



2023:DHC:9052-DB



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of Decision: 13th December, 2023*+ **RFA(COMM) 293/2023**

SANTOKH DHUNNA

..... APPELLANT

Through: Mr. Ashim Vachher &
Mr. Vaibhav Dabas, Advs.

versus

NITESH KUMAR

..... RESPONDENT

Through: None

CORAM:**HON'BLE MR. JUSTICE VIBHU BAKHRU****HON'BLE MR. JUSTICE AMIT MAHAJAN****VIBHU BAKHRU, J. (Oral)****CM APPL. 64483/2023 (for exemption)**

1. Exemptions allowed, subject to all just exceptions.
2. The application stands disposed of.

RFA(COMM) 293/2023 & CM APPL. 64482/2023 (for stay)

3. The appellant has filed the present appeal, impugning a judgement and decree dated 04.09.2023 (hereafter '**the impugned judgment**'), delivered by the learned Commercial Court in CS(COMM) 112/2021 captioned *Nitesh Kumar v. Santokh Dhunna*.
4. The respondent had filed the said suit claiming a sum of ₹4,60,200/- (Rupees Four Lakhs Sixty Thousand Two Hundred only) from the appellant. It is the respondent's case that he had paid the said amount to the appellant for "*fabricated expeller*

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machine; fabricated packaging machine; fabricated flour milling machine and; fabricated box stitching machine”.

5. Admittedly, the appellant had received the said amount of ₹4,60,200/- from the respondent by way of a Demand Draft, issued in February, 2018. The dispute between the parties is, essentially, whether the appellant had supplied the said machinery to the respondent. According to the respondent, he had not received the machinery for which it had paid in full. Accordingly, the respondent had instituted a suit for the recovery of the said amount.

6. It is the appellant's defence that the machinery was physically handed over to the representatives of the respondent on 12.03.2018, who had thereafter dispatched the same to the respondent's place of business in the State of Bihar.

7. It was the respondent's case before the learned Commercial Court that the machines were not delivered to him. The respondent stated that he had received a *bilty* (transportation receipt), marked as 'A', from the transporter, Nayyar Tempo Transport Service, and had paid the said amount. However, the said *bilty* was fabricated, and the machines were not delivered.

8. The learned Commercial Court had, in the given context, framed the following issues:

- “1. Whether the plaintiff is entitled for recovery of Rs.4,60,200/- alongwith interest from the defendant as alleged? OPP*
- 2. Whether plaintiff has concealed material facts? OPD*
- 3. Whether there is no cause of action in favour of the plaintiff? OPD*



4. *Whether the suit is not properly verified? OPD*

5. *Relief.*”

9. The said issues have been decided in favour of the respondent.

10. Mr. Ashim Vachher, learned counsel appearing for the appellant, has confined the present appeal to assailing the conclusion of the learned Commercial Court that the respondent (plaintiff) was entitled to recover ₹4,60,200/- along with interest.

11. He has founded the challenge to the impugned judgment essentially on two grounds. Firstly, he submits that it was admitted by the respondent that he had paid the transporter. He submits that in the normal course, there would be no liability to pay the transporter, unless the respondent was delivered possession of the machinery. He submits that this would also indicate that the respondent had received the machinery as nobody would pay a transporter without receiving the goods for which transportation charges are paid.

12. Second, he submits that the respondent's case is fraught with contradictions. He referred to the legal notice dated 06.11.2018 (Ex. PW-1/5) and pointed out that the respondent had visited the appellant's shop several times. However, in his cross-examination, the respondent has stated that his employees/ his staff had not visited the appellant's premises. He also pointed out that in the plaint, the respondent has made averments to the effect that *bilty* was given by the transporter company, however, in his



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cross-examination, the respondent (PW-1) had stated that one, Pankaj Patel, had given the transporter receipt (*bilty*) to him.

13. We have heard the learned counsel at length and have also examined the record.

14. Concededly, no material has been placed on record evidencing that the machines in question had been handed over by the appellant. Although, the appellant claims that it was handed over to the employees/ representatives of the respondent, there is no acknowledgement receipt of handing over the said machines to such employees.

15. It is the appellant's case that he had handed over the machinery to the employees/ representatives of the respondent in Delhi, and they, on their own, had engaged the transporter (Nayyar Tempo Transport Service) for transportation of the machinery. This defence set up by the appellant is contradictory to the principal document produced by him – the tax invoice dated 12.03.2018 (Ex. DW 1/2). The said tax invoice issued by the appellant clearly indicates that the goods had been shipped to the respondent through Nayyar Tempo Transport Service. The invoice also mentions the registration number of the vehicle as DL-1L-3916. It also indicates that the said dispatch was against payment. The said document militates against the appellant's case that the goods had been handed over to the representatives of the respondent.

16. In our view, the tax invoices produced by the appellant, coupled with the fact that the appellant has no document

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acknowledging the delivery of the said machines, is sufficient to reject the appellant's defence that he had delivered the goods to the representatives/ employees of the respondent.

17. The contention that the entire case of the respondent is belied by contradictions is also unpersuasive. In the legal notice (Ex. PW-1/5), it was asserted on the respondent's behalf that he had visited the appellant's shop several times. However, the said notice does not indicate that such visits were prior to the purchase of the said machinery. The respondent (PW-1) was cross-examined and in his cross-examination, had stated that he had not visited the appellant, and he did not know him. There does appear to be some contradiction. However, we are unable to accept that the same would be fatal to the case set up by the respondent as there was no dispute that he had paid the amount, the recovery of which was sought by the respondent. As noted, at the outset, the controversy was confined to whether the appellant had delivered the machinery to the employees/ staff of the respondent. There is no contradiction in the respondent's testimony in this regard.

18. The respondent's case that he had not received delivery of the machinery is supported by his evidence filed by way of an affidavit, as well as his cross-examination.

19. We do not find any contradiction in the averments made in the plaint and the respondent's testimony that the *bilty* was handed over by one, Pankaj Patel.



20. In the plaint, the respondent had asserted that he was shocked and surprised “*when official of Nayyar Tempo Transport Service on the basis of forged and fabricated bilty of transport alongwith tax invoice demanded the transport expenses/ Freight Charges against the above said machine and goods which had never been supplied by the defendant.*” He had also enclosed copy of the forged *bilty* given by the above said transporter company.

21. Whereas in the plaint, the respondent had mentioned that an official of Nayyar Tempo Transport Service had demanded transport expenses, in his cross-examination, he has identified Pankaj Patel as the agent of the transporter company. We do not find that the variance in the averment in the plaint and the statement in his cross examination are irreconcilable. It is apparent from the cross-examination that the respondent had been referring to Pankaj Patel as the agent of the transporter company. There is no reason to assume that he is not the official of the transporter company mentioned in the plaint.

22. In view of the above, we concur with the view of the learned Commercial Court that Issue No. 1 – “Whether the plaintiff is entitled to recovery of ₹4,60,200/- along with interest from the defendant as alleged?” – is required to be decided in favour of the respondent, and against the appellant. The respondent has established its entitlement to recover the said amount along with interest from the appellant.



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23. In view of the above, the present appeal is unmerited and is accordingly dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

DECEMBER 13, 2023
“SS”