

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR

: J U D G M E N T :

S.B. Civil First Appeal No.375/2005.
(Deshraj Singh Vs. Rakesh Dave)

DATE OF JUDGMENT : April 30, 2009

P R E S E N T

HON'BLE MR. JUSTICE GOPAL KRISHAN VYASReportable :

Mr. Shambhoo Singh for the appellant.
Mr. S.N. Trivedi for the respondent.

Instant regular first appeal has been filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 07.01.2005 passed by the Addl. District Judge (Fast Track), Parbatsar in Civil Original Suit No.4/2004 (20/2002), whereby, the trial Court decree the suit filed by the respondent plaintiff.

Brief facts of the case are that a suit was filed for recovery of amount of Rs.1,46,300/- along with interest at the rate of 1.5 p.m. from the date of filing the suit till recovery of the said amount. In the plaint, it is specifically stated that respondent plaintiff Rakesh Dave is resident of Kuchaman City and appellant-defendant borrowed Rs.15,651/- and Rs.81,800/- on 09.06.1999 and 16.06.1999 respectively which was deposited

with Ashok Leyland Finance Ltd. and Rathore Auto Pvt. Ltd. Receipts of the said amount were lying with the plaintiff. It was assured that the said money will be returned soon but the amount was not returned. Thereafter, a cheque for a sum of Rs.95,000/- was given to the plaintiff by the appellant-defendant drawn on the Central Bank, Kuchaman City. The said cheque was submitted before the Bank for payment but the same was returned on 01.06.2001 by the Bank on the ground that amount is not sufficient in the account of the defendant. Thereafter, on 10.10.2001, notice for payment was sent to the defendant through Advocate but no reply was given to the notice nor payment was made by the appellant-defendant. Therefore, suit for recovery of Rs.1,46,300/- i.e., for principal amount of Rs.95,000/- along with interest from the date of filing suit was filed before the trial Court.

After issuance of the notice by the trial Court in the suit filed by the respondent-plaintiff, a reply was filed by the defendant contending that he has not borrowed money from the plaintiff. It is submitted by the defendant in the reply that the plaintiff was working as sub-agent of Ashok Leyland Finance Ltd and, in fact, the defendant took loan through respondent plaintiff Rakesh Dave and the loan was obtained from the company and, for that, ten advance cheques were given to the respondent plaintiff because there was a condition that loan will be repaid in

24 installments. As per appellant-defendant, out of ten cheques two cheques were utilized and after repayment of loan only seven cheques were returned by the finance company and one cheque was kept by the respondent-plaintiff with malafide intention to misuse the same. This fact came to the notice of the appellant-defendant for the first time when a notice was served upon him through Advocate. The respondent-plaintiff for his malicious act and due to enmity has cheated the defendant. However, it is also stated in the written-statement that the plaintiff kept one cheque out of ten cheques to deceive the appellant-defendant and used the cheque for committing mischief whereas ten cheques were given by the appellant-defendant.

The appellant also stated that except the signature on the cheque the hand-writing is not belonging to him. A specific plea was taken that after encashment of two cheques, the defendant paid total loan amount to the finance company through plaintiff Rakesh Dave and further requested the plaintiff to hand over remaining eight cheques but deceiving him the plaintiff kept one cheque with him and after some time he has used the cheque and submitted before the Bank for encashment. Therefore, as per the appellant defendant he has been cheated by the respondent-plaintiff and, in fact, there was enmity in between his brother-in-law who filed an FIR against the plaintiff for offences

under Sections 467, 468, 471, 406, 420 and 120B, I.P.C. On these grounds, it was prayed that the suit filed by the plaintiff may be dismissed.

On the pleadings of the parties, the trial Court framed following issues :

- “{1} आया वादी ने दिनांक 9.6.99 को रूपये 15651 अशोक निलेण्ड फाईनेन्स व दिनांक 16.6.99 को रूपये 81800 राठी ऑटो प्राइवेट लिमिटेड के यहाँ प्रतिवादी के लिये जमा कराये ?
- {2} रूपये 95000/- का चैक दिनांक 20.5.2001 को प्रतिवादी ने वादी को दिया बैंक ने आर्हता के खाते में राशि नहीं होने से चैक बिना भुगतान के लौटा दिया ?
- {3} आया वादी रूपये 146300 मय ब्याज प्रतिवादी से प्राप्त करने का अधिकारी है ?
- {4} प्रतिवादी ने 10 खाली चैक बतौर सिक्यूरिटी दिये थे। वादी ने एक चैक का गलत रूप से उपयोग कर यह वाद प्रेस्तुत किया। वादी व प्रतिवादी के बीच लेनदेन नहीं हुआ
- {5} अनुतोष 1”

At the trial, the plaintiff examined himself as P.W.-1 and filed his affidavit. From the side of defence, D.W.-1 Deshraj Singh and D.W.-2 Mahendra Singh were examined. Their statements were recorded and documents were exhibited viz., Ex.-1, cheque dated 20.09.2001, Ex.-2 communication sent by the Central Bank of India dated 01.08.2001 and Ex.-3 communication sent by the United Commercial Bank. Thereafter, the learned trial Court decided the matter issue-wise. Issues No.1 and 3 were decided against the plaintiff. However, upon adjudication of the issues No.2 and 4, the Court held that

the plaintiff has succeeded in proving the issues in his favour and, accordingly, the trial Court decreed the suit in favour of the plaintiff and passed order for recovery of Rs.95,000/-. Being aggrieved and dissatisfied, the appellant defendant has preferred this regular first appeal under Section 96, C.P.C.

Learned counsel for the appellant, first of all, argued that the trial Court has gravely erred in law while decreeing the suit against the defendant-appellant. It is vehemently contended that the findings given by the trial Court are perverse and contrary to the material on record. It is also argued that the learned trial Court has discussed issue No.1 and decided the same against the plaintiff; meaning thereby, the issue with regard to depositing the amounts with Ashok Leyland Finance Company and Rathore Auto Pvt. Ltd. was not found to be proved. Therefore, the finding with regard to issue No.2 which is based upon the fact narrated by the plaintiff in the plaint cannot be held to be proved and hence the finding on issue No.2 is erroneous and illegal.

It is further contended by learned counsel for the appellant that similarly issue No.3 has been decided in favour of the appellant-defendant, then, there is no question of deciding issue No.4 against the defendant, in which, it was adjudicated that the appellant-defendant has failed to prove that he has given blank cheque for the purpose of security of the loan amount.

It is argued by learned counsel for the appellant that the learned trial Court has also not properly considered and discussed the evidence produced by the defendant with regard to issue No.4; but, without appreciating the evidence properly, issue No.4 has been decided against the defendant which deserves to be reversed.

Per contra, learned counsel for the respondent argued that the finding on issues No.2 and 4 does not require any interference because admittedly the appellant-defendant does not dispute his signature on the cheque Ex.-1 but he is only disputing that this cheque was given as security of the loan amount to Ashok Leyland Finance Company; meaning thereby, the appellant-defendant is not denying his signature upon the cheque but his assertion is that this cheque was given to the plaintiff being agent of the Ashok Leyland Finance Company which is not supported by any evidence, therefore, the learned trial Court has rightly arrived at the finding with regard to issues No.2 and 4.

It is further argued by learned counsel for the respondent plaintiff that by cogent evidence it has been proved by him that the amount of Rs.95,000/- was borrowed by the defendant from the plaintiff-respondent and, for the same, cheque was issued; but, ultimately, when the cheque was submitted for encashment it was dishonoured. Therefore, the finding does not require any

interference.

I have considered the rival submissions and perused the entire record of the case.

In this matter, admittedly, three witnesses from both the sides were produced before the Court. To prove the case, statement of plaintiff was recorded and, so also, five documents were exhibited including cheque upon which the appellant does not dispute his signature. But, without any cogent evidence, the appellant defendant is raising the ground that this cheque was given as security to Ashok Leyland Finance Company. Such plea cannot be accepted because no evidence was adduced by the appellant-defendant to substantiate his plea that the cheques were given as security to the loan amount. Besides, no document with regard to taking the loan from the Ashok Leyland Finance Company has been produced by the appellant-defendant before the trial Court. Only assertion is made in the reply to the suit by the appellant. It is obvious that if any person is taking loan from any finance company, then, he can very well have the documents summoned before the Court from the finance company and, so also, he can adduce other evidence to show that loan was taken from Ashok Leyland Finance Company but no such evidence was produced by the appellant-defendant.

The respondent-plaintiff, however, produced documentary

evidence which is cheque Ex.-P/1 upon which signature is not disputed by the appellant-defendant. He has also proved that the said cheque was deposited with the Bank for encashment but the same was not honoured by the Bank due to insufficient amount in the account of the defendant; meaning thereby, the trial Court has rightly arrived at the finding on issues No.2 and 4 that a sum of Rs.95,000/- was borrowed by the defendant-appellant from the plaintiff-respondent for which cheque Ex.-1 was issued by the defendant. Ultimately, when the said cheque was submitted it was not honoured by the bank due to insufficient amount in the account; meaning thereby, the judgment and decree passed by the trial Court with regard to recovery of the principal amount of Rs.95,000/- is based upon both oral and documentary evidence coming on record which does not require any interference.

It is also one of the important facts that no documentary evidence has been produced by the appellant in support of his plea that a loan of Rs.2,45,000/- was taken by him from the Ashok Leyland Finance Ltd.

The plea of the appellant with regard to cheating is not proved by any evidence by the appellant-defendant before the trial Court; more so, concocted story was brought before the Court by the appellant which is discredited by the trial Court because the plaintiff has proved his case with regard to issues

No.2 and 4 by leading cogent oral and documentary evidence.

In this view of the matter, there is no force in this appeal.

Hence, this first appeal filed by the appellant-defendant against the judgment and decree dated 07.01.2005 is hereby dismissed.

(Gopal Krishan Vyas) J.

Ojha, a.