

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

% *Date of Judgment : 24.12.2010*

+ **R.S.A.No.232/2010 & CM No.23191/2010**

SH. MANOJ KUMAR & ANR.Appellants

Through: Mr.S.K.Bhaduri, Advocate.

Versus

SH.BHAGWAN DASS @ BHAHMCHARIRespondent

Through: Nemo.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.(Oral)

CM No.23190/2010 (for exemption)

Allowed subject to just exceptions.

R.S.A.No.232/2010 & CM No.23191/2010 (for stay)

1. This appeal has impugned the judgment and decree dated 05.10.2001 which had reserved the finding of the trial judge dated 06.3.2010. Vide judgment and decree dated 06.3.2010 the suit of RSA No.232/2010

the plaintiff Bhagwan Dass seeking recovery of Rs.41,900/- stood dismissed. In appeal vide the impugned judgment and decree dated 05.10.2010 the suit of the plaintiff for recovery of the amount of Rs.41,900/- stood decreed.

2. On behalf of the appellant, it has been urged that the judgment of the trial court is perverse. It has admittedly come on record that PW-1 who was the plaintiff had admitted in his cross-examination that his affidavit Ex.PW-1/A was neither prepared in his presence and nor under his instructions; he had put his signatures at the instance of his counsel. This unreliable testimony of PW-1 had however been relied upon in this impugned judgment to decree his suit. This was a perverse finding. It is pointed out that the well reasoned judgment of the trial court could not have reversed. Moreover there was no evidence to decree the suit for the principal amount of ₹30,000/-; for this amount there was no evidence. Substantial questions of law have been framed in para 9 of the memo of appeal.

3. The record has been perused. The plaintiff was alleged to be engaged in the work of white washing, painting and other ancillary works. Defendant was no.1 was the proprietor of M/s Neelkanth construction. The plaintiff was given a contract for the sum of

₹30,000/- for white washing a school building i.e. Government Sarvodaya Bal Vidyalya, Yamuna Vihar, Delhi. Cheque in the sum of ₹22,000/- dated 10.2003 had been issued by the defendant which had on presentation been dishonoured. The balance amount of ₹8000/- was agreed to be paid by the defendant to the plaintiff in cash which amount was also not paid. Suit was accordingly filed.

4. In the written statement the defendant had contested this claim. It was admitted that this cheque was issued but the submission was that this cheque was advanced by the defendant as a loan to the plaintiff and was not in lieu of any payment which was due from the defendant.

5. The submission of the learned counsel for the appellant that the testimony of PW-1 is unreliable for the reason that he has admitted that Ex.PW-1/A (affidavit by way of evidence) was not read over to him and he has signed it at the instance of his counsel is bereft of any merit. PW-1 was Bhagwan Dass. He had reiterated the averments made in his plaint on oath. The cheque in the sum of ₹22,000/- was proved as Ex. PW-1/1. His accounts were maintained in his personal diary Ex.PW-1/7 showing his entitlement to the sum of ₹30,000/-. Cross-examination of PW-1 has also been perused.

There is not a whisper in the cross-examination that the amount of ₹8000/- which was exclusive and over and above the cheque amount of ₹22,000/- was not due or payable. PW-1 had studied up to 10th Class; he could read a little english. He had candidly and frankly admitted that the affidavit by way of evidence was not prepared in his presence and the same had been signed in the chamber of his counsel. He denied the suggestion that this cheque has not been issued in the discharge of liability. After this deposition of PW-1 there was an endorsement of the Court where it had been recorded by Presiding Officer that the witness has refused to sign the statement saying that his statement had not been recorded.

6. The impugned judgment had returned a finding that mere refusal by the witness to sign his statement would not render the statement recorded by the court as inadmissible especially keeping in view the fact that PW-1 had studied only up to 10th Class. The relevant extract and the finding in the impugned judgment qua this proposition read as follows:

“4. I have carefully gone through the testimony of PW1 and PW2 examined by the trial court. It is correct that in the statement recorded of PW1 there is an endorsement that witness refused to sign the statement stating that his statement has not been recorded. However, in my considered view mere refusal by the witness in signing the statement does not render the statement recorded by the court as inadmissible. PW-1 has only studied up to

intermediate. He was simply put a question if he was read over the contents of affidavit Ex.PW-1/A to which he candidly admitted that it was not so read over to him. He also admitted that affidavit was not prepared in his presence and that it was signed by him in the chamber of his counsel and he had not gone to the office of Oath Commissioner for putting his signatures. In the obtaining scenario it was incumbent upon Ld.Trial court to have either examined the plaintiff under Section 165 Indian Evidence Act or under Order 10 CPC to elicit the truth since the facts were in the knowledge of the plaintiff. In the alternative, the contents of the affidavit could have been read over to ascertain the veracity thereof. Defendant has admitted the issuance of cheque. He has also admitted in his cross-examination that he is the proprietor of M/s Neel Kanth Constructions (defendant no.2) and he undertakes government contract of construction, repair and all types of construction. He also admitted that he had a contract with the government school No.1, Block-B, Yamuna Vihar for repairs and white-wash including other repair works which work continued for 2-3 years. In this background, the claim of the plaintiff assumes significance when he is in possession of cheque issued by defendant no.1 and when he is also supported by PW2 in his claim that the cheque was issued for work done by him at the above school. The observations of Ld.Trial court that PW2 refused to produce the register regarding the attendance of labourer is not in consonance with the record as the cross-examination dated 22/9/09 of PW2 reflects that he had offered to bring the relevant register on the next date of hearing but it seems that he was not directed by the court or asked by the defendant to produce the above register, so no benefit can be given to the defendant for non-production of such a register. The observation of Ld. Trial court that PW2 had not mentioned the names of the labourers working for plaintiff is also not in keeping with the record as in his cross-examination, PW-2 had categorically stated that 10-12 labourers were working with the plaintiff and he also named few as Mr. Ram Kumar, Ram Avtar and Yogender. No

suggestion has been given in rebuttal that the aforesaid Ram Kumar, Ram Avtar and Yogender were not working for the plaintiff for the work of white-washing. In civil case facts can be proved on the basis of preponderance of probabilities. The non-production of any document such as work order by the plaintiff, is of no consequences when the claim of the plaintiff is viewed in the backdrop of entire facts and circumstances more so when issue No.3 has been decided against the defendant meaning thereby that the cheque under reference was issued for consideration.”

7. There is no perversity in this finding. PW-1 was a partially educated witness probably from a rural background and he had most likely refused to sign his statement in the Court as his statement was being recorded by the Presiding Officer in english and the contents of the same probably would not being understood in the course of the dictation. As rightly held in the impugned judgment, this did not wash away the version of PW-1 which had admittedly been given by him on oath. Testimony of PW-2 had also been adverted to in the impugned judgment before decreeing the claim of the plaintiff. There is no perversity in these findings. No substantial question of law is made out. Appeal as also pending application is dismissed in limine.

INDERMEET KAUR, J.

DECEMBER 24, 2010

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