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

+ **RSA 319/2015**

Date of Decision: 31.03.2016

MUKESH

..... Appellant

Through: Mr.M.C.Verma, Advocate.

versus

SURJEET KAUR

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J. (ORAL)

CM Appl.17942/2015

1. For the reasons stated in the application, the delay of 20 days in filing the second appeal is condoned.
2. The application is allowed and disposed of accordingly.

RSA 319/2015

1. Mukesh, the appellant, has challenged the judgment dated 07.05.2015 passed by the learned Additional District Judge-II (Central), Tis Hazari Courts, Delhi, in RCA No.137/2013 whereby the judgment and decree of the Trial Court dated 28.11.2011 passed in suit no.802/2008 (old suit no.1399/2006) has been upheld and affirmed.
2. The respondent/plaintiff filed suit no.802/2008 seeking recovery of Rs.1,05,000/-. She had, on the asking of the appellant/defendant, invested Rs.50,000/- in cash in order to bail out the

appellant/defendant from financial crunch. Out of the aforesaid amount of Rs.50,000/-, Rs.30,000/- was paid after withdrawing that amount from the bank on 11.05.2005. The rest amount of Rs.20,000/- was paid in cash on 15.05.2005. After about sometime, the respondent/plaintiff herself suffered huge losses in her business of catering and perforce had to dispose of various office items/equipments like refrigerator, Photostat machine, gas cylinder, etc. The appellant/defendant, according to the respondent/plaintiff, offered to buy those articles and it was agreed to be purchased for Rs.45,000/-. An arrangement was effected whereby an amount of Rs.1,05,000/- (Rs.50,000/- + Rs.10,000/- as profits + Rs.45,000/-) had to be given to the respondent/plaintiff in 21 equal monthly instalments of Rs.5,000/- each, payment commencing from June 2006 and in the event of failure to pay the regular monthly instalments, the appellant/defendant would be required to pay an interest at the rate of 24% per annum on the entire amount. Pursuant to such an arrangement, a cheque bearing no.157403 dated 30.06.2006 for Rs.5,000/- was given to the respondent/plaintiff but the same could not be encashed because of insufficient funds in the account of appellant/defendant.

3. After a legal notice, a complaint was also lodged by the respondent/plaintiff under Section 138 of the Negotiable Instruments Act against the appellant/defendant.

4. The suit was contested by the appellant/defendant. A preliminary objection was raised by the appellant/defendant that the payment by the mode of cheque of Rs.5,000/- was towards a different

obligation i.e. for the expenses towards the cost of 100 plates which were ordered by the appellant/defendant for feeding his friends in a party. The respondent/plaintiff, a caterer by profession, had accepted the aforesaid cheque but when the cheque could not be encashed for insufficient funds, payment was made by the appellant/defendant in cash with the assurance from the respondent/plaintiff that the cheque would be returned to him.

5. The further contention of the appellant/defendant in his written statement was that he had never approached the respondent/plaintiff for purchase of office items or that any arrangement was entered between him and the respondent/plaintiff for repayment of Rs.1,05,000/- in 21 equal monthly instalment of Rs.5,000/- each.

6. The Trial Court on the basis of the pleadings of the parties, by order dated 10.07.2007, framed the following issues:

- i. *“Whether suit of the plaintiff is without cause of action? (OPP)*
- ii. *Whether plaintiff is entitled for a decree of a sum of Rs.1,05,000/-? (OPP)*
- iii. *Whether plaintiff is also entitled for any interest, if so at what rate and for what period? (OPP)*
- iv. *Relief. ”*

7. Surjeet Kaur, respondent/plaintiff examined herself as PW.1 before the Trial Court and filed documents namely copy of legal notice dated 23.08.2006 (Ex.PW.1/1), postal receipt (Ex.PW.1/2), acknowledgement card (Ex.PW.1/3) and UPC (Ex.PW.1/4). She reiterated her case by stating that on the inducement of appellant/defendant, she had invested Rs.50,000/- who in turn had

agreed to return the same along with profit of Rs.10,000/-. The appellant/defendant had agreed to buy the office equipments for Rs.45,000/- and as per the arrangement between her and the appellant/defendant, money had to be paid in instalments (21 equal instalments of Rs.5,000/- each). Neither the first cheque towards the payment was honoured nor the dues were paid by the appellant/defendant.

8. Mukesh, appellant/defendant, deposed before the Trial Court that he had thrown a party of about 100 persons in which the respondent/plaintiff had supplied food and had charged Rs.50/- per plate. He had issued the cheque of Rs.5,000/- towards payment of the cost of plates. It was reiterated by the appellant/defendant that when the cheque could not be encashed, cash payments were made. No documentary evidence was led by the appellant/defendant.

9. The Trial Court, for the reason that the appellant/defendant did not lead any evidence as to the reason for throwing a party, or the factum of throwing a party, did not accept the defence version and instead, relied upon the testimony of the respondent/plaintiff in view of her deposition and the material evidence especially the notice regarding the dishonour of the cheque given by way of first instalment, the receipt of the registered post (Ex.PW.1/2), registered A/D envelope and (Ex.PW.1/3) and UPC (Ex.PW.1/4). The Trial Court took note of the fact that the appellant/defendant, in cross examination, has admitted of his having received the legal notice (Ex.PW.1/1) but had not replied to the same.

10. No question or suggestion were put to the respondent/plaintiff

regarding the fact that Rs.5,000/- was later paid in cash and the cheque, according to the defence of the appellant/defendant, was not returned despite assurance.

11. On the contrary, the Trial Court had reasons for accepting the case of the respondent/plaintiff regarding loan of Rs.50,000/- as the averment in that regard was neither rebutted nor the respondent/plaintiff was cross examined for denial of the aforesaid facts.

12. Thus, the case of the respondent/plaintiff stood proved before the Trial Court.

13. However, for the paucity of any evidence regarding the rate of interest having been agreed at the rate of 24% per annum, the Trial Court awarded an interest of 9% per annum from the date of filing of the suit till its realisation.

14. Before the First Appellate Court, the appellant raised the plea that there was no document on record to show that Rs.50,000/- was given to the appellant/defendant by the respondent/plaintiff and that the details of the equipments which were allegedly purchased by the appellant also were not given by the respondent/plaintiff. The appellant also took the plea that the legal notice was never served upon him, which fact would be borne out from the copy of the legal notice which contains only one address of the appellant whereas the appellant has two addresses and which fact was known to the respondent/plaintiff. No official of the postal department, it was urged, was examined by the respondent/plaintiff to prove the service of the notice dated 23.08.2006.

15. The First Appellate Court rejected the contentions of the appellant on the ground that the appellant/defendant was required and which requirement was not fulfilled, to prove the throwing of party of 100 persons in which the respondent/plaintiff had provided food in the capacity of a caterer. Neither any photograph of the party nor any invitation card was brought on record. Hence, the aforesaid defence of the appellant was highly unacceptable.

16. The First Appellate Court further took note of the fact that if at all payment of Rs.5,000/- was made in cash after the cheque was dishonoured, it was only incumbent upon the appellant/defendant to have first asked for the cheque before making any payment in cash. The absence of any complaint regarding non-return of the bounced cheque or any notice to the respondent/plaintiff regarding the return of the bounced cheque, made the contentions of the appellant/defendant absolutely without any merit/substance and rendered it suspicious.

17. Though the stand of the appellant/defendant initially had been of his having not received any legal notice (Ex.PW.1/1) but in cross examination, he admitted of having received the notice. However, the reply to the notice which was sent by him has also not been brought on record.

18. An adverse inference, therefore, was drawn by both the Courts below.

19. This Court finds no good reason to differ with the findings returned by the Trial Court or the First Appellate Court.

20. No substantial question of law has been raised in the present second appeal.

21. The averments made in the plaint and the deposition of the respondent/plaintiff as well as the material evidence placed on record, completely proves the case of the respondent/plaintiff.

22. For the aforestated reasons, the present second appeal is dismissed but without costs.

CM Appln. 17941/2015

1. In view of the appeal having been dismissed, this application has become infructuous.

2. This application is disposed of accordingly.

ASHUTOSH KUMAR, J

MARCH 31, 2016/ab