

**(2011) 04 DEL CK 0224****Delhi High Court****Case No:** Regular Second Appeal No. 110 of 2007

Rajiv Motors Ltd

APPELLANT

Vs

Shri Jagvir Singh

RESPONDENT

**Date of Decision:** April 29, 2011**Hon'ble Judges:** Indermeet Kaur, J**Bench:** Single Bench**Advocate:** None, for the Appellant; Praveen Chauhan and Akshay Singh, for the Respondent**Final Decision:** Dismissed**Judgement**

Indermeet Kaur, J.

This appeal has impugned the judgment and decree dated 27.1.2007 which had endorsed the finding of the trial judge dated 03.1.2007 whereby the suit filed by the Plaintiff i.e. M/s Rajiv Motors Ltd seeking recovery of Rs. 1,49,000/- against the Defendant has been dismissed.

2. Plaintiff is a limited company. Defendant had purchased an ambassador car from the Plaintiff for a sum of Rs. 4,13,275/- which was inclusive of the road tax and registration charges. Defendant had made payment of Rs. 3,13,275/- to the Plaintiff; balance payment of Rs. 1,00,000/- was due and payable. Defendant issued a cheque dated 1.3.1999 drawn on Vijay Bank, Gopi Nath Bazar, Delhi Cantt. for this balance amount; Plaintiff issued receipt dated 01.3.1999. Defendant assured the Plaintiff that he would take back this cheque and give another cheque/pay order in lieu of this cheque; the said cheque was taken back by the Defendant. When the official of the Plaintiff visited the office of the Defendant for getting exchequer/pay order, they were put off; neither the said cheque nor the pay order has been paid to the Plaintiff till date. Suit was accordingly filed.

3. In the written statement it was stated that the Plaintiff has filed the present suit to harass the Defendant. Material facts have been concealed. It is highly improbable

that if a buyer had issued a cheque in favour of the seller, the seller would return the same without taking the money due on it; no such cheque as has been alleged by the Plaintiff was ever issued by the Defendant. Defendant had paid the entire consideration of the said vehicle. It is further stated that the Defendant had already sold vehicle in question in February, 2001. Receipt of the legal notice had also been denied. Suit is liable to be dismissed.

4. From the pleadings of the parties, the following five issues were framed:

1. Whether the Defendant issued a cheque dated 01.3.99 in the sum of Rs. 1lac in favour of the Plaintiff ? OPP

2. If issue No. 1 is proved in affirmative, whether the said cheque was returned by the Plaintiff to the Defendant on the assurance of the Defendant that another cheque will be issued ?OPP

3. Whether the Defendant has paid the entire consideration amount in respect of ISUZO CNG BAUC Ambassador vehicle to the Plaintiff? OPD

4. Whether the notice dated 28.5.01 issued by the Plaintiff was received by the Defendant?

5. Whether the Plaintiff is entitled to recover Rs. 49,000/- as interest @ 21%per annum from 01.3.1999 till the filing of the suit?

6. Whether the Plaintiff is entitled to pendent elite and future interest? If so at what rate and for which period? OPP

7. Relief.

5. Oral and documentary evidence which included two witnesses of the Plaintiff and two corresponding witnesses on behalf of the Defendant was led.

6. On the preponderance of probabilities after scrutiny of the oral and documentary evidence the trial court held that the Plaintiff has failed to prove that any amount is due from the Defendant. Suit of the Plaintiff was dismissed.

7. This was endorsed in first appeal.

8. This is a second appeal. It has been admitted and on 16.4.2007 the following substantial question of law was formulated:

Does it stand proved that the Respondent had paid Rs. 1,00,000/- to the Appellant in the absence of any receipt in this context, whereas all the other documents were reduced in writing?

9. None has appeared for the Appellant in spite of intimation to the counsel Mr. K. Sunil. On behalf of the Defendant it has been urged that the impugned judgment calls for no interference.

10. The testimony of the witnesses of the Plaintiff and the Defendant were examined. Both the two fact finding courts had returned a positive fact finding that the Plaintiff has failed to prove that he is entitled to the sum of Rs.1,00,000/- as has been claimed by him. The case set up by the Plaintiff was unbelievable. Preponderance of probabilities had rightly and correctly weighed in favour of the Defendant. The impugned judgment on this count had returned the following finding.

13. It is well settled that the Plaintiff has to stand on his own legs and no benefit of weakness of defence can be taken by him. It is also well settled that the evidence which is led beyond pleadings is of no use. No amount of evidence beyond pleadings can prove the case of a party.

14. In the present case, the Plaintiff in para 11 of the plaint has stated that a notice dated 28.05.2001 had been sent to the Defendant. The Defendant had denied receipt of such notice. The Plaintiff was required to prove this particular fact. It has proved copy of the notice as Ex.PW1/9. However, no postal receipt or AD card or the envelope received undelivered, has been placed on record. The same had not been proved. In fact, it was stated by Shri I.S. Bhatia PW1 in his cross examination dated 18.09.2003 that he cannot say as to whether any proof regarding the service of the notice has been filed or not. This is one aspect.

15. The case of the Plaintiff is that the vehicle had been sold for a sum of Rs. 4,13,275/- An amount of Rs. 3,13,275/- had been paid by the Defendant. For balance of amount of Rs. 1 lac a cheque bearing No. 851277 dated 01.03.1999 of Rs. 1 lac had been issued by the Defendant for which an entry had been made in the records. This particular cheque had been returned to the Defendant on his assurances that he will make the payment either through pay order or another cheque. However, the Defendant did not do so. The car was sold on 05.03.1999. The suit had been filed on 31.08.2001. The Plaintiff wants this Court to believe that the cheque of Rs. 1 lac had been returned by its employee to the Defendant on the assurance that another cheque or pay order shall be handed over. It is unbelievable that the Defendant would have agreed to issue another cheque in lieu of the cheque dated 01.03.1999 without there being any cogent reason. In the entire plaint, nothing has been mentioned as to by whom the cheque had been returned to the Defendant and why the Defendant had asked for the return of the cheque dated 01.03.1999. It is also not mentioned as to on which date, in which month and in which year the cheque had been returned by the Plaintiff to the Defendant. In the notice Ex.PW1/9 also nothing in this regard has been mentioned. The notice had been issued on 28.05.2001. The Plaintiff wants this Court to believe that though a vehicle of Rs. 4,13,275/- had been sold on 05.03.1999 on payment of Rs. 3,13,275/- yet no effort had been made by it to recover Rs. 1 lac. It has come in the cross examination of Shri S.P. Tyagi PW2 that the payments had been made through two cheques. The cheque of Rs. 1 lac had been received back with the remarks .in sufficient funds....

This witness was not sure as to whether this particular cheque was in possession of the Plaintiff or not. Now this particular claim is in consistent with the pleadings. The case of the Plaintiff is that the cheque of Rs. 1 lac issued by the Defendant had been returned to him. The Plaintiff could have examined the officials of the bank to prove this particular fact that cheque No. 851277 dated 01.03.1999 had been issued by the Defendant and the same had been dishonoured by his banker. It was a documentary evidence and would have certainly gone a long way against the Defendant. The plea of the Defendant is that he had made the entire payment on 03.03.1999. Rs. 1 lac had been paid in cash and the balance amount had been paid through cheque. The Plaintiff has also relied on the receipt dated 05.03.1999 (Ex.PW1/6) of Rs. 10,820/- and receipt dated 10.03.1999 (Ex.PW1/7) of Rs. 475/-. On these dates also the Plaintiff did not ask for the payment of Rs. 1 lac by the Defendant. It was not a small amount. The Plaintiff could not have waited for such a long period from 03.03.1999 to 28.05.2001 to ask the Defendant to pay the amount. Shri S.P. Tyagi PW2 in his cross examination dated 21.01.2004 has stated that he had delivered the cheque to the Defendant but he was unable to recollect the date. It has been stated by him that he had sent his Sales Officer, twice or thrice, to the Defendant to collect the payment. Neither the sales officer has been examined nor the dates of visits of the sales officer have been disclosed by PW2. The payment of Rs. 3,01,980/- had been made through cheque No. 365448 dated 03.03.1999. The cheque of Rs. 1 lac had allegedly been handed over to the Plaintiff on 01.03.1999. It is not the case of the Plaintiff that the amount of Rs. 1 lac had been received in advance. The invoice dated 04.03.1999 (Ex.PW1/4) shows that the value of the vehicle was 3,72,204/- on which sales tax of Rs. 29,776/- had been charged. Thus, the total amount was Rs. 4,01,982/-. It was for the Plaintiff to establish that cheque of Rs. 1 lac had been handed over by the Defendant on 01.03.1999. The evidence produced by the Plaintiff is shaky and contradictory. In view of the above discussion I do not find any merit in this appeal. It is dismissed.

11. The Plaintiff had also failed to prove that the legal notice dated Ex.PW-1/9 has been sent to the Defendant. Testimony of PW-2 was without credence. He had set up a twin defence. In one breath he had stated that the cheque which had been issued by the Defendant was dishonoured on presentation and in the second breath it was stated that the cheque had been taken back by the Defendant on the pretext that a pay order in lieu of the sum would be issued but the same was not issued. It was also difficult to imagine that the vehicle had been sold in March 1999 and the suit having been filed more than two years four months later (i.e. in August 2001); the Plaintiff waited for such a long period to recover the said amount of Rs. 1,00,000/-. It was a make-believe story.

12. This finding calls for no interference. Substantial question of law is answered in favour of the Respondent and against the Appellant. There is no merit in the appeal. Dismissed.