

GAHC010091762009



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/68/2009

OIL and NATURAL GAS CORPORATION and ORS
HAVING ITS REGD. OFFICE AT JEEVAN BHARATI TOWER-II, CANNAUGHT
CIRCLE, NOW INDIRA CHOWK, NEW DELHI-110001 HAVING ITS REGIONAL
OFFICE FOR EASTERN REGION AT NAZIRA REPRESENTED BY THE
DEPUTY GENERAL MANAGER LEGAL, ONGC LTD. ERBC, NAZIRA,
ASSAM.

VERSUS

M/S INDUSTRIAL ENGINEERS and TRADERS and ORS
MAKUM ROAD, TINSUKIA ASSAM, REPRESENTED BY ONE OF ITS
PARTNER, SHRIRAVINDRA KR. JAIN, SON OF SHRI O.P. JAIN, PRESENTLY
RESIDING AT BORDOLOI NAGAR NEAR NAMGHAR, TINSUKIA ASSAM.

2:UCO BANK

HAVING ITS HEAD OFFICE AT 10 BTM SARANI
BRABOURNE ROAD
KOKATA- 700001 AND BRANCH OFFICE AMONGST OTHER AT HOSPITAL
ROAD
SIVASAGAR-785640 ASSAM

Advocate for the Petitioner : MR.G N SAHEWALLA

Advocate for the Respondent : MR.H K BORA

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the appellant : Mr. G. N. Sahewalla Senior Advocate.
Mr.N. Anix Singh, Advocate
For the Respondents : Mr. O.P.Bhati, Advocate.
Date of Hearing & :
Date of Order : 16.05.2023

JUDGMENT AND ORDER(ORAL)

Heard Mr. G.N. Sahewalla, learned Senior Counsel assisted by Mr. N. Anix Singh learned counsel for the appellant. Also heard Mr. O.P.Bhati, learned Counsel for the respondents.

2. The present second appeal is directed against the judgment and decree dated 24.12.2008 passed by the learned District Judge, Tinsukia in Money Appeal No.21 of 2006 affirming the judgment and decree dated 15.9.2006 passed in Money Suit No.24/2001 by the learned Civil Judge, Tinsukia. This court under its order dated 24.4.2009 admitted the present second appeal on the following substantial questions of law:

(i) Whether the learned appellate court below was justified in not allowing the application of the appellant for adducing evidence under Order 41 Rule 27 CPC to prove the documents including the bill in respect of the supply in question as a fraud has been perpetuated in the instant case as the only bill Ext-Kha which was received by the appellant on the basis of which the payment was

made and the person who submitted the bill and withdrawn the draft is the same person who submitted other papers ?

(ii) Whether the learned lower appellate court dismissed the appeal preferred by the appellant/defendant No.1 by misconstruing the evidence on record relating to the plea of payment of the plaintiff's claim through the authorised agent of the firm viz. Vinod Kr. Jain?

(iii) Whether the plaintiff's suit as framed is maintainable in law in respect of the specific plea of the defendant No.1 regarding payment of the claimed amount of the suit to Vinod Kr. Jain ?

3. For determination of the present second appeal, let this court first record the background facts in nutshell as follows:

CASE OF THE PLAINTIFF:

The plaintiff instituted the suit for recovery of Rs. 4,52, 656 from the defendant No. 1. According to the plaintiff the defendant No. 1 placed an order of supply of 6 numbers of Tool Kits with the plaintiff on 29.12.1997 by purchase order dated 22.12.1997. According to the plaintiff, the plaintiff delivered the ordered materials on 7.4.1998 and simultaneously raised a bill dated 7.4.1998. The bill raised was for Rs 3,26,138/- including AGST of Rs. 24, 158/- and a specific instruction in the bill was given to the effect that the bill be paid by A/c draft deducting draft commission of State Bank of India, Tinsukia Bazar branch, Code No 3051.

According to the plaintiff despite repeated reminders, the plaintiff did not get the payment and therefore, the plaintiff issued a notice on

1.11.1998 to the defendant No. 1 to clear the payment due as mentioned in the bill. Thereafter the plaintiff received a letter on 12.11.1998 whereby it was intimated to the plaintiff that the accounts section of the defendant No. 1 had already made payment on 24.6.1998 and on 30.6.1998 to the plaintiff Bank account No. 1055/C5 UCO Bank Sivasagar Branch. The plaintiff contends that neither the said Bank account at UCO Bank belongs to the plaintiff nor did the plaintiff had given any authority to anybody to collect the payment from defendant No.1 and on the contrary he had specifically instructed the defendant No. 1 to pay the bill by way of Account payee draft payable at State Bank of India, Bazar Branch, Tinsukia. Subsequently the plaintiff by a legal notice intimated the defendant No. 1 that the plaintiff never opened any bank account in UCO Bank, Sivasagar. Letters were sent demanding the money and when the money was not paid the plaintiff instituted the suit.

The defendant took a stand that there is no specific instruction or remark in the bills to pay the bills by account payee draft deducting draft commission of SBI, Tinsukia Bazar Branch. It was a stand of the defendant that the account No. 1055/65 of UCO Bank, Sivasagar was endorsed in the respective bill for making payment. Accordingly, the payment was sent to the Bank in Account number 1055/C5. It was also a stand of the defendant that the original bill /invoice dated 24.6.1998 of the plaintiff did not contain any instruction regarding payment of the bill except, mentioning the account No. 1055/C5 of UCO Bank , Sivasagar. It was also a stand of the defendant that from the relevant papers, the signature of the person on the receipt copy of the supply order dated 22.12.1997 and the signature in the bill dated 26.4.1998 and another

signatures in a communication dated 24.5.1998 for release of the security deposit, seems to be of the same person. It was another pleading of the defendant in their written statement that the payment has directly been made to the plaintiff and by account payee cheque in his account No. 1055/C5 in UCO Bank Sivasagar as per instruction of the plaintiff. Accordingly it was pleaded that even if any fraud is committed, the defendant No.1 cannot be held responsible, for the same but it is the plaintiff who is to take responsibility.

4. The learned trial court has framed as many as 8 issues which are as follows:

1. *Whether the suit is maintainable in law as well as in fact and in the present form?*
2. *Whether the suit is barred by limitation ?*
3. *Where there is cause of action for the suit?*
4. *Whether this court has jurisdiction to try the suit?*
5. *Whether the plaintiffs have right to sue?*
6. *Whether the alleged payment was made by the defendant No.1 in favour of the plaintiff, and whether there was any specific instruction made by the plaintiff in respect of the payment to the defendant No.1?*
7. *Whether the plaintiffs are entitled to a decree alongwith reliefs , as prayed for ?*
8. *To what relief or reliefs, the partners are entitled ?*

5. Issue No.6 is vital for determination of the second appeal. The plaintiff examined himself as PW-1 and exhibited certain document. Ext.1 is the work order and he also exhibited Ext. 2, the bill raised for such supply. The defendant examined DW 1 who is one of the officials of the defendant

and also exhibited certain documents. After perusal of the aforesaid evidence including the evidence, the learned trial court came to the following findings:

- (i) Ext.1 supply order is admitted by defendant No.1 and from such admission it is clear that defendant has full knowledge about the address of the plaintiff. In terms of column 19 of Ext.1 CST/ State/ ST registration number must be given in the bills and in the event of failure to do the same, payment will not be made.
- (ii) The Ext.2 bill raised by the plaintiff contains Central Taxes/, Central sales Tax registration No./AGST number of the plaintiff Farm. As Ext. 19 is the registration of the CST and Ext. 12 is AGST registration Number and the same were registered in the name of M/s Industrial Engineers and Traders, Makum Road, Tinsukia.
- (iii) The Ext.Ka exhibited by defendant, according to the defendant is the bill raised by the plaintiff and on the basis of which the payments were made.
- (iv) In Ext. Ka, there is no mention of CST/AGST registration and is reflected and therefore, in terms of column 19 of Ext.1, the defendant No. 1 cannot pay the bill to M/s Industrial Engineers and Traders, at Sivasagar in pursuance of bill dated 24.6.1998, (Ext. Ka).
- (v) Accordingly, the learned trial court concluded that such payment was made in the UCO Bank in violation of provision of Ext.1.
- (vi) The court also concluded that though Ext.Ka and Kha were executed by DW 1, these are photo copies of original. Taking note of Ext. 18 the court concluded that the plaintiff is a registered Farm.

It has four partners and it has main office at Makum but the payment was released by the defendant No.1 to account of one Binod Kumar, who was not partner of the said Farm. Therefore the court concluded that defendant No.1 had released the amount to an unauthorised persons not to the plaintiff. Thus payments were made in violation of Ext. 2 i.e. bill raised by the plaintiff. Accordingly the suit was decreed for recovery of Rs. 4,52,656/- from the defendant No. 1 with interest rate 12 % per annum from the date of filing of the suit till the date of realisation of the decretal amount alongwith the cost of the suit.

(vii) Such decision was challenged in the appeal by the defendant No.1, the present appellant. Learned appellate court after framing point of determination to the effect that whether the appellant is liable to pay the decretal amount as determined by the learned trial court to the respondent No.1 and after reappreciating the evidence came to the following conclusion:

(i) The appellant defendant No.1 admitted everything except the fact that the plaintiff respondent had given any standing instruction to pay the amount in his account maintained in SBI, Tinsukia Branch.

(ii) The plaintiff had proved bill Ext.2 in its original wherein there is a specific instruction to the appellant defendant No.1 to pay the amount of bill by A/C draft deducting draft commission in SBI, Tinsukia Branch code No. 9051.

- (iii) Though the defendant denied such instruction however failed to prove that such instruction was false and concocted. There is no instance that plaintiff had maintained any account with UCO Bank Sivasagar and he was the actual holder of the said account.
- (iv) One Binod Kr. Jain Opened the account just 2/3 days before the withdrawal of the amount and the said account was closed though account was opened in the name of the plaintiff.
- (v) The plaintiff has proved by sufficient evidence that it had no account in UCO Bank, Sivasagar Branch as pleaded by defendant No.1. The court also concluded that it was proved through Ext.2 wherein there was specific instruction for payment in SBI, Tinsukia Branch.
- (vi) The defendant has failed to prove by any evidence that the plaintiff in fact instructed them to issue cheque against the account maintained in UCO Bank, Sivasagar. It was also not proved that the plaintiff had withdrawn the amount of the bill from the account maintained in Sivasagar and it was proved that the plaintiff had nothing to do with the opening of account No. 1055/C5 at UCO Bank , Sivasagar Branch.
- (vii) The defendant No. 2 Bank is not supposed to interfere with the withdrawal of the money but was supposed to examine irregularity in respect of deposit of

any amount.

6. Accordingly, the learned appellate court found no perversity or fault on the decision that has been made by the learned trial court in decreeing the suit.
7. Mr. Sahewalla, learned Senior Counsel argued that the learned appellate court has not given any opportunity to prove Ext.Kha the bill which was received by the defendant No.1, on the basis of which the payment was made and thereby serious perversity has been committed. It is contended that as the fraud has been perpetuated and only Ext. Kha bill was received by the appellant on the basis of which the payment was made and the person who submitted the bill and withdrew the draft is the same person , the trial court below was not justified in not allowing the application of the appellant Accordingly, the first substantial questions of law framed is required to be answered in favour of the appellant.
8. It is further contended by Mr.Sahewalla learned Senior counsel that the basic issue and crux of the matter was whether one Binod Kumar Jain was the authorised person of the respondent who not only submitted the bill but his signature appeared in the receipt copy of the supply order dated 22.12.1997 as well as the application for amendment for charges. Therefore, the finding of the learned appellate court treating the said Binod Kumar Jain as a third party is perverse inasmuch as the evidence of the defendant has not been taken note of by the learned court below and thus misconstrued the evidence on record. Accordingly, Mr. Sahewalla learned Senior Counsel argues that substantial question of law No. 2 is also required to be answered in favour of the appellant defendant No.1.

9. Mr.Sahewalla, learned Senior Counsel further submitted that the suit itself was not maintainable in view of the specific plea of the defendant No.1 regarding the payment to the claimant through Binod Kumar Jain inasmuch as Binod Kumar Jain was a necessary party for determination of the suit. Accordingly, Mr.Sahewalla, learned Senior counsel argues that substantial question of law No3 is required to be determined in favour of the plaintiff and the both the judgments of learned court below should be reversed.
10. Per contra, Mr. O.P.Bhati, learned counsel for the respondent submits that Ext. Kha was not disputed by any of the contesting parties and the evidentiary value of Ext. Kha was duly appreciated by both the learned courts below and therefore question of leading additional evidence in terms of Order 41 Rule 27 of the CPC, 1908 was not at all necessary inasmuch as even for the arguments sake, it is proved that the person who submitted the bill has withdrawn the draft cannot change the course of the judgment for the reason that both the courts below came to a definite conclusion that Ext.Kha was not in conformity with the Ext.1 work order and that the defendant No. 1 could not have made payment on the basis of Ext. Kha, even if it is given by an authorised person. Therefore, Mr.Bhati submits that these are all questions of fact and not even questions of law not to say to be substantial questions of law.
11. The second substantial question of law according to Mr.Bhati do not involve any substantial question of law inasmuch as nothing is exhibited or pleaded that Binod Kr. Jain was an authorised agent of the plaintiff and on the basis of such authority the defendant No. 1 has made the

payment to the account of said Binod Kr. Jain. There is no pleading to that effect except a statement that the signature of the person who signed certain documents relating to work is similar to that of the person who submitted the bill.

12. Coming to the third substantial question of law framed, Mr. Bhati submits that in absence of any specific plea that the said Binod Kumar Jain was an authorised agent of the plaintiff and the plaintiff authorised him to receive the amount such question of law cannot be framed inasmuch as nothing has been pleaded by the defendant No.1 in their written statement except pleading that the signature of the person who submitted the Ext.Kha bill and other signature relating to the supply works are similar. Accordingly, Mr.Bhati that the present second appeal is liable to be dismissed.
13. This Court has given anxious consideration to the submissions advanced by the learned counsel for the parties. Also perused the materials available on record.
14. The application under Order 41 Rule 27 CPC,1908 filed by the defendant/appellant was dealt with by the learned appellate court under its order dated 31.5.2007 and came to a conclusion that the additional evidence sought to be adduced by the appellant was within their knowledge and they failed to adduce the same at the time of trial of the suit inasmuch as such fault has been attributed to the conducting lawyer. Accordingly, learned court came to a conclusion that blaming a lawyer is not sufficient to allow the evidence under Order 41 Rule 27 of the CPC, 1908.

15. The Order 41 Rule 47 of CPC, 1908 empowers the appellate court to allow the parties to the appeal to produce additional evidence, oral or documentary on certain contingencies, such as, when the trial court has refused to admit evidence, which ought to have been admitted. This is not the case of the plaintiff.
16. Another contingency is that the party notwithstanding exercise of due diligence, such evidence was not within their knowledge or after exercise of due diligence could not produce the evidence before the trial court. This is also not the case of the appellant inasmuch as it was pleaded in the application seeking production of additional document on the ground that the defendant No.2 UCO Bank, Sivasagar maintained the account No. 1055/C5 in the name of the plaintiff respondent No.1, to which the bill amount was deposited as per the standing instruction and was released and therefore the FIR was filed and police seized the relevant documents in connection with Sivsagar P.S.Case No. 197/99 u/s 419/420 of the IPC for alleged withdrawal of said amount by some unauthorised person.
17. From the application, it is also not discernible why such documents are relevant and there is nothing on record to show that it was not within their knowledge or could not produce such evidence even after exercise of due diligence. Only blame was put to lawyer that the lawyer did not take steps for production of original documents, seized by the police.
18. The other situation where the exercise of power under Order 41 Rule 27 of the CPC, 1908 can be exercised is when the appellate court itself requires production of document or examination of witnesses to enable it to pronounce the judgment or for any substantial cost. The learned

appellate court has determined the dispute on the basis of evidence available on record including deposition and exhibits produced by the parties to the suit, and the same was concurred by the learned appellate court. Therefore it is clear that learned appellate court did not require any additional document for pronouncement of the judgment. Such discretionary power, exercised in the given facts of the present case, in the considered opinion of this court is a factual determination which cannot be treated as a substantial question of law.

19. The Substantial questions of law framed basically relates to perversity and misreading of the evidence by both the courts below.
20. It is well settled that the power of High Court to interfere in a second appeal under Section 100 is very limited and court has to decide only substantial questions of law if arises. In the case of ***Karnataka Board of Wakf Vs. Anjuman-E-Ismail*** reported in ***(1999) 6 SCC 343***, the Hon'ble Apex Court held that finding of facts reached by the courts below cannot be interfered or reversed in second appeal without coming into a conclusion that said finding of fact is either perverse or not based on material on record. It is also equally well settled even when from the evidence two inferences are possible, then one drawn by courts below should be opted by the High Court in exercise of power u/s 100 CPC . Such finding of fact and decision can only be interfered in a second appeal when such decision is based on inadmissible evidence or arrived at without evidence or recorded decision based on misreading of evidence on records or documents.
21. Coming to the case in hand, both the courts below concurrently found that the plaintiff was awarded with the supply work through Ext.1 and

the said supply work was executed by the plaintiff. Such facts also have been admitted by the defendant in their written statement. Only dispute arose when the payment was made to the account in question which the plaintiff disowns. For determination whether defendant No.1 has rightly transfer the amount due to the plaintiff to his account, Both the court concurrently held that Ext Kha on the basis of which the payment was transferred to the account in UCO Bank was not in conformity with the Ext.1 and such bill (Ext. Kha) lacks all the details particulars as required under Ext.-1. Such determination on the basis of Ext.Kha and Ext.1 cannot be interfered at second appellate stage, the same being not perverse inasmuch as the said determination is based on Ext 1 and Ext Kha and both the exhibits have been admitted by the plaintiff as well as the defendant.

22. The learned Courts below further relied on the Ext.2, which according to the plaintiff, was the bill submitted by him which discloses the necessary particulars as required under Ext.1. Therefore, the conclusion of the learned courts below that the defendant No.1 committed wrong in transferring the amount to the Bank account in question on the basis of Ext. Kha, as it violates the terms of Ext.1 inasmuch as Ext.1 debars the defendant No. 1 to make any payment to the contractor in absence of such detail particulars as mandated under Ext.1. Such finding of facts, in the considered opinion of this court not being perverse cannot be interfered in a second Appeal.
23. The argument of the appellant that the learned courts below misconstrued the evidence on record relating to the payment to the plaintiff, through his authorised agent, namely, Binod Kumar Jain cannot be said

to be a substantial question of law inasmuch as there is no whisper of such fact that the defendant No.1 has released the money in the account of Binod Kumar Jain and said Binod Kumar Jain being the authorised agent of the plaintiff. In absence of any pleading to that effect such question cannot be raised at second appellate stage. Therefore, second substantial question of law is also answered against the appellant.

24. In view of the aforesaid discussion and reasons, this Court finds no merit in the second appeal.
25. Accordingly the same stands dismissed. Prepare a decree accordingly. Send back the LCR. Parties to bear their own cost.

JUDGE

Comparing Assistant