

RSA No.391 of 2017 (O&M)

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

**RSA No.391 of 2017 (O&M)
Date of Decision: 24.1.2017**

M/s Parkash Amusement Rides & Fun World Pvt. Limited and others

.....Appellants

Vs.

Children's Welfare Society (Regd.)

.....Respondent

CORAM : HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present : Mr. Bhrigu Dutt Sharma, Advocate
for the appellants.

Mr. Manuj Nagrath, Advocate
for the respondent.

RAMESHWAR SINGH MALIK J. (ORAL)

Defendants are in second appeal against the impugned judgment of reversal dated 27.10.2016 passed by learned District Judge, Jalandhar, whereby judgment and decree dated 18.8.2015 passed by learned trial court, dismissing the suit of plaintiff-respondent as well as counter claim of the defendants-appellants, were reversed, allowing first appeal of the plaintiff.

Brief facts of the case, as recorded by learned first appellate court in para 2 of its judgment, are that the plaintiff-Society was maintaining an amusement park for the children in Model Town, Jalandhar, under the name and style 'Nikku Park'. In the said amusement park, number of rides

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were installed for the amusement of children, including a ride by the name of Carousel. Defendant No.1 was engaged in the business of manufacturing of rides, whereas defendants No.2 and 3 were its directors. The defendants sold a ride machine (carousel) for being installed in the said Nikku Park against the price of ₹10,68,750/- and the defendants had assured that the said machine was mechanically sound and when installed, it will provide uninterrupted service for the amusement of children without any mechanical defect. The said machine was purchased on the representation and assurance of the defendants. The said machine was installed by the defendants in the Nikku Park on 28.12.2007. After installation, the plaintiff was assured the said machine will work without any mechanical defect. But when the same was put into use, it was discovered that the same was not mechanically sound and broke down after a few days. The said defect was brought to the notice of the defendants which was repaired many times but it could not work smoothly and it again broke down even after repairs. Ultimately, the plaintiff vide notice dated 9.12.2010 called upon the defendants to refund ₹9,36,285/- to the plaintiff society, alongwith interest at the rate of 12%, but the said amount was not returned. Hence, the suit for recovery of ₹12,73,347.00 was filed on 9.4.2011.

Having been put to notice, defendants appeared and filed their contesting written statement raising more than one preliminary objections. Denying the averments taken by the plaintiff in support of its suit for recovery of ₹12,73,347/-, defendants also filed their counter claim for an amount of ₹1,97,098/-. Plaintiff filed its replication as well as written statement to the counter claim of the defendants.

After completion of pleadings of the parties, learned trial court

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framed the following issues:-

1. Whether the plaintiff is entitled for recovery of suit amount as prayed for?OPP
2. Whether plaintiff has no cause of action to file the present suit?OPD
- 2A. Whether this court has no jurisdiction to try and decide the present suit?OPD
3. Whether suit of the plaintiff is not valued properly for the purpose of court fee and jurisdiction?OPD
4. Whether suit of the plaintiff is time barred?OPD
5. Whether the plaintiff is estopped by his own act and conduct from filing present suit?OPD
6. Whether the present suit is bad for misjoinder and non-joinder of necessary parties?OPD
- 6A. Whether the counter claimant is entitled to recover a sum of Rs. 1,97, 098/- OPCC/D
- 6-B Whether the counter claim is within limitation? OPCC/D
8. Relief?

With a view to prove their respective pleaded cases, both the parties brought on record documentary as well as oral evidence. After hearing learned counsel for the parties and going through the evidence brought on record, learned trial court came to the conclusion that both the parties failed to prove their respective stands taken. Accordingly, suit for recovery of the plaintiff as well as counter claim of the defendants were

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dismissed vide judgment and decree dated 18.8.2015.

Feeling aggrieved against the judgment and decree dated 18.8.2015 passed by learned trial court, plaintiff filed its first appeal. However, defendants-appellants did not challenge the judgment and decree passed by learned trial court. Appeal of the plaintiff came to be allowed by learned first appellate court, vide impugned judgment and decree dated 27.10.2016. Hence this regular second appeal at the hands of the defendants.

Heard learned counsel for the appellants.

The transaction between the parties is an admitted fact. Plaintiff-respondent purchased CAROUSEL Machine from the defendant. This ride machine namely CAROUSEL was supplied to the plaintiff-Society by the defendants in the month of December, 2007, for a sum of ₹10,68,750/-. The ride machine was installed at Nikku Park, Jalandhar. However, none of the parties produced any agreement arrived at between the parties qua purchase of the machine. Plaintiff-Society brought on record retail invoice as Ex. P4 in its evidence. A bare reading of this document would show that the machine worth ₹10,68,750/- was sold by defendants to plaintiff. Ex. P5 is the bill issued by the carrier, who consigned the machinery and received ₹9,550/-, as freight charges.

It is pertinent to note here that plaintiff-Society was working for the welfare of the children. The CAROUSEL Machine in question was installed as a riding equipment in the Nikku Park, Jalandhar, for the amusement of the children. Neither the plaintiff-Society had any profit motive, nor anybody's personal interest was involved. The ride machine did not work properly right from the day one. Having been left with no other

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option, plaintiff-Society got conducted mechanical inspection of the riding machine from a qualified Mechanical Engineer namely P.S.Bhalla. The Mechanical Engineer, after conducting inspection of the machine in question, submitted his detailed report Ex.P6.

Perusal of this uncontroverted expert opinion would show that the riding machine was not properly designed and appropriate central bearing connecting crank mechanism and supplying shaft had not been used and the same was too weak to withstand the load exerted during the working of the ride. This material witness PW2, P.S.Bhalla, submitted his affidavit and he was put to lengthy cross examination by the defendant-appellant, however, nothing adverse could be elicited from this expert witness.

The CAROUSEL Machine supplied by the defendants-appellants was found defective right from the initial stage. It is also pertinent to note here that to controvert the abovesaid expert opinion, defendants did not produce any expert witness in their defence, for the reasons best known to them. However, since learned trial court misdirected itself, while not appreciating the abovesaid expert and controverted evidence brought on record by the plaintiff-Society, in the correct perspective, learned first appellate court was well justified to set aside the judgment and decree passed by learned trial court because of which the impugned judgment and decree passed by learned first appellate court deserve to be upheld.

During the course of hearing, learned counsel for the appellants failed to substantiate any of his arguments either on merits or on limitation. In the circumstances of the case, it can be safely concluded that defendants-appellants miserably failed to discharge their onus on issue Nos. 2 to 6B, whereas the plaintiff duly proved its case, by bringing on record cogent

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evidence, which was rightly appreciated by learned first appellate court, before arriving at its just conclusion, which has been found based on sound reasons. Learned counsel for the appellants could not point out any patent illegality or perversity in the impugned judgment and decree passed by learned first appellate court and the same deserve to be upheld, for this reasons also.

Before arriving at its factually correct and legally justified conclusion, learned first appellate court re-appreciated the facts as well as evidence available on record, in the correct perspective. Relevant observations made by learned first appellate court, in para 18 and 19 of the impugned judgment, which deserve to be noticed here, read as under:-

“In this letter, it is mentioned that the machine is giving problem but the defendants have submitted the explanation as mentioned vide points No.1 to 3 in Mark B infra. Firstly, it was mentioned that the machine/amusement ride was supplied, installed and handed over in good working condition with specific instructions for the operations but the defendants did not produce any entrustment document. Secondly, it was mentioned that the machine was working satisfactorily till heavy rain during monsoon when motor/electrical parts got damaged because of heavy water and no protection from operators but in the cross-examination, DW1 has admitted that he never visited during rainy season nor he had seen if the machine was water logged. No other evidence is produced to prove these facts.

Thirdly, it was mentioned in Mark B that there was a problem in gearbox because of heavy load which was again taken care at no costs. In the letter Mark B, it has been stated that the electric motor was changed/replaced but the date of replacement is not mentioned. However, this letter is dated 6.11.2008. If the electric motor was replaced on 6.11.2008 or prior to it, it gives a fresh cause of action to the plaintiff. Thus, if the cause of action is taken from 6.11.2008, the present suit was filed within the period of limitation i.e. on 9.4.2011.

On independent appraisal of the evidence on record, this Court is of the considered opinion that learned trial court failed to appreciate the evidence on record. As such, findings of learned trial court are liable to be set aside on issue No.1.”

Although the plaintiff-society had filed a suit for recovery of ₹12,73,347/-, yet learned first appellate court, while striking appropriate balance, with a view to do complete and substantial justice between the parties, held plaintiff-Society entitled for recovery of ₹9,36,285/- only, alongwith interest @ 6% per annum.

Under the abovesaid circumstances, the impugned judgment and decree passed by learned first appellate court have not been found suffering from any patent illegality or perversity, which may warrant interference at the hands of this Court, while exercising its appellate jurisdiction under Section 100 of the Code of Civil Procedure. No substantial question of law has been pointed out nor found involved in the

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instant appeal, which is sine qua non for entertaining second appeal and the impugned judgment and decree deserve to be upheld, for this reason as well. In this regard, reliance can be placed on the law laid down by the Hon'ble Supreme Court in **Naryanan Rajendran and another Vs. Lekshmy Sarojini and others, 2009 (2) RCR (civil) 286.**

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that the present appeal is misconceived, bereft of merit and without any substance, thus, it must fail. No case for interference has been made out.

Resultantly, with the abovesaid observations made, instant regular second appeal stands dismissed, however, with no order as to costs.

(RAMESHWAR SINGH MALIK)
JUDGE

24.1.2017
Ak Sharma

Whether speaking/reasoned Yes/No
Whether reportable: Yes/No