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

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RSA No.3099 of 2012 (O&M)
Date of decision: 20.11.2018

Mehal Singh ...... **Appellant**

Versus

M/s Judge Trading Company and others ...... **Respondents**

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. B.P.S. Virk, Advocate
for the appellant.

Mr. H.R. Bhardwaj, Advocate
for respondent No.1.

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<u>ANIL KSHETARPAL, J. (ORAL)</u>

Respondent in the counter claim (filed by the defendant) is in the appeal against the judgment and decree passed by the learned trial Court decreeing the counter claim for recovery of Rs.3,22,500/- against the appellant herein.

Three brothers namely Mehal Singh, Tehal Singh and Jagmohan Singh, all sons of Labh Singh filed a suit for rendition of account against the defendant-counter claimant/respondent herein with the assertions that they are agriculturist and the defendant-firm is a commission agent firm through whom the plaintiffs used to sell their agriculture produce but the defendant-firm has neither issued proper J-forms nor the payments of the agriculture produce is being made. The defendant has only issued some temporary receipts of the agriculture produce sold through the shop of the defendant.

The plaintiffs have also asserted that some agriculture land has also been sold to the defendant and it was assured by the defendant that after execution of the sale deed in their favour, they will clear the accounts and shall make payment thereof but no payment has been made.

On the other hand, the defendant pleaded that it is a sole proprietorship and therefore, Jagtar Singh has nothing to do with the firm. The claim made by the plaintiffs was denied. It was stated that prior to the year 1999, all accounts have been settled. Before 18.12.2000, any member of the family used to transact in the account. The sale of some agriculture land in favour of the defendant-firm was denied. The counter claim was filed seeking recovery of Rs.5,14,185/- against plaintiffs No.1 to 3, that Rs.2,78,140/- against plaintiff No.1, Rs.1,18,000/- each plaintiffs No.2 and 3.

Learned trial Court after appreciating the evidence dismissed the suit as well as counter claim filed by the plaintiffs. The reasons given by the learned trial Court correctness whereof has not been disputed by learned counsel for the parties, is extracted as under:-

> *"First of all we have to see, whether the defendant concern is maintaining the account books in regular course of business, if so, then the presumption of truth is attached to the statement of account and for that purpose, I like to discuss the entries Ex.1 dated 18.5.2000 for advancing loan amount of Rs.3,00,000/- to Mehal Singh, but the thumb mark was obtained of Labh Singh. Similarly the entry Ex.D-12 dated 10/5/2001 amounting to Rs.1,30,000/- was entered in the name of Mehal Singh and it was also thumb marked by Labh Singh again entry in the Rokar Bahi Ex.D-13 dated 17.5.2001 regarding advancing of loan amount of Rs.1,00,000/- in the name of Mehal Singh is also signed by Labh Singh. Similarly another entry Ex.D-20 dated 13.10.2001 amounting to Rs.80,000/- in the name of Mehal Singh which was also thumb marked by Labh Singh and it is not case of the defendants that the plaintiff Mehal Singh ever authorized Labh Singh to get advance amount from his account, if so, Mehal Singh never authorized Labh Singh, although Labh Singh is father of*

Mehal Singh, then defendant firm has no right to advance huge amount of loan to said Labh Singh.

51. More over, DW-1 Shera Sngh himself admitted in his cross-examination that Labh Singh was having account with the defendant firm. This admission is one the first page of his cross examination, if so, then Labh Singh was having his own account in the Khata book of the defendant firm, then it is presumed tht Labh Singh has got advance/loan from the defendant concern from his own Khatta and said amount cannot be converted into the Khata of Mehal Singh plaintiff No.1.

52. Apart from the DW-1 Shera Singh also admitted in his cross-examination at page 3 in the last 4/5 lines that Mehal Singh was accompanying with Labh Singh on 13.10.2001, when said Labh Singh received Rs.80,000/- under the instruction and on behalf of Mehal Singh. Similarly, DW-2 Sarabjit Singh, admitted in his cross-examination at page 1 that there is account in the name of one Labh Singh in the Khata book of the defendant and further admitted that Labh Singh was having his separate account and further admitted at page 2 in the last lines that it is correct that if any person having account with a commission agent, personally comes, when transaction of loan occurs, it is that customer in person who is supposed to put his signatures or thumb impression under the loan entry and further admitted at page 7 in the middle that Mehal Singh was accompanying Labh Singh on 13.10.2001, when Labh Singh received Rs.80,000/- so if Mehal Singh was accompanying with Labh Singh then why thumb of Labh Singh was obtained, when Mehal Singh was also present. So, it is clear that the account of the defendant firm is not maintained in ordinary and regular course of business, rather it is a manipulated one for that purpose. I like to refer two entries i.e. Ex.-2 dated 16.5.2000 regarding advance of loan of Rs.5000/- to Mehal Singh and another entry Ex.D-7 dated 13.12.2000 for amount to Rs.70,000/-, these entries have been made in the Rokar Bahi in the name of Mehal Singh and both the loan amount shown to be paid to Mehal Singh, but these entries are neither thumb marked by Mehal Singh or another plaintiff. Not so the *defendants also brought on the file entries Ex.D15, Ex.D16, Ex.D17 showing that the plaintiffs deposited an amount of Rs.73,000/- Rs.559.66 Paise and Rs.1,00,000/- respectively, but these entries have not been signed by the plaintiff Mehal Singh, at the time when he deposited the said amount with the defendant firm, it means that these entries are manipulated and created by the defendants firm just to tally the amount with the due amount. Even the defendant as well as Shera Singh Munim of the defendant firm also admitted in their cross examination that when plaintiff sold his crops he gets some cash amount but the said cash amount was never shown to be made in the Bahi Khata, nor the signature of the plaintiff was obtained, so it means that the defendant firm not maintaining its accounts in ordinary and regular course of its business. There are two entries Ex.D34 for amounting to Rs.13,500/- and entry Ex.D25 for an amount of Rs.89,000/- which seems to be over written by the defendants just to tally and settle the amount for the purpose, I have gone through the entries and find that the entry of the Bahi Ex.D-34 can be seen with naked eye that it is a manipulated, over writing and similarly entry Ex.D25 regarding the amount of Rss.89,000/- has also been manipulated and overwriting by the defendant firm, for that purpose, I like to refer the evidence for the expert witness who also categorically deposed that in his report Ex.PB that entr mark E1 and E2 was originally writtn as 100 which has been subsequently changed to 89,000/- by altering the digit 1 to 9 and adding 89 later on. The figure E3 and E4 shows that the original figure 4500 has been subsequently changed to 13500/- by erasing the digit 4 and subsequently writing 13 in front of 500. So it is clear that the defendant can go to any extent to settle the amount, how we can say that the account maintained by the defendant is in regular course of business.*

53. Further, I like to refer the cross-examination of DW-1 Shera Singh, wherein he deposed, at first page of his cross-examination that it is correct that in case commission agent runs business at more than one Center or station, he is to maintain separate books of account for each Center or Station but the *defendant has maintained onlly one set of books, for that purpose, I further like to draw my attention towards the cross-examination of DW-2 Sarabjit Singh, Sole Proprietor of the firm at page 4 in the middle, he deposed that the form and books containing J Forms dated 25.9.2000 started above is of the business of the defendant being run at Patran, whereas the J Form dated 17.10.2000 is of the business of the defendant concern run at Purchase Center Shutrana, so it is clear that the defendant firm was running business at two places and different J-Form and books were simultaneoulsy used in the written statement and in the counter claim. He further deposed that the plaintiff has sold the agricultural produce some time at Patran Purchase Center and sometimes at Shutrana. So the conduct of the defendant firm itself comes on the file that he is committed fraud with the plaintiff by producing J-Form pertaining to two diffeent Purchase Centers which is beyond the pleadings.*

54. Now coming to the cross-examination of DW-1 Shera Singh wherein he admitted that there is no account in the name of Tehal Singh and Jagmohan Singh in the Khata of the defendant firm for the year 2001-02. Similarly DW-2 Sarabjit Singh sole Proprietor of the firm also admitted the same, so if Jagmohan Singh and Tehal Singh was having no account with the defendant firm, then how the defendant firm allowed them to get advance of Rs.1,00,000/- each. It is also admitted neither the plaintiff Jagmohan Singh nor Tehal Singh ever sold their agricultural produce at the shop of the defendant firm. So, the entries against the name of Jagmohan Singh and Tehal Singh are also manipulated one. In this case, Labh Singh is not party, even huge amount has been obtained by Labh Singh at the instance of Mehal Singh, then defendant firm is required to array him as party in the counter claim, but they did not do so, for the best known reason. Even DW-1 Shera Singh at page 2 in the 10/11th line stated that Mehal Singh plaintiff taken amount of Rs.3,00,000/- from the defendant firm on 15.5.2002 and even his father Labh Singh was also accompanying with him, so if, Mehal Singh who was having account with the defendant, then why *thumb impression of Mehal Singh was not taken in the Bahi against the huge amount of Rs.3,00,000/-. He further admitted at page 3 that it is correct that there is no mentioned in the affidavit that Mehal Singhl plaintiff took loan of Rs.3,00,000/- from the defendant on 15.5.2000 and rather, it is specifically mentioned that Labh Singh father of the plaintiff took the amount of Rs.3,00,000/- from the defendant vide entry now exhibited as Ex.D1 and also admitted that the entry regarding the amount of Rs.5,000/- dated 16.5.2000 does not contain thumb impression of Mehal Singh or anybody. It is further admitted that J-Form dated 25.9.2000 does not bear the thumb impression of the plaintiff nor contain the signature of any book of the defendant firm and also admitted that the entry dated 13.12.2000 pertaining to Rs.70,000/- is not thumb marked by the plaintiff Mehal or any else on his behalf. It is further admitted that the entry pertaining to the amount of Rs.1,30,000/- dated 10.5.2001 does not contain the thumb impression of Mehal Singh plaintiff or any other plaintiff and further admitted at page 5 that entry dated 17.5.2000 of Rs.1,00,000/- marked as Ex.D13 does not bear the thumb impression of Mehal Singh or any other plaintiff. He further deposed that he cannot tell the reason why thumb impression of Mehal Singh has not been obtained under the entry dated 17.5.2001. It is further admitted that there is no specific entry in the Khata for the year 2001-2002 for payment of Rs.102.12 Paise made to plaintiff Mehal Singh in cash and further admitted at page 7 that it is correct that thumb impression under the entry dated 15.10.2001 which he claim to be of Mehal Singh is overlapping the parallel line for total of the day transaction and the amount of Rs.5,12,333/- itself. This entry dated 15.10.2001 is the last entry of that day and further admitted at page 8 that there is no specific entry in the Rokar Bahi for the year 2002-2003 that payment of Rs.118.04 Paise on 31.7.2002 Rs.127.12 on 5.8.2002, Rs.181.60 Paise on 26.9.2002, Rs.214 on 21.10.2001 were made to Mehal Singh in cash. Although he voluntarily said that these entries have been shown in the zimidar Khata, but admittedly after making the payment of*

> *the aforesaid amounts, the signatures of the plaintiff Mehal Singh was not obtained. Thus, the cross-examination of both the material DWs show that the account books maintained by the defendant not maintained in the ordinary and regular course of business, therefore, the same cannot be presumed to be true and correct."*

The defendant-counter claimant filed first appeal. The plaintiffs also filed a counter appeal. Learned First Appellate Court dismissed the appeal filed by the plaintiffs whereas partly decreed the counter claim filed by the defendant to the extent of Rs.3,22,500/-.

In the considered view of this Court, the following substantial question of law arise for consideration:-

> "Whether the learned First Appellate Court before reversing the judgment and decree passed by the trial Court is obligated to critically analyze the reasons given by the trial Court?

This Court has heard learned counsel for the parties at length and with their able assistance gone through the judgments passed by the Courts below and the record.

It is undisputed that learned First Appellate Court has not chosen to advert to the reasons given by the trial Court extracted above before reversing the judgment and decree passed by the trial Court while dismissing the counter claim. The judgment passed by the learned First Appellate Court is perfunctory. Learned First Appellate Court apart from other reasons did not even take care to look into the recovery sought against the appellant-Mehal Singh. Learned First Appellate Court decreed the counter claim for Rs.3,22,500/- although, the counter claimant-respondent had sought recovery of Rs.2,78,140/-. Learned First Appellate Court also overlooked the fact that as per summary of the account books re-produced in the counter claim, balance due and recoverable against Mehal Singh, defendant No.1 is shown to be Rs.2,35,140.20 as on 01.09.2002.

In the present case, apart from the reasons given by the trial Court, correctness whereof is not being disputed by learned counsel for the parties, certain facts which have come on record to prove that the counter claim of the defendant could not be decreed. The reasons for arriving at such conclusion apart from the reasons given by the trial Court are as under:-

1. Two sale deeds have been executed by the plaintiffs and their mother in favour of Baljinder Kaur and Balwinder Kaur on 06.09.2002, wives of partners of the defendant firm although, it is being claimed that it is sole proprietorship. As per the plaint, two partners of the firm are Jagtar Singh and Sarabjit Singh sons of Swaran Singh whereas as per counter claim, it is Sarabjit Singh who is sole proprietor. It is not disputed that Baljinder Kaur and Balwinder Kaur are wives of Sarabjit Singh and Jagtar Singh. One sale deed is with respect to the land measuring 23 kanals and 19 marlas executed by mother of the plaintiffs on 06.09.2002 and it is the positive case of the plaintiffs that no amount of sale consideration has been paid whereas the second sale deed is executed by the plaintiffs in favour of the aforesaid two ladies with respect to the land measuring 13 kanals and 7 marlas out of which Rs.2,00,000/- has not been paid. The defendant-counter claimant has not accounted for the aforesaid amount or depicted the aforesaid amount of the sale consideration in the account books on the ground that the defendant has no connection whereas the sale deeds are in favour of the wives of the aforesaid two persons mentioned above.

2. The defendant when appeared in evidence has stated that the accounts upto the year 1999 have been settled and therefore, not produced on the Court file.

Shera Singh, accountant who has appeared as DW-1 has stated that Mehal Singh, the plaintiff No.1-appellant has never sold his crop through the defendant prior to the year 2000. He goes on to state that there is a separate account in the name of Labh Singh, father of the plaintiffs in the books but no such account has been opened in the name of Labh Singh in the year 2000-01 whereas once again account of Labh Singh has been opened in 2001-02. It is undisputed by learned counsel for the respondent-counter claimant that entry of Rs.3,00,000/- dated 15.05.2000, entry of Rs.1,30,000/- dated 10.05.2001, entry of Rs.1,00,000/- dated 17.05.2001, entry of Rs.50,000/- dated 06.06.2001 and entry of Rs.80,000/- dated 13.10.2001 have not been signed by Mehal Singh but thumb marked by Labh Singh. All these entries are with respect to taking of loan from the account of Mehal Singh. It has not been explained as to why the amount borrowed by Labh Singh, if any has been entered in the account of Mehal Singh particularly when Labh Singh was owner of the land, father of Mehal Singh having dealing with the defendant-counter claimant firm. Still further, it has not been explained why account of Labh Singh was not opened in the year 2000-01 particularly when it was in existence in the previous years as well as in the subsequent years. Learned counsel for the respondent has submitted while referring to various J-forms that crops belonging to Mehal Singh sold has thumb impression of Labh Singh and therefore, at that time, family was joint. It will be mentioned here that if the argument of learned counsel for the respondent is to be accepted, then in the account books, the account in the name of father Labh Singh would have been opened and not in the name of his son Mehal Singh. Still further, learned trial Court has given cogent reasons to record a finding that the account books have not been properly maintained by the defendant-firm. Neither learned First Appellate Court nor learned counsel for the respondent-counter claimant could convince this Court that the account books produced by the firm had been properly maintained in the regular course of business. Learned trial Court has further found that there are interpolations/overwriting in the account books to manipulate the accounts. Learned First Appellate Court has not even adverted to the aforesaid findings of the learned trial Court.

It may be significant to note here that Labh Singh father of the plaintiffs who is claimed to have borrowed maximum amount has not even been impleaded as a party by the counter claimant.

It is well settled that before a suit for recovery on the basis of the account books is to be decreed, the counter claimant was required to satisfy the conscious of the Court that the account books have been maintained in the regular course of business and are above suspicion. In the present case, the counter claimant has failed to discharge that onus.

In view of the aforesaid, question of law framed in the earlier part of the judgment, is answered in favour of the appellant.

Hence, the judgment passed by the learned First Appellate Court is set aside and that of the trial Court is restored.

All the pending miscellaneous applications, if any, and cross-objections (XOBJC-5-C-2013) shall stand disposed of accordingly.

Regular Second Appeal is allowed.

(ANIL KSHETARPAL)
JUDGE

20.11.2018
Dinesh Bansal

Whether speaking/reasoned Yes / No

Whether Reportable Yes / No