

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

**Regular Second Appeal No. 49 of 2000
Date of decision: March 04, 2015**

Kishan Singh

....Appellant

Versus

Ishar Singh

....Respondent

Coram: Hon'ble Mr. Justice Fateh Deep Singh

**Present: Mr. Muneesh Gupta, Advocate, for the appellant
Mr. BPS Virk, Advocate, for the respondent**

Fateh Deep Singh, J.

In this regular second appeal, the appellant-defendant Kishan Singh has challenged judgment decree dated 6.10.1999 passed by learned Additional District Judge, Rupnagar in which the findings of the learned Additional Civil Judge (Senior Division), Anandpur Sahib dated 21.8.1996 decreeing the suit have merged.

Heard Mr. Muneesh Gupta, Advocate, for the appellant, Mr. BPS Virk, Advocate, for the respondent and perused the records.

The undisputed facts are that Punjab Alkalies Chemical Ltd. (in short, PACL), Naya Nangal allotted tenders for certain civil works to defendant Kishan Singh by virtue of letter dated 16.8.1991 Mark 'A' and in pursuance of which Kishan Singh entered into an agreement with plaintiff Ishar Singh by way of Ex. P3 dated 5.9.1991 whereby it was decided that the works shall be executed by Ishar Singh under the supervision of Kishan Singh and out of returns, 90% shall go to the plaintiff and 10% to the defendant. It is during the course of events some sort of dispute arose between the two of them and Kishan Singh through letter dated 4.1.1992 Ex. D1 sent to PACL has given up execution of 7 items on account of his inability to execute and through letter of that very date Ex. D2, PACL accepted this and cancelled these items from the allotment and which were instead allotted to the plaintiff. It is thereafter a dispute had arisen between the two when Kishan Singh received Rs 1,20,000/- from PACL.

The only bone of contention is if the plaintiff was entitled to his share as per the agreement out of this amount or not. The learned trial court framed the following issues and after leading evidence has led to the passing of the impugned findings:-

- “1. Whether the plaintiff is entitled to the rendition of account regarding the amount allegedly received by the deft. for the work done at PACL/Project/91/11544 and suit for recovery of 90% of the amount along with interest ? If so, at what rate ? OPP
2. Whether the suit is bad for non-joinder of

necessary parties ? OPD

3. Wheher the suit of the plaintiff is incompetent and not maintainable in the eye of law and in the present form ? OPD

4. Whether the pltff. is estopped by his act and conduct from filing the suit ?OPD

5. Whether the suit is properly valued for the purposes of court fee and jurisdiction ? OPP

6. Whether the terms and conditions of the agreement were mutually revoked by the parties and the plaintiff agreed to make payment of 10% of amount against the payment of the work allotted to the pltff. ?OPD

7. Relief.”

Since it is the plaintiff who has knocked at the doors of the Court and therefore, was under bounden duty to establish his case by preponderance of probabilities and cannot by any means take undue benefit of the weakness of the defendant as has been laid down in **Rangammal vs. Kuppuswami & anr. , AIR 2011 SC 2344.** Though much arguments have been spelled out over the pleadings and the evidence and the onus of the principal issue no. 1 was placed upon the plaintiff who has examined himself as PW1 and sought corroboration from PW2 Balbir Singh Typist who drafted the agreement whereas on the other defendant has testified as DW1 and examined DW2 Civil Engineer Sarabjit Singh from PACL regarding allotment and Dharminder Singh Account Officer of PACL. To the specific query of the Court, learned counsel for the plaintiff could not

show of having executed any such work at his own costs though by virtue of agreement Ex. P3 there was an understanding between the parties to share the profits but since as has been argued on behalf of the appellant by virtue of subsequent events own letter of the defendant Ex. D1, letters of PACL Ex. D2 and D3 and by virtue which the work consisting of 7 items was allotted to the plaintiff certainly over-rides this agreement by such a novation through the own conduct of the parties when the original allotment has undergone change and which has fallen to the share of the plaintiff certainly over-rides this agreement and its after effects. There is nothing suggestive that this amount of Rs 1,20,000/- was qua the original works or after the 7 items were allocated to the plaintiff by PACL on the asking of both the sides or there is any reciprocity qua this in terms of section 51 of Contract Act qua this new allocation of work subsequent to their contract. Merely because the defendant in his written statement has admitted having received the amount does not mean or can be construed that the plaintiff is entitled to this amount by virtue of this agreement which by this conduct of the parties stands impliedly revoked until and unless the plaintiff establishes his case he cannot be found entitled to any relief under the law. Two courts below have misconstrued this vital aspect of the matter and has on mere assumption that the payment of Rs 1,20,000/- was by virtue of the agreement had ordered decreeing of the relief.

In the light of these discussions, there is total mis-interpretation

resulting in perverse findings which findings needs to be set aside by acceptance of appeal. Resultantly, the appeal is allowed. Judgments and decrees passed by both the courts below are set aside. However, no order as to costs.

March 04, 2015
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(Fateh Deep Singh)
Judge

