

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

+ CM(M) 1294/2008 & CM No.16367/2008

Date of Decision: 01.05.2009

ITHAD TRANSPORT (P) LTD (K) Petitioner
Through: Ms. Renu Verma, Advocate

versus

MALHOTRA AUTO SUPPLIERS Respondent
Through: Mr. Akash Tyagi, Advocate.

**CORAM:
HON'BLE MR. JUSTICE MANMOHAN**

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

J U D G M E N T

MANMOHAN, J (Oral)

1. Present petition has been filed under Article 227 of Constitution of India challenging the order dated 12th August, 2008 passed in RCA No. 08/2007 by virtue of which decree and judgment of trial Court dated 07th March, 2007 had been set aside and the matter had been remanded back to trial Court after permitting respondent-plaintiff to file original of Ex.PW1/F and produce original ledger and bill books referred to by respondent-plaintiff in their cross-examination.

2. Briefly stated, the material facts of this case, are that respondent-plaintiff had filed a suit for recovery of Rs.96,081/-. However, trial Court dismissed respondent-plaintiff's suit

primarily on the ground that respondent-plaintiff had not brought on record original documents and had also not proved its accounts and any delivery challan/ receipts showing acceptance of goods on behalf of petitioner-defendant.

3. Appellate court after perusing the statement of PW1 came to the conclusion that bill books and ledgers were produced in cross-examination of PW1 and having been asked questions with regard to the said documents, the same should have been taken on record. Consequently, vide impugned order the matter has been remanded back to trial court.

4. Learned counsel for petitioner submitted that appellate court could have set aside the judgment and decree only on merits. In this connection, learned counsel for petitioner relied upon a judgment of ***Municipal Corpn. Hyderabad v. Sunder Singh*** reported in ***(2008) 8 SCC 485*** wherein it has been held as under:

“A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. Before invoking the provision regarding remand of a case by the appellate court under Order 41 Rule 23 CPC the conditions precedent laid down therein must be satisfied. Order 41 Rule 23 would be applicable when a decree has been passed on a preliminary issue. The appellate court must disagree with the findings of the trial court on the said issue. Only when a decree is to be reversed in appeal, the appellate court may if it considers necessary, remand the case in the interest of justice. It provides for an enabling provision. It confers a discretionary jurisdiction on the appellate court. The court should be loathe to exercise its power in terms of Order 41

Rule 23 and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties."

5. She further submitted that appellate court could not have allowed the respondent-plaintiff to file documents under Order 41 Rule 27 of CPC as necessary ingredients of the said provision were not fulfilled. In this connection learned counsel for petitioner referred to Order 41 Rule 8 of CPC. Learned counsel for petitioner also submitted that no case for any 'substantial cause' had been made out which would entitle respondent-plaintiff to lead any evidence. She lastly submitted that the relief granted by appellate court was beyond the relief prayed for in respondent-plaintiff's application as according to her, by way of the said application, respondent-plaintiff had only prayed for producing and placing on record the original of documents which were produced in evidence before the trial Court. In this connection, learned counsel for petitioner relied upon a judgment of Supreme Court in ***Sunder Lal & Son v. Bharat Handicrafts Private Ltd.*** reported in ***AIR 1968 SC 406*** wherein it is held as under:

"7.....Where the Appellate Court requires any document to be produced or witnesses to be examined to enable it to pronounce judgment, or for any other substantial cause, the Court may allow such document to be produced or witnesses to be examined. We do not require additional evidence to be produced in this case to enable us to pronounce judgment, nor do we think that any substantial cause

is made out which would justify an order allowing additional evidence to be led at this stage. The document relied upon was admittedly in the possession of the appellants, but they did not rely upon it before the High Court. It was said at the Bar that the importance of the document was not realized by those in charge of the case. We do not think that the plea would bring the case within the expression "other substantial cause" in O. 41 R. 27 of the Code of Civil Procedure. We therefore decline to allow this additional evidence to be brought on the record. There is accordingly no writing evidencing the consent or authority to the appellants entering into a contract on their own account with the respondents in respect of jute goods, and it is not the case of the appellants that they had secured written confirmation of such consent or authority by the respondents within three days from the date of the contract."

6. Learned counsel for respondent, on the other hand, submitted that jurisdiction of this Court in Article 227 proceedings was extremely limited and in this connection, he relied upon a judgment of Supreme Court in ***Sadhana Lodh v. National Insurance Company Ltd.*** reported in **(2003) 3SCC 524** wherein it has been held as under:

"7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision...."

7. Learned counsel for respondent further submitted that

appellate court was well within its jurisdiction to grant permission to respondent-plaintiff to adduce additional evidence. In this connection, he relied upon a judgment of Supreme Court in ***Jaipur Development Authority v. Kailashwati Devi*** reported in ***AIR 1997 SC 3243*** wherein it has been held that appellate court can grant permission to lead additional evidence to a party that has not even adduced any evidence in the trial Court.

8. Having heard the parties and having perused the trial Court and appellate court's order, I am of the view that trial Court had dismissed respondent-plaintiff's suit primarily on the ground that they had not filed original of the documents that they had relied upon.

9. In fact, the reasoning of trial court is to be found in the following passage:

"In the present case, however, the defendant did not accept the correctness of the books of account rather the plaintiff has examined himself as PW1. In his examination in chief, the plaintiff did not depose that he writes account books or he is the author of ExPW1/C. The plaintiff has not specifically deposed as on what basis i.e. Bills, Voucher or Bahi, the EXPW1/C was prepared. He has not proved the accounts, any delivery challan/receipt showing acceptance of goods on behalf of defendant. Merely by filing the statement of accounts and that too a photocopy does not constitute proof about the veracity and correctness of the accounts. Section 34 of the Indian Evidence Act clearly spells out that the nature of corroborative evidence can be either vouchers, bills, examination of the writer of accounts or any other evidence which can lend credence to the statement of accounts. Merely by producing computerized copy is not sufficient, the testimony of PW also does not assist as the same lacks material

particulars and is vague. The letter ExPW1/C1 is only the photocopy, there is no receipt from postal authority showing the actual dispatch of the same. There is no evidence on the point that the defendants tendered sum of Rs.10,000/- to the plaintiff as alleged. Furthermore, the EXPW1/F is also the photocopy. There is nothing on record to suggest as to who has signed the documents EXPW1/F on behalf of defendant. The defendant was also not cross examined on this aspect. The defendant has taken specific objection with regard to mode of proof at the time of leading of evidence, still, the plaintiff did not take any steps for proving the same in accordance with law. Merely by putting exhibits marks on the documents, the documents are not proved.

10. However, on a perusal of PW1's statement, I find that respondent-plaintiff had at the time of their cross-examination brought the original record along with them which petitioner-defendant did not ask for inspection despite being informed of availability of originals of the documents. Surprisingly, even trial court did not ask for their production.

11. In my view, it is unfair to deny relief to respondent-plaintiff without looking at the said documents especially when it was the respondent-plaintiff's case during their cross-examination that they had brought originals of the documents to trial court.

12. Consequently, in my view, trial court's finding that no originals of the documents had ever been brought on record is erroneous and the present case falls within the ambit of Order 41 Rule 23 CPC.

13. Moreover, I am of the opinion that this is not a case for

leading of additional evidence under Order 41 Rule 27 CPC but this is a case of evidence on record not being looked into. In fact, the error, if any, was committed by trial court and by petitioner-defendant when they neither inspected nor asked the respondent/plaintiff to produce the documents even when they said on the date of cross-examination that they had brought the originals.

14. Consequently, the remand order passed by the appellate court calls for no interference in Article 227 jurisdiction and is perfectly justified and reasonable.

15. In view of aforesaid observations, present petition and application are dismissed, but with no order as to costs.

MAY 01, 2009
js

MANMOHAN,J