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

**CR No.5445 of 2018
Date of Decision :19.11.2018**

M/s Rajesh Kumar & sons ....Petitioner

VERSUS

**M/s Hari Singh Mam Chand
Commission Agent ...Respondent**

BEFORE : HON'BLE MR. JUSTICE B.S. WALIA

Present: Mr. Parminder Singh, Advocate for the petitioner.

Mr. R.S. Budhwar, Advocate for the respondent.

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B.S. WALIA, JUDGE (Oral)

1. Challenge in the revision petition under Article 227 of the Constitution of India is to order dated 17.8.2018 (Annexure P-5) passed by the learned Additional District Judge, Karnal allowing the application under Order 41 Rule 27 CPC for leading additional evidence allegedly on the ground that the same tantamounts to permitting the respondent to fill up the lacunae which led to the dismissal of the civil suit and allowing the respondent to bring on record the documents in question i.e. Bahi Khata, Roznamcha as well as sales tax return and income tax returns etc. without proving the documents in accordance with law.

2. Brief facts of the case leading to the filing of the instant revision petition are that the respondent-plaintiff had filed a suit for recovery of Rs.2,73,340.83/- inclusive of interest @ 18% per annum upto 31.7.2011 with future interest till the date of recovery. The civil suit filed by the respondent-

plaintiff was dismissed vide order dated 18.12.2015 whereafter appeal was filed before the learned District Judge, Karnal alongwith an application under Order 41 Rule 27 CPC for permission to lead additional evidence by way of entries in Bahi Khata, sales tax return and income tax returns, balance-sheet etc. on the ground that the same had been supplied by the respondent-plaintiff to his counsel but the same were inadvertently not produced by him before the learned trial Court. The application was opposed on the ground that the application was nothing except an attempt to fill up the lacunae as the documents sought to be produced by way of additional evidence were very well within the knowledge of the respondent-plaintiff but the respondent had failed to produce the same on record at the relevant time, therefore, the respondent-plaintiff could not be allowed to lead additional evidence at the appellate stage.

3. Learned counsel for the petitioner-defendant contended that the learned trial Court while dismissing the civil suit took into account the plea of the petitioner-defendant that the respondent-plaintiff's firm had not produced on record any account of the petitioner-defendant's firm as also roznamcha by which it could be proved on which specific days, the respondent-plaintiff's firm had sold the paddy to the petitioner-defendant's firm as also that PW1-Birbal Pal in his cross-examination admitted that they had not produced the account book and rojnamcha at the time of filing of the civil suit nor had the account books and roznamcha been produced on the case file in the evidence of the plaintiff and further that Form-I i.e. Ex.PW1/D to Ex.PW1/J on which the respondent-plaintiff relied upon was not sufficient to prove the fact that the petitioner-defendant's firm was under liability to pay the amount of Rs.2,73,340.80/- because Ex.PW1/D to Ex.PW1/J i.e Form-I

did not bear the signatures of the purchaser and further that the respondent-plaintiff's firm was not maintaining its account books in usual course of business (wrongly mentioned as defendant's firm).

4. Learned counsel further referred to the observations of the learned trial Court that the respondent-plaintiff's firm had not placed on record any income tax and sales tax return wherein alleged amount of Rs.2,73,340.80/- had been shown and absence of income tax return and sales tax return also revealed that the respondent-plaintiff's firm was not maintaining its account books in the normal course of business.

5. On the basis of the same, learned counsel for the petitioner-defendant contended that it was apparent that the application under Order 41 Rule 27 CPC was nothing except an attempt to fill up the lacunae and the impugned order had the affect of permitting the respondent-plaintiff of relying upon documents to fill up the lacunae without having to prove the same or for that matter giving an opportunity to the petitioner-defendant to cross-examine the respondent-plaintiff in respect thereto. Learned counsel contended that the impugned order is liable to be set aside on the aforementioned aspect of the matter alone.

6. Per contra, learned counsel for the respondent-plaintiff argued that the application had been allowed as per law and the impugned order warrants no interference.

7. I have considered the submissions of counsel for the parties and perused the record and deem it fit to remit the matter to the learned First Appellate Court. As per Section 107 of the Code of Civil Procedure, the First Appellate Court has power to take evidence or to remand the matter back to the trial Court for taking evidence on a specific issue. Admittedly, the

respondent-plaintiff has not proved on record documents sought to be produced on record in accordance with law, therefore, the matter is liable to be remitted to the learned First Appellate Court to decide the application of respondent-plaintiff under Order 41 Rule 27 CPC keeping in view the provisions of Section 107 CPC.

8. Accordingly, the impugned order is set aside and the matter is remitted to the learned First Appellate Court to take action on the application for additional evidence moved by the respondent-plaintiff in accordance with the provisions of Section 107 CPC either itself or by remitting the matter to the learned trial Court.

9. Revision petition disposed of in the light of observations made above.

November 19, 2018 **(B.S. WALIA)**
ps **JUDGE**

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No