

**(1985) 04 DEL CK 0023**

**In the Delhi High Court**

**Case No :** Civil Revision Appeal No. 540 of 1984

Badri Dass Jain

APPELLANT

Vs

A.G.F.R. and S. Consumers Cooperative Stores Ltd.

RESPONDENT

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**Date of Decision :** 09-04-1985

**Acts Referred:**

**Citation :** (1985) 28 DLT 149 : (1986) RLR 26

**Hon'ble Judges :** Sultan Singh, J

**Bench :** Single Bench

**Advocate :** Mukul Rohatagi, for the Appellant;

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## **Judgement**

Sultan Singh, J.

(1) This revision u/s 115 of the CPC (for short "the Code") by the decree-holder is directed against the judgment and order dated 27th April, 1984 accepting the objections of the respondent-judgment debtor.

(2) Briefly these are the facts. On appeal by the petitioner, the Additional District Judge, Delhi on 22nd February, 1980 passed a decree for recovery of Rs. 7,750.00 with costs of the suit and appeal and interest at 15 per cent per annum from the date of the suit till payment in favor of the petitioner against the respondent. The judgment debtor-respondent failed to pay the decretal amount. The petitioner took out execution wherein on 14th January 1981 a compromise was arrived at between the decree-holder and the judgment debtor whereby the judgment debtor agreed to pay a sum of Rs. 12,000.00 by monthly Installment of Rs. 1,000.00. The first Installment was payable at the time of recording of compromise by the court and the second Installment was payable on 10th February, 1981 and the subsequent monthly Installments were payable on 10th of each English calendar month. It was further provided that in case of default in payment of any Installment the entire balance of decretal amount was payable at once. The decree-holder alleges that monthly Installments were received late by him on 11th June, 1981, 13th July, 1981, 13th August, 1981 and 13th-

September, 1981. He has further alleged that the Installment due on 10th December, 1981 has not been paid. On these allegations the execution application was filed on 16th December, 1981 for recovery of the decretal amount after adjusting the amount of Rs. 11,000.00 paid by the judgment debtor. Notice of the application was issued to the judgment debtor who filed objections on 29th January, 1982. The judgment debtor has alleged that at the time of compromise was agreed that the decree-holder would come personally for collection of the cheques from the office of the judgment debtor and accordingly the decree-holder collected Installments for the months February, March, April and May, 1981 in person from the office of the judgment debtor, It has been denied that the Installments for June, July, August, September and December were not paid within time. It has been pleaded that the cheques were drawn and posted to the decree-holder in time and the decree-holder did not deliberately take delivery of the cheque for the month of December, 1981. It has been further alleged that the decree- holder by a letter dated 5th December, 1981 from the judgment debtor was requested to collect the last Installment due for the month of December, 1981 against receipt of full and final settlement but he failed and Therefore a cheque for Rs. 1,000.00 with letter dated 10th December, 1981 was sent to the decree- holder. On these grounds it has been alleged that the judgment debtor has not violated the terms of the compromise and there was no default in payment of any Installment. In replication the decree-holder has pleaded that he never collected any Installment in person from the office of the judgment debtor, that the representative of judgment debtor had delivered the cheques to him for which receipts were issued and that some cheques were received by post. The decree-holder has denied the receipt of the alleged letter dated 5th December, 1981 requiring him to collect the Installment for December, 1981 against receipt for full and final settlement. He has further pleaded that a cheque for Rs. 1,000.00 along with letter dated 10th December, 1981 was received by him on 29th December, 1981, that the cheque and the letter was ante-dated purporting to be dated 10th December 1981 , that the said letter along with cheque is purported to have been posted on 10th December, 1981 at Ghaziabad, that the judgment debtor Realizing that it had committed the default in payment of Installment has manipulated the posting of the letter at Ghaziabad in collusion with some official of the post office, that the envelope containing the said letter and the cheque was received at Delhi post office on 28th December, 1981 and the same was delivered to him on 29th December, 1981. The decree- holder has further pleaded that he sent a reply dated 6th January, 1981 returning the said cheque to the judgment debtor intimating him that he had Already filed the execution application,

(3) The execution court framed the following issues :

"1. Whether the judgment debtor has complied with the terms of compromise as alleged in the objections". If so, its effects ?

2. Relief,"

The judgment debtor examined its Secretary Shri R.D. Malik, and its peon Subash. The decree-holder examined himself. The executing court has held that the judgment debtor has complied with the terms of the compromise. It has been observed by the executing court that there was some understanding between the decree-holder and the judgment debtor that he would visit the office of the judgment debtor for collecting payment.

(4) Learned counsel for the petitioner-decree-holder submits that the trial court has acted in the exercise of its jurisdiction illegally or with material irregularity by holding that there was understanding between the parties that decree-holder would collect payment in person from the office of the judgment debtor, that the executing court has not applied its mind to the facts of the case and has erred in observing that the decree-holder did not dispute the receipt of the letter dated 5th December, 1981. He submits that the receipt of this letter has always been disputed by the decree-holder and the observation of the executing court to the contrary is against the record. He further submits that the letter dated 10th December, 1981 Ex. DH-1 received in the envelope Ex. Dh 2 was ante-dated, that the said envelope contains the date of Delhi post office as 28th December, 1981 and it was delivered to decree-holder on 29th December, 1981. He further submits that the letter is purported to have been posted at Ghaziabad and the alleged certificate of posting is forged one, that it is not at all difficult to obtain postal seal of a prior date on a certificate of posting and as such the certificate of posting is forged, that the written terms of compromise arrived at between the parties on 14th January, 1981 before the executing court cannot be varied by any oral agreement, that there was never any oral agreement for collection of the payments from the office of the judgment debtor in person, that the well known rule is that in the absence of the agreement, the debtor is to find the creditor or to deposit the decretal amount/installment in court. Learned counsel for the judgment debtor on the other hand submits that there was an oral agreement that the decree-holder would collect the Installments in person, that the decree-holder did not collect the cheque due in December and Therefore the cheque was sent under certificate of posting on 10th December, 1981.

(5) The written compromise dated 14th January, 1981 does not contain any term requiring the decree-holder to collect the Installments in person from the office of the judgment debtor. The executing court has however held that there was some understanding to that effect between the parties. There is only solitary statement of the decree-holder and the secretary of the judgment debtor in support of their respective contentions. It is well known that when there is choice only between the two oral statements the party upon whom the onus lay must fail. Thus it must be held that the judgment debtor has failed to prove that there was any understanding as alleged by it. Moreover the terms of the written compromise cannot be varied by any oral agreement. Section 91 of the Evidence Act provides that the terms of a contract reduced to the form of a document can be proved by the document itself. Section 92 of the Evidence Act further provides that where the terms of the written contract have been proved in accordance

with section 91 of the Evidence Act no evidence of any oral agreement shall be admissible for the purpose of contradicting, varying, adding to or subtracting from its terms of the agreement. In the instant case the written agreement was arrived at before the executing court in the previous execution case on 14th January, 1981 and as such under sections 91 and 92 of the Indian Evidence Act its terms have been proved according to the written agreement and the oral evidence to the contrary is excluded under law.

(6) It is also well known that a debtor is to find the creditor. The judgment debtor in this case agreed to pay Installments on or before 10th of every month to the decree holder. It was thus for him to see that the Installment due was pay to the decree-holder according to the settlement on or before 10th of every English calendar month. It is in evidence of the decree-holder that the Installment for June" July, August and September, 1981, were paid on 11th June, 1981, 13th July, 1981 13th August, 1981 and 13th September, 1981 and these were late payments. He has also deposed that the Installment due on 10th December, 1981 was received by him on 29th December, 1981. The next question for decision is whether the letter dated 10th December, 1981 was ante-dated. A perusal of the envelope Ex. Dh 2 reveals that it bears the postal seal dated 10th December, 1981 of Ghaziabad post office, and a postal stamp dated 28th December, 1981 of Delhi post office. The certificate of posting is Ex. 0.14 which also bears the seal dated 10th December, 1981. Similar is the seal on the envelope Dh 2. If this letter was posted on 10th December, 1981 at Ghaziabad it ought to have reached the decree-holder at Delhi in a day or two but it reached Delhi post office on 28th December, 1981 as is apparent from the seal of the post office. The peon Subash Dw 2 who is alleged to have posted this envelope containing the letter and cheque from the post office at Ghaziabad admittedly is not a resident of that place. In any case it is apparent that this letter was not posted on 10th December, 1981 but it was posted a day or two before 28th December, 1981. It is not known why the judgment debtor who has an office at Delhi could not deliver the cheque in person to the decree-holder on 10th December, 1981 itself. The judgment debtor further has not placed on record the day book or cash book showing the issue of any cheque on 10th December, 1981. It is well known that it is not at all difficult these days to obtain a postal seal of a prior date on a certificate of posting. In the present case as observed above there is no Explanation as to how the envelope Dh 2 bears the date 28th December, .1981 of Delhi Post Office. Similar observations were made by a Division Bench of Allahabad High Court in Padrauna Raj Krishan Sugar Works Ltd. and Others Vs. Kunwar Laxmi Pratap Narain Singh and Others, .

(7) From the pleadings of the parties I find that the decree-holder has seriously contested the receipt of the letter dated 5th December, 1981 Ex. 0-11 but the executing court has made an observation to the contrary. The executing court has not discussed as to how the judgment debtor had complied with terms of the compromise. In my opinion the executing court has acted in the exercise of its jurisdiction illegally and Therefore the impugned order is liable to be set aside.

The judgment debtor did not comply with the terms of the compromise. He committed default in payment of monthly Installments.

(8) The revision petition is accordingly accepted with costs setting aside the order dated 27th April, 1984. The objections of the Judgment debtor are dismissed. The decree-holder is entitled to take out execution for the recovery of the remaining amount due to him in accordance with law.