91 (2001) DLT 616 and *BPDL Investments (Pvt.) Ltd.* supra holding that suits based on cheques, never presented for encashment during the validity period, would not be maintainable under

Order XXXVII of the CPC. I have wondered, whether a suit based on a cheque, through presented but returned unpaid not for insufficiency of funds but for the reason of material alteration, would be maintainable under Order XXXVII.

19. I am reminded of *Canara Bank Vs. Canara Sales Corporation* (1987) 2 SCC 666 holding that the relationship between the customer of the bank and the bank is that of a creditor and debtor and when a cheque which is presented for encashment contains a forged signature, the bank has no authority to make payment against such a cheque and would be acting against law in debiting the customer's account with the amounts covered by such a cheque. It was explained that when a cheque duly signed by the customer is presented before a bank with whom he has an account, there is a mandate on the bank to pay the amount covered by the cheque; however, if the signature on the cheque is not genuine, there is no mandate on the bank to pay. I have wondered whether the said principle would extend to a situation as the present. The mandate of the customer to the bank to pay has to be in unequivocal terms and if there are cuttings/alterations on the cheque, as has been found by the bank in the facts of the present case, there can be no mandate to the bank to pay and if there is no such mandate, the question of

maintainability of a suit under Order XXXVII on the basis of such a cheque would not arise.

20. Faced therewith the counsel for the respondent/decreed holder states that suit under Order XXXVII is not on the basis of the cheque alone but also on the basis of the promise of the appellant/defendant to pay the amount of the cheque contained in the SMS of the appellant/defendant to the respondent/decreed holder and of which photoshops were annexed to the plaint.

21. I have perused the plaint to see whether the respondent/decreed holder has pleaded the suit to be based on such SMS also besides on the cheque. However no pleading to the said effect as should ordinarily have been contained, is found in the plaint.

22. The counsel for the respondent/decreed holder also contends that the appellant/defendant in the application for leave to defend did not rebut or controvert the said SMS.

23. The respondent decreed/holder in the plaint pleaded:-

“In these circumstances, plaintiff sent short messages to the defendant from his mobile phone for payment of the above said amount. Thereafter the defendant replied through SMS from his mobile phone admitting the fact that he has altered the date on the cheque and asked for some more time to make payment. Images taken from the

mobile phone of the plaintiff is attached as Annexure P/2.”

24. The image of the SMS dated 10th January, 2014 relied upon is as under:-

“Bhaiya thoda wait karo jo total 1180000 mene aapke dene hai main aapko pure int. ke sath doonga jo cheque mene aapko axis bank ka diya hai usme alteration mene ki thi galti meri hai main aapko cash dekar cheque wapis le loonga plz hath jod ke request hai.”

25. The appellant/defendant in his leave to defend application has however pleaded that the respondent/decreed holder had many times used the mobile phone of the appellant/defendant and from the plaint it was revealed that the respondent/decreed holder mischievously, fraudulently and illegally got sent a false SMS from the mobile phone of the appellant/defendant to his own mobile phone on 10th January, 2014 in order to implement and give colour to his fraudulent designs and motives. It is thus not as if the SMS is not controverted.

26. I am even otherwise of the view that no suit under Order XXXVII can be maintained on such a screen-shot of an SMS and the same would not qualify as a written contract within the meaning of Order XXXVII of the CPC. I may in this regard also notice that the respondent/decreed holder did not avail of the opportunity to file reply to the application for leave to

defend.

27. For all the aforesaid reasons, the impugned judgment and decree cannot be sustained and is set aside.

28. The suit is remanded to the Trial Court for adjudication as an ordinary suit.

29. The parties to appear before the Court of the District & Sessions Judge, North, Rohini Courts, Delhi on 14th July, 2016. The appellant/defendant to file his written statement on the said date and the learned Trial Court to proceed to adjudicate the suit in accordance with law.

30. The file of the Trial Court requisitioned in this Court be sent back forthwith.

No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

MAY 23, 2016

bs/gsr /pp..