

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

+CS(OS) NO. 421/2007 & IA Nos. 4309/2007 & 9402/2009

Reserved on : 19.05.2010
Date of Decision : 05.07.2010

Sh. Mohinder Gupta

..... **Plaintiff**

Through: Mr. Shiv Charan Garg,
Advocate.

Versus

Sh. Subhash Mittal

..... **Defendant**

Through: None

CORAM :
HON'BLE MR. JUSTICE V.K. SHALI

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | YES |
| 2. To be referred to the Reporter or not ? | NO |
| 3. Whether the judgment should be reported in the Digest ? | NO |

V.K. SHALI, J.

1. This is a suit under Order XXXVII CPC filed by the plaintiff for recovery of Rs.21,40,000/-.
2. Briefly stated the facts of the case as averred in the plaint are that the plaintiff is a proprietor of M/s Gupta Trading Corporation situated at K-32/19, Palam Road, Matiala Village, Delhi-110059. It is alleged that the defendant is a proprietor of M/s Mittal & Co. and deals in business of supplying old empty bottles to various factories situated all over India. The plaintiff and the defendants were having the business transactions because of which the plaintiff had provided the credit facility to the defendant for

purchasing the old empty bottles from the plaintiff for an amount of Rs.21,43,185/- against the various bills, the details of which are given in para 4 of the plaint. It is alleged that all these bills were issued in favour of M/s Mittal & Co. and the defendant on its part had issued five post dated cheques for a sum of Rs.21,40,000/- drawn on Oriental Bank of Commerce, Najafgarh Road, Delhi in favour of the plaintiff concerned. It is alleged that on presentation, all the cheques were dishonoured by five separate memos dated 09.11.2004, two cheques on 20.11.2004 and the remaining two cheques on 23.11.2004 on account of payment stopped by the drawer. The plaintiff is purported to have issued a notice through registered post and UPC on 07.12.2004 to the defendant and despite the receipt of notice the amount has not been paid to the plaintiff. Apart from institution of this case, a case under Section 138 of the Negotiable Instrument Act has been registered in an appropriate forum and the plaintiff has chosen to file the present summary suit for the recovery of the amount under Order XXXVII CPC. The defendant had put in appearance and sought to leave to contest the matter. This Court vide its order dated 10.09.2008 while deciding the 12185/2007 and 6430/2007 had granted leave to defend the suit subject to furnishing security to the extent of 25% of the claim within four weeks to the satisfaction of the Registrar. It was specifically

directed that it will be open to the defendant to furnish bank guarantee in compliance to the present order. The contention of the learned counsel for the plaintiff is that despite the conditional leave to defend granted to the defendant the said condition has not been complied, and therefore, a decree has to be passed in favour of the plaintiff. For this purpose, the learned counsel for the plaintiff has relied upon the judgment of the Division Bench in case titled **Kailashpati Steel Industries Ltd. & Anr. Vs. Steel Authority of India Ltd.** 2008 (106) DRJ 532 (DB).

3. I have heard the learned counsel for the plaintiff and perused the said judgment. The point that in case a conditional leave to defend is granted to the defendant and condition so imposed is not complied with by the defendant, a decree is to follow in favour of the plaintiff as the averment made in the plaint are deemed to have been admitted is no more res integra. The observations of the Division Bench in the **Kailashpati Steel (Supra)** which are pertinent in this regard. It was observed in the said case:

“In case the defendant is not able to comply with the condition, the result is that the plaint is taken to be admitted and the plaintiff is entitled to another on that basis. It is true that it will be open for the defendants to file an appeal against the decree that may be passed on account of the inability of the defendant to comply with the condition and in the appeal the grounds for not granting unconditional leave can also be agitated. But in the meantime the plaintiff, having got his final decree, may have levied execution, and it may be too late for all

practice purposes for the defendant to challenge the interlocutory order.”

4. A perusal of the aforesaid judgment clearly shows that once the defendant had been granted the leave to contest the present suit, on furnishing security to the extent of 25% of the suit amount to the satisfaction of the learned Registrar and the same has not been complied with, the averments made in the plaint are deemed to have been admitted and accordingly a decree for an amount of Rs.21,40,000/- deserves to be passed in favour of the plaintiff. In the instant case, the defendant having failed to furnish the security, the plaintiff is entitled to a decree.
5. The plaintiff has even filed his affidavit by way of examination-in-chief which is treated as an ex-parte evidence against the defendant and thus the averments made the plaint are clearly supported by a statement on oath and there is no reason to doubt the version of the plaintiff. The various bills against the delivery of old empty bottles which were given to him and are dishonoured, along with the dishonoured memo have been exhibited in detail in the affidavit of the plaintiff as PW1/1 to PW1/54, and therefore, I hold that the plaintiff has proved by preponderance of probabilities that the defendant is liable to pay a sum of Rs.21,40,000/- to the plaintiff on account of the business transaction in respect of which he had issued him five cheques which were dishonoured. I,

accordingly, pass a decree for a sum of Rs.21,40,000/- in favour of the plaintiff. I also direct the plaintiff shall be entitled for an interest @ 6% on the decretal amount from the date of filing the suit till the actual realization. The plaintiff has claimed interest @ 18%, however, no evidence has been produced in this regard by the plaintiff and the bank rate of interest being only @ 6% over the period of one year or above, I think he is entitled for an interest @ 6 %. The Registry to prepare an appropriate decree sheet in this regard.

V.K. SHALI, J.

JULY 05, 2010
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