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

+ RFA No.366/2015

AMIT KUMAR

..... Appellant

Through: Mr. Amarjeet Singh, Adv.

versus

ANURAG KUMAR

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **06.04.2016**

1. The appeal impugns a judgment and decree of dismissal of a suit for recovery of money.
2. Notice of the appeal was issued and though the respondent had appeared in person on earlier occasions and was represented by the counsel on the last date but none appears for the respondent today.
3. A perusal of the impugned judgment shows that the respondent/defendant, before the Trial Court also though had appeared but did not file any written statement and his defence was struck off and he did not cross examine the appellant/plaintiff to the extent permissible also though participated at the time of hearing.
4. In this view of the matter it is not deemed necessary to await the respondent any further and the counsel for the appellant has been finally heard and the Trial Court record perused.
5. The appellant/plaintiff instituted the suit from which this appeal arises, for recovery of Rs.4,68,500/- pleading (i) that the appellant/plaintiff,

in view of friendly relations with the respondent/defendant, had advanced loan to the respondent/defendant and as on 1st April, 2011 a sum of Rs.3,63,500/- was due and outstanding towards the balance loan amount and which was confirmed by the respondent/defendant in writing of the said date; (ii) that the respondent/defendant in discharge of the said liability issued two cheques dated 15th May, 2011 and 15th June, 2011, one for Rs.1 lac and the other for Rs.2,63,500/- respectively, in favour of the appellant/plaintiff; (iii) the said cheques were returned dishonoured for the reason of “insufficient funds and account closed”, vide Memos dated 23rd June, 2011 and 27th June, 2011 respectively; (iv) that complaint of offence under Section 138 of the Negotiable Instruments Act, 1881 was filed and which was pending at the time of institution of the suit; and, (v) that inclusive of interest at 12% per annum on the said sum of Rs.3,63,500/-, a sum of Rs.4,68,500/- was due from the respondent/defendant to the appellant/plaintiff at the time of institution of the suit and which the respondent/defendant had failed to pay despite legal notice.

6. The counsel for the appellant on enquiry states that the complaint of offence under Section 138 of the Act is still pending adjudication.

7. The appellant/plaintiff filed his affidavit by way of examination-in-chief and also summoned the record from the Court of the Metropolitan Magistrate (MM) where the complaint case was pending and where the originals of all the documents had been filed, to prove certified copies thereof. The respondent/defendant as aforesaid neither choose to cross-examine the appellant/plaintiff, even to the extent permissible, nor examined his witness.

8. However the counsel for the respondent/defendant at the time of hearing contended before the learned Additional District Judge (ADJ) that merely because the defendant was *ex parte* did not relieve the plaintiff of proving his case and the appellant/plaintiff in the present case has failed to prove his case.

9. The learned ADJ vide the impugned judgment and decree has dismissed the suit holding/recording (i) that the appellant/plaintiff had proved two cheques as Ex.PW1/A (Colly) and had deposed that the said cheques were dishonoured vide Memo proved as Ex.PW-1/BColly.; (ii) that as per the cheque returning memos, the cheque for Rs.1 lac was dishonoured for insufficient funds but the memo did not bear the number of the cheque and therefore it could not be known whether it pertained to the cheque for Rs.1 lac; (iii) the other cheque returning memo with respect to cheque for Rs.2,63,500/- though bore the number of the cheque but did not state as to when it was dishonoured; (iv) that the other documents proved by the petitioner as Ex.PW1/C and Ex.PW1/D were loose paper of some calculations and “could not be proved” and “cannot be made admissible under Section 34 of the Indian Evidence Act being not part of any diary”; (v) mere examination of the PW-2 (*Ahlmad* of the Court of MM where the complaint case is pending) without any evidence about the entries of those documents could not prove that the amount mentioned in those documents was advanced or transacted between the parties; (vi) there was discrepancy in the dates of the cheque returning memos in the two notices got sent by the appellant/plaintiff before the institution of the suit; (vii) no witness from the Bank had been examined to prove the memos of dishonour of the cheques;

(viii) thus, there was no conclusive evidence on the part of the appellant/plaintiff; and, (ix) in fact, the appellant/plaintiff had also failed to prove having advanced any loan.

10. I am afraid the learned ADJ failed to notice that the documents which he has held could not have been proved by PW2 were indeed proved by the appellant/plaintiff in his own examination-in-chief by way of affidavit and with respect whereto there was no cross examination on the part of the respondent/defendant. The appellant/plaintiff, while tendering his affidavit into evidence, had also tendered the said documents into evidence and which were admitted into evidence without the learned ADJ also at that point of time raising any doubts as to the admissibility thereof into evidence or as to proof thereof.

11. I am of the view that the discrepancies, as the learned ADJ has noted, could not be relevant especially when the attention of the appellant/plaintiff when he appeared in the witness box had not been drawn thereto and no opportunity given to him to prove the same.

12. The learned ADJ also erred in not considering that there was a presumption of the cheques being for consideration. Similarly, the reasoning that there could be no acknowledgment of debt on a loose paper and that it necessarily had to be in a diary, is erroneous.

13. The impugned judgment and decree thus cannot be sustained and has to be set aside and the suit of the appellant/plaintiff decreed.

14. The appeal is accordingly allowed.

15. The impugned judgment and decree is set aside and the suit of the appellant/plaintiff is decreed for recovery of principal amount of

Rs.3,63,500/-, however with interest at the rate of 9% per annum from the date of dishonour of the two cheques and till the date of payment. The appellant/plaintiff shall also be entitled to costs throughout.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

APRIL 06, 2016

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