202 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RA-RS-120-C-2016
CM-6474-C-2017 in
RSA No.2790 of 2016
Date of decision: August 04, 2017

Dinesh Batra **.... Appellant**

Versus

Chander Shekhar Tomar **....Respondent**

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Kunal Vinayak, Advocate
for the applicant/appellant.

Mr. Kuldip Singh Chaudhary, Advocate
for the caveator/respondent.

AMIT RAWAL, J.(ORAL)

Appellant/defendant has sought the review of the judgment/order dated 8th July, 2016 referred in the aforementioned Regular Second Appeal on following points:-

1. Along with the appeal preferred against the judgment and decree of the trial Court dated 3rd December, 2015, under Section 96 read with Order 41, Rule 1 of the Code of Civil Procedure, application under Order 39 Rule 1 and 2 and another application under Order 41 Rule 27 CPC was filed, however, according to the zimini orders extracted at Page No.59 to 64 the said applications remain undecided and therefore, in view of the decision rendered by the Hon'ble Supreme Court, the order of the lower Appellate Court dismissing the appeal is liable to be *set aside*.
2. The lower Appellate Court in Paragraph 8 of impugned judgment had observed that the application under Order 41 Rule 27 CPC was allowed but there is no reference to the same in the judgment and order, thus there is illegality and perversity.

In support of the contentions, reference has been made in the judgment referred by the Hon'ble Supreme Court in *Namdeo Vs. Tukaram*, 2008(72) ALR 918 by giving reference to Para-3 of the aforementioned judgment wherein the Supreme Court had an occasion to deal with preposition of law that when an application for amendment of pleading has been allowed along with the application for additional evidence, there has to be reference to the documents. In the absence of the same, the matter requires to be remitted. So is the finding by referring another judgment i.e. *Malayalam Plantations Ltd. Vs. State of Kerala and another*, 2011 AIR SC 559.

This Court issued the notice of the application to learned counsel for the non-applicant/plaintiff. Reply has been filed stating that additional evidence would not be of any relevance in the absence of prayer for amendment in the written statement or any pleadings with regard to aforementioned transactions. Reference has been made to the averment of the written statement.

The lower Appellate Court in Paragraph 14 has dealt with aforementioned issue that the evidence was beyond pleadings, thus, urges this Court for dismissal of the review application with exemplary costs.

I have heard the leaned counsel for the parties and appraised the paper book.

The scope of interference under Order 47 Rule 1 read with Section 114 of the Code of Civil Procedure in case there is an error apparent on the face of record is no longer *res integra*. No doubt in my judgment when both the parties are agreeable that there has been a typographical error with regard to incorporation of the partnership firm under the name and style M/s Galena International F/C being of the year 2011 instead of 2013. The same is ordered to be corrected and the cheques issued by the plaintiffs in favour of the defendant. The two suits were filed one by the wife and other by the plaintiff in respect of two transactions. The factum of receipt of the cheque has not been denied thus, typographical error would not be a ground but would be a case of correction in the judgment.

For the purpose of determination of controversy raised/noticed above as to whether the lower Appellate Court had abdicated in not discharging the obligation as enshrined under Section 96 of the Code of Civil Procedure by taking into consideration the documents sought to be placed on record or purported to have been allowed by way of filing additional documents.

Documents referred to in Para 3 of the application reads, thus:-

> *"that the applicant-appellant-defendant has traced certain documents relating to the floating of Company under the name & style of Galena International FZC having License No.500626 at Dubai where certain documents i.e. share certificate issued in the name of the respondent/plaintiff, which could not be produced before the ld. LC inspite of best efforts and due diligence as the Dubai Authorities cancelled the license for not complying with certain formalities and the said documents were in their custody. The appellant-applicant-defendant will have to prove the investment made by the appellant-defendant-applicant for and on behalf of the respondent-plaintiff in the said Company with the concerned witness to be produced for proving the establishment of the said Company".*

The applicant/defendant failed to seek amendment of the written statement. It is settled law that in the absence of pleadings, no evidence can be looked.

The aforementioned view was also reiterated by the lower Appellate Court in Paragraph 14 of the judgment which reads as under:-

> *"In order to controvert the above evidence, defendant examined himself as DW1 by way of affidavit Ex.DW1/A in-verbatim to his pleadings as mentioned in the written statement. In the affidavit Ex.DW1/A, defendant Dinesh averred that he made repayment of whole amount in question to the plaintiff in cash, including two cheques No.760949 dated 30.04.2013 for a sum of Rs.30,000/- and 768983 dated 06.05.2013 for a sum of Rs.20,000/-. It is further averred that plaintiff acknowledged the full and final payment by issuing separate receipt for cash amount of Rs.1,00,000/- on dated 22.06.2010. Plaintiff also entered in full and final settlement in the said settlement, wherein plaintiff mentioned that he will not claim any amount from DW1 in future in any manner whatsoever. Then in the said affidavit Ex.DW1/A defendant averred that there was partnership business of the deponent and plaintiff, vide which they started their partnership business at Dubai under the name and style of M/s Galena International FZC. Later-on in the said partnership business, the defendant suffered huge losses, due to the negligence of plaintiff, and due to the said reason, the said partnership business was closed by them. These submissions made by the defendant in his affidavit Ex.DW1/A are beyond his defence as mentioned in the written statement and is clearly an afterthought strategy to escape from the liability. The alleged receipt/document Mark C tendered by the defendant in his evidence is not duly proved, and the author of the same cannot be ascertained. The plaintiff has specifically taken the plea that said document Mark C is false and fabricated by the defendant himself, and moreover, this particular document is*

> *silent regarding the remaining liability. Moreover, no transaction above Rs.20,000/- should be paid by cash as per the provision of Income Tax Act".*

On conjunctive reading of the contents of the application and judgment of the lower Appellate Court, as referred supra, would not in my view be able to come to the rescue of the review petitioner as in those matters by seeking placing on record documents by way of additional evidence had sought amendment of the pleadings.

I would be failing my duty in not referring to the contents of the written statement expressing the admission of receipt of the amount. Para 6 of the preliminary objections and Para 3 of reply on merits are reproduced as under:

> *6. That there is concealment of true facts from this Hon'ble Court in the above noted case.*
>
> *As a matter of fact, the defendant made the part payment of the amount in question to the plaintiff in cash and also the defendant being one of the friend of the plaintiff, took him on foreign trip several times and the defendant spent a huge amount by purchasing various valuable items and gave the same to the plaintiff without claiming any amount from him. Hence there remains nothing due as against the defendant and the plaintiff has no right to claim any alleged amount from the defendant in any manner whatsoever. The present suit of the plaintiff is based on false and frivolous grounds which is not maintainable in law and the same is based on false and baseless grounds and is liable to be dismissed with heavy costs.*
>
> *3. That contents of para No.3 of the plaint are correct and admitted to the extent that the defendant purchased residential house. It is not disputed that the cheques mentioned in para No.2 of the plaint are credited in favour of the defendant. Rest of the para is wrong hence denied. It*

> *is wrong hence denied that besides the cheques mentioned in this para of plaint, the plaintiff more helped the defendant financially as alleged. It is wrong and denied for want of knowledge that the wife of the plaintiff contributed in the alleged financial aid to the defendant.*

The review applicant has failed to lead evidence with regard to money spent or incurred in the alleged foreign trips by direct and cogent evidence.

In my view there is no error apparent on the face of record except for correction of the order in the year of incorporation. Even otherwise, incorporation of the partnership has nothing to do. The respondent-plaintiff had extended Rs.5.00 lac as friendly loan to the defendant. Counsel representing the plaintiff has brought to the notice of this Court that in respect of suit filed by the wife for discharge of the obligation of the cheque issued, the review applicant/appellant/defendant herein is paying the amount in installments in a pending execution application.

I do not find any error apparent on the face of record. Application seeking review of order is hereby dismissed. Stay is vacated.

Though there is typographical error with regard to the year of incorporation of the partnership and the observations made on the basis of the same but that would not affect the merits of the appeal or would reinforce the arguments of the appellant in view of observations given hereinabove.

August 04, 2017 **(AMIT RAWAL)**
m.sharma **JUDGE**

Whether Speaking/Reasoned **Yes/No**
Whether Reportable **Yes/No**