

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

RSA No.920 of 2012 (O&M)

Date of Decision.24.10.2016

Gurmail

.....Appellant

Vs

M/s Lekh Raj and sons

.....Respondent

Present: Mr. Sarju Puri, Advocate
for the appellant.

Mr. Vijay Lath, Advocate
for the respondent.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J.

The appellant-defendant is aggrieved of the judgment and decree rendered by the Courts below whereby the suit of the respondent-plaintiff for recovery of amount of ₹1,29,748.37 i.e. principal amount of ₹96,195.00 and interest calculated upto date ₹33,553.37, has been decreed.

Mr. Sarju Puri, learned counsel appearing for the appellant-defendant submitted that the respondent-plaintiff filed the suit on the basis of the entries recorded in the *roker bahies*. The defendant had been raising the loans from the commission agency of the plaintiff on different dates and used to sign *roznamcha roker* maintained by the respondent-plaintiff firm. The advancement of the loan was emphatically denied in the written statement and it was asserted that *bahi* entries are manipulated. Originals of the manipulated *bahi* entries have not been produced which is a matter of record as noticed by the Courts below. In the absence of the same, the Courts below could not have decreed the suit.

He further submitted that there is no compliance of the

provisions of Order 7 Rule 17 of the Code of Civil Procedure. Even interest @12% is too phenomenal. There is no evidence as regard the entry pertaining to the sale of agricultural produce.

The Courts below have overlooked the fact that except the entry Ex.P1, all other entries Ex.P2 to Ex.P12 are not related to the defendant rather the same are in the name of Gurmail son of Dhanna whereas the appellant is Gurmail son of Bhana. The provisions of Order 30 Rule 10 CPC have been totally misconstrued by the lower Appellate Court. In fact, the Courts below have lost sight of the fact that the proprietor firm is not a legal entity and the suit filed could have been filed by the proprietor in his personal capacity. Even there is no compliance of provisions of Order 13 Rule 5 CPC.

In support of his contentions, he relied upon judgment rendered by this Court in **Karnail Singh Vs. M/s Kalra Brothers, Sirsa 2009(2) RCR (Civil) 380** and as well as judgment of Division Bench of Madras High Court in **P.Sood and Co. Vs. Peerchand Misrimalji Bhansali 2005(3) RCR (Civil) 64.**

Per contra, Mr. Vijay Lath, learned counsel appearing for the respondent submitted that from the perusal of the averments in the written statement, particularly in paragraphs 3 and 4, the corresponding pleadings in the plaint had been admitted and therefore, there was no necessity for producing the original *bahi* entries. No doubt, in the cross-examination, the respondent-plaintiff admitted that the *roker bahi* which he had brought was not endorsed by the Courts below, the fact remains that it did not lie in the mouth of the defendant to raise such plea. As per amendment caused in the provisions of Order 13 Rule 4 CPC by this Court in 1974, the photocopy of

the documents can be produced on record, thus, urges this Court for confirming the findings rendered by the Courts below.

I have heard learned counsel for the parties and appraised the paper book. The provisions of Order 7 Rule 17 read with Orders 18 CPC, reads as under:-

17. Production of shop book.- (1) *Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891 (18 of 1891), where the document on which the plaintiff sues is an entry in a shop book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.*

(2) *Original entry to be marked and returned—The court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification, and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.*

“Explanation - When a shop-book or other account written in a language other than English or the language of the Court is produced with a translation or transliteration of the relevant entry, the party producing it shall not be required to present a separate affidavit as to the correctness of the translation or transliteration, but shall add a certificate on the document itself, that it is a full and true translation or transliteration of the original entry, and no examination or comparison by the Ministerial Officer shall be required except by a special order of the Court.”

From the perusal of the same, it is evident that in case the plaintiff sues for recovery of amount on the basis of an entry in a shop book or other account in his possession or power, the plaintiff shall produce the same at the time of filing the plaint along with a copy of the entry and the Court below would mark the document after comparing and examining the same with the original, return the same back to the plaintiff. However, no such procedure has been followed. Be that as it may be. Even during the course of the evidence, the originals have been produced but the same were not bearing the endorsement of the Court which is not necessary requirement as per the provisions of Order 13 Rule 4 CPC. No doubt, this Court had caused the amendment on 11.06.1974 in the provisions of Rule 4

in the manner laid down in the above Rule, was in fact, admitted in evidence, it shall treat the documents as having been properly admitted in evidence unless non-compliance with this rule has resulted in miscarriage of justice.

In my view, the present case falls within the miscarriage of justice as the originals of the *rokar bahi* entries have not been proved on record in accordance with law, in essence, mere exhibition of the document does not dispense with proof of the same. The aforementioned view of mine is fortified from the ratio decidendi culled out from the judgment of Hon'ble Supreme Court in **Sait Tarajee Khimchand And Ors. vs Yelamarti Satyam Alias Satteyya and others AIR 1971 SC 1865.** I am fortified with the ratio decidendi culled out by this Court in **Karnail Singh's case** (supra) whereby on the same proposition, the Court had rejected the plea of the respondent-plaintiff. Even the respondent-plaintiff has failed to prove the signatures of the appellant-defendant on the *rokar bahi* entries, in the absence of its original, much less, who had written the same. All these facts have not been noticed by the Courts below and had decreed the suit on the premise that the *rokar bahi* entries carries the presumption of truth under Section 34 of the Indian Evidence Act. The *bahi* entries are self-serving documents as they did not bear the signatures of the appellant.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213,** wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the

Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure, so there is need to frame the substantial questions of law or not. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29] ”*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the

commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

For the foregoing reasons, the judgments and decrees passed by the Courts below are set aside as they have committed illegality and perversity in appreciating the documentary as well as oral documents. The second appeal is allowed. The decree sheet shall be prepared accordingly.

(AMIT RAWAL)
JUDGE

October 24, 2016

Pankaj*

Whether reasoned/speaking Yes

Whether reportable No