217 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No. 3299 of 2014 (O&M)
Date of Decision: 09.03.2018.

M/s Ashok Kumar and Co. **...Appellant**

Versus

The Municipal Council and anr. **...Respondents**

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Vipin Mahajan, Advocate
for the appellant.

Ms. Kavita Arora, Advocate
for the respondents.

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AMIT RAWAL, J. (ORAL)

CM-7656-C-2014B

For the reasons mentioned in the application delay of 31 days in filing the appeal is condoned.

Application stands allowed.

Main case

Appellant/plaintiff is aggrieved of the dismissal of the suit, seeking recovery of ₹15, 70, 821/- i.e. ₹5,00,000/- as security and ₹ 7,87, 558/- as profit and ₹ 2 , 83, 226 as interest accrued from 10.12.2004 to 09.10.2006 @ 12% p.a., has been dismissed by the trial Court, being pre-mature and also upheld by the lower Appellate Court.

The plaintiff/appellant instituted the suit on the ground that the plaintiff being duly registered partnership firm, in pursuance to the advertisement promulgated by the defendant/respondent was awarded a contract for collecting the Octroi for the period with effect from the 10.12.2003 to 09.10.2004 as the highest rate was to the tune of

₹ 2, 87, 60,000/- and the contract impugned thereof, was granted to the plaintiff and as per terms and conditions of the agreement, plaintiff/appellant deposited a sum of ₹ 5,00,000/- as security. The contract envisaged the deposit of the collections of each and every day which, as per the averments in the plaint, have been deposited with the Office of Municipal Council. During the tenure of the contract, plaintiff/appellant had been collecting octroi and accounts used to be settled and an amount of ₹ 7,87,558/-on account of profit was still payable after deduction of the Electricity and Telephone charges which was not paid. A legal notice was also sent to the respondent but neither reply was filed nor any payment was made.

Respondent-Municipal Council, Gurdaspur, contested the suit by admitting the factum of awarding the contract of collection of the octroi and also the fact that the plaintiff/appellant had been depositing daily collection but stated that out of the octroi collection of 80 per cent was to go to the State and Electricity Bills and the octroi profits were also to be paid out of the collection amount of octroi. The trial Court on the basis of pleadings of the parties, framed the following issues:-

1. Whether the plaintiff is entitled for recovery of ₹ 15, 70, 821/- with interest @ 12% p.a. with future interest at the same rate? OPP
2. Whether the plaintiff has no cause of action to file the present suit? OPD.
3. Relief.

In order to prove its case, plaintiff examined PW-1 David Masih, a witness from the department of Municipal Council, Gurdaspur and himself appeared as PW-2 and closed its evidence. The aforementioned witness as testimony documents Exhibit P-1, P-2 and P-3 were brought on record in the testimony of PW-1, but the trial Court dismissed the suit and the appeal as noticed above was also dismissed.

Mr. Vipin Mahajan, learned counsel for the plaintiff/appellant submitted that the aforementioned suit was filed on 22.11.2006 when the witness PW1- David Masih, was summoned to produce the record of Municipal Council, Gurdaspur dated 26.07.2010 whereby the claim of the appellant/plaintiff to the tune of ₹ 6,76,023 was noted to be outstanding. The Court could always grant any relief than asked for by taking the aid of Order 7 of Rule 7 of the Code of Civil Procedure but should not have dismissed the suit being pre mature as the cause of action was a continuing one. Thus there is illegality and perversity.

On the other hand, learned counsel appearing for the respondents/defendants submitted that the terms and conditions of agreement were sacrosanct between the parties which were required to be adhered to by the parties much less by the plaintiff, since the charges towards the Electricity and Telephone were not adjustable. The department had not been able to calculate the outstanding amount to be paid to the plaintiff/appellant. The Court below rightly dismissed the suit being pre-mature. There is no illegality and perversity in dismissal of the appeal as well and urged this Court for dismissing the appeal.

I have heard learned counsel for the parties and appraised the paper book and perused the record of the court below with the assistance of learned counsel and am of the view that there is force and merit in the submissions of learned counsel for then plaintiff/appellant. The provisions of Order 7 of Rule 7 of the CPC are not in dispute. Exhibit P1 and P2 read out in this Court in vernacular reflect that the outstanding amount. The aforementioned decision was taken on 26.07.2010 i.e. during the pendency of the suit and Exhibit P-2 reflected the adjustment of the rent of different barriers by adjusting a sum of ₹ 5, 64,424 which had already been paid. The outstanding amount as mentioned above was found to be due and statement of the account also reflected the said outstanding amount. The aforementioned statement of account has been produced from the office of Municipal Council, Gurdaspur.

In that eventuality, the Court should have looked into the document but they did not advert to aforementioned document by holding that the aforementioned document did not help the plaintiff in any manner Thus in my view, there is illegality and perversity. The decision of Municipal Council had not been controverted by the counsel for the Municipal Council for the reason that it is document from their custody.

Learned counsel for the respondents relied upon the judgment of the Hon'ble Supreme Court in the case of **Shri Mulchand Odhavji vs. Rajkot Borough Municipality, 1970 AIR (SC) 685,** to contend that the settlement of account was mandatory between the parties.

I am afraid, the argument of learned counsel does not find favour with the mind of the court, for settlement of account was done by the department during the pendency of the suit and the outstanding amount has not been disputed by any of the defendant. No contrary evidence has come that some amount as per the settlement was required to be paid. Therefore, the findings rendered in the above cited case are not applicable to the present case.

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 V/s. 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 and decision thereof could be without framing substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in ***"Kulwant Kaur and others V/s. 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]"*
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> *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 80 A 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.

As an upshot of my opinions the appeal is allowed, the suit of the plaintiff is decreed for recovery of amount along with interest at the rate of 9% p.a. from the date of filing of the suit till realisation.

[AMIT RAWAL]
JUDGE

March 09, 2018
Jyoti-IV

Whether speaking/reasoned: Yes/No
Whether Reportable: Yes/No