IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision: August 30, 2018

1. S.A.O.No.31 of 2015 (O&M)

Gurinderjit Singh (Retired Brig.) since deceased through L.Rs.

...Appellant

Versus

Ajit Singh Malhi (Retired Lt.Colonel)

...Respondent

2. S.A.O.No.32 of 2015 (O&M)

Gurinderjit Singh (Retired Brig.) since deceased through L.Rs.

...Appellant

Versus

Ajit Singh Malhi (Retired Lt.Colonel)

...Respondent

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr. R.K.Chhibbar, Senior Advocate with
Mr. Vaibhav Sahni, Advocate,
for the appellant in both the appeals.

Mr. Rajnish Gupta, Advocate,
for the respondent in both the appeals.

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AMIT RAWAL, J.

This order of mine shall dispose of two S.A.Os. bearing No.31 and 32 of 2015, which have arisen out of the judgment dated 17.11.2014, whereby the appeal preferred by the judgment debtor against the judgment and decree dated 18.5.2009 of Civil Judge (Junior Division), Chandigarh drawing a final decree in pursuance to the preliminary decree dated 4.11.2003, has been allowed.

Two Civil Suits bearing No.278 dated 11.9.1992 and 228 dated 21.9.1992 titled as "Brig.Gurinderjit Singh Versus Lt.Col.Ajit Singh Malhi" for dissolution, rendition of accounts, distribution of assets and winding up of business of M/s Sanchi Detectives and M/s Sanchi Security Company were filed. Both the partnership firms were formed between the parties on 17.2.1988 as both the partners had contributed 50% from each, in essence, 50% share in both profits and losses. The purpose was to provide security personnel, labour on contract basis and transport services. The partnership was at will. Both the suits aforementioned were decreed by passing a preliminary decree, whereby the defendant was directed to give the accounts of both the firms to the plaintiff and settle accounts. In pursuance thereof, decree holder/appellant/plaintiff filed an application for drawing a final decree as the plaintiff had produced the documents in compliance of the preliminary decree. For the purpose of drawing the final decree, the trial Court appointed a Local Commissioner and sought the report regarding the accounts maintained by the firms. Shri K.B. Sood, a Chartered Accountant, acting as a Local Commissioner, called upon the defendant-judgment debtor for providing account records of M/s Sanchi Detectives and M/s Sanchi Security Company, but despite having written two letters dated 22.7.2005 and 9.8.2005, on 29.9.2005, defendant through representative submitted the following documents:-

"*(A) Cash Books & General Ledger*
(i) From 01-10-1989 to 31-03-1990
(ii) From 01-04-1990 to 31-03-1991
(iii) From 01-04-1991 to 31-03-1992
(B) Payment vouchers
(i) From 01-10-1989 to 31-03-1990
(ii) From 01-04-1990 to 31-03-1991

(C) Copy of Balance Sheet and Income & Expenditure account alongwith the schedules.

(i) From 01-04-1990 to 31-03-1991

(ii) From 01-04-1991 to 31-03-1992

From the balance sheet and income & expenditure account of the firm submitted for the period from 01-04-1990 to 31.03.1992, the following date is prepared."

The Chartered Accountant/Local Commissioner prepared the balance sheet but before finalizing the report, again, a notice dated 4.11.2005, was sent to both the parties requesting them to appear for recording statements. However, the plaintiff appeared but the defendant did not appear. Noticing the aforementioned fact, the final decree was drawn. However, in appeal laid against the aforementioned final decree by the judgment debtor, the Lower Appellate Court reopened the issue of final decree by remitting the matter to the trial Court for fresh decision by assigning reasons. It is in these circumstances, the appeals have been filed.

Mr. R.K.Chhibbar, learned Senior Counsel assisted by Mr.Vaibhav Sahni, Advocate, representing the appellant in both the cases, in support of the memorandum of appeal, raised the following submissions:-

a) The defendant did not file any written statement to the suit filed by the plaintiff and, therefore, had no stand;

b) Despite repeated requests by the Chartered Accountant acting as a Local Commissioner, respondent did not give the material except the documents and on the basis of the aforementioned documents, the Local Commissioner arrived at a figure in respect of the period referred to therein;

c) Defendant though had filed the objections to the report submitted by the Local Commissioner, but the same were duly considered by the trial Court and accordingly vide order dated 18.5.2009 passed the decree of ₹ 8,95,000/- along with interest @ 9% per annum in one case and ₹ 21,40,000/- in another case;

d) Lower Appellate Court ignored the last six lines of the Local Commissioner's report while remitting the matter, which tantamounts to re-opening the issue, but remained oblivious that valuable right had accrued in favour of the appellant;

e) There is no compliance of the provisions of sub-rules (2) and (3) of Rule 10 of Order 26 CPC;

f) Both the firms started the business on 17.2.1988. Defendant had been misappropriating the funds of the firm nor maintained the books regularly and, therefore, cause of action accrued to institute the suit;

g) The firm was deemed to have been dissolved on filing of the suit as partnership was at will;

h) The judgment debtor had not taken any steps to cross-examine the Local Commissioner in terms of the provisions of the Civil Procedure Code, referred above. In support of the aforementioned submissions, other than the provisions of law, relied upon the following judgments:-

i) **M/s. Nopany Investments (P) Ltd. Versus Santokh Singh (HUF), AIR 2008 Supreme Court 673;**

ii) Unreported judgment dated 24.12.2015 rendered in SAO No.44 of 2013 titled as Yashpal Sharma Versus Rekha Sharma and others, whereby two SAO Nos.44 and 45 of 2013 have been allowed by relying upon the provisions of Order 41 Rule 23, 23-A and 25 of CPC to contend that once the final decree has not been set-aside, the order of remand is not sustainable;

i) The scope of drawing the final decree is different to the one while drawing the preliminary decree which has attained finality determining the share of the parties;

j) Withholding of information by the other partner had led to adverse inference by the Local Commissioner and the Court;

k) Reliance was also laid to the judgment of the Hon'ble Supreme Court in **Selvi Versus Gopalakrishnan Nair (D) Thr. LRs and Ors. 2018 (7) SCC 319**. Reference has also been made to the judgment rendered by the Hon'ble Supreme Court in **Madhukar & others Versus Sangram & others, AIR 2001 Supreme Court 2171.**

Per contra, Mr. Rajnish Gupta, learned counsel for the respondent supported the order of remand on the premise that the Lower Appellate Court has followed the provisions of natural justice as the final decree was drawn irrationally as the trial Court did not notice that the firm was dissolved on 11.9.1992 and 21.9.1992 when the suits were filed, but the Local Commissioner has taken into consideration the accounts of a later period. The reasoning of the Local Commissioner is on surmises and conjectures regarding the aspect of profit. Even the objections to the report of the Local Commissioner had not been dealt with in correct perspective. The material placed on record before the Lower Commissioner through representative has not been adverted to. Payment vouchers prepared were not properly verified by the trial Court. Expenditure account for the period

1.10.1989 to 31.3.1990 was also not produced. All these factors weighed in the mind of the Lower Appellate Court, therefore, there is no illegality and perversity.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr. Chhibbar on following counts:-

1) It would be apt to reproduce the observations made by the Local Commissioner in his report (Annexure A-2). The same read thus:-

"*While verifying the accounts records of the firm, I made the following observations:-*

i) Proper books of accounts have not been kept due to following reasons:-

a) Cash books & General Ledgers of the periods are not balanced properly. Material alterations are observed in the cash book & general ledgers.

b) I am not provided with the wage registers of the periods, in the absence of which it is not possible to comment whether proper wages are paid or not.

c) I am not provided with the Bank statements of the periods in the absence of which it is not possible to comment whether payments received from the various companies are deposited in the Bank account or not and also in the absence of bank statements. I am not able to confirm the closing bank balance shown in the books.

d) Payments vouchers are not properly verified by the partners. Payments under various expense heads are made without roper bills.

e) In absence of proper records being maintained, no comments can be offered about the proper receipt from the debtors.

ii) Balance sheet alongwith income & expenditure account *from the period 01.10.1989 to 31.3.1990 is not provided to me.*

Iii) Copy of the partnership deed & its dissolution are not provided to me and as such it is not possible to know the tenure of the partnership.

iv) Copy of the income tax returns filed with the Income Tax Department are not provided to me. As such, it is not possible to know whether TDS deducted by the parties have been correctly accounted for in the books or not.

v) No details of unsecured loans taken in cash from outside parties and capital introduced in cash by the partners are provided to me for our verification.

Comments

Lt.Col. A.S.Malhi (Retd.) was given first notice on 22.7.2005 for producing accounts records of the firm. On his failure to produce accounts records, a second notice dated 9.8.2005 was sent to him. On 29.9.2005, some accounts records of the firm was submitted by him through his representatives. Before the finalization of report, notice dated 4.11.2005 was sent to both Lt.Col. A.S.Malhi (Retd.) and Brig. Gurinderjit Singh (Retd.) requesting them to appear before undersigned to record their statements regarding the maintenance of accounts records. Brig. Gurinderjit Singh (Retd.) has appeared in response to my above notice and has described about his investments in the firm and has also further clarified regarding the returns and working of the firm. Brig. Gurinderjit Singh (Retd.) submitted the following written statements:-

a) That Lt. Col. A.S.Malhi (Since Lt. Col.A.S.Malhi (Retd.) failed to appear before me to rebut the written statement of Brig. Gurinderjit Singh (Retd.) and he also failed to maintain proper accounts records, enabling me to prepare the true and correct statement. Keeping Retd.) has not supplied supplied the cure accounts of the firm, Sanchi Detectives.

b) That the firm, Sanchi detectives was started and registered with Defence authority by me in my name with the *initial investment of Rs.25,000/-.*

c) That Lt. Col. A.S.Malhi (Retd.) joined me as a partner and partnership deed was executed in December, 1989 to start supplying the security persons to various organizations.

d) That as Sanchi Detectives was showing approximately a monthly profit of Rs.5,000/- for each partner. Since Lt. Col. A.S.Malhi (Retd.) has no other source of income, he used to withdraw his share of profit and my share of profit remained invested in the firm to increase the work.

e) That the company is still working and is supplying more than 200 to 300 persons to various institutions and making a monthly profit of Rs.20,000/-. Even if it assumed that company is earning a monthly profit of Rs.10,000/-, my share of profit comes to Rs.5,000/- per month. Since the partnership firm was started from 1st January, 1990, my share of profit till date come to Rs.8,95,000/- plus initial investment of Rs.25,000/-.

f) In view the above, I have no hesitation in assuming that the written statement given by Brig. Gurinderjit Singh (Retd.) is correct."

2) No explanation and reasons have come forward on behalf of the respondent submitting any request to the Local Commissioner for seeking adjournment or more time in placing on record desired documents;

3) All possible efforts have been made to delay the execution of the final decree;

4) The argument of Mr. Gupta that the Lower Appellate Court had taken into consideration the period later to the dissolution of the firm is farfetched as repeatedly this Court called upon him to apprise from the report, but nothing was pointed out;

5) The Local Commissioner has also remained oblivious of

Rule 10 of Order 26 CPC. The same reads thus:-

> ***"10. Procedure of Commissioner***
>
> *(1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.*
>
> *(2) Report and depositions to be evidence in suit. Commissioner may be examined in person - The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation. -*
>
> *(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."*

6) It was obligatory upon the defendant to seek cross-examination of the Local Commissioner and only after recording dissatisfaction with proceedings of the Local Commissioner, further enquiry could be made. Even no additional material was placed on record with the appeal to, *prima-facie,* establish that had those material been looked into by the Local Commissioner, the report with regard to the outstanding dues of the appellant-plaintiff would have been different;

7) The preliminary decree pertained to determination of the share, whereas the final decree is with regard to the outstanding

dues;

8) Balance sheet was prepared on the basis of the material provided through representative of the respondent- judgment debtor;

9) Withholding of any further material, in my view, would lead to an adverse inference as per provisions of Section 114(g) of the Indian Evidence Act;

10) The interpretation of the aforementioned provisions of law is no longer *res integra;*

As an upshot of my aforementioned findings, I am of the view that the reasoning assigned by the Lower Appellate Court remitting the matter to the trial Court is wholly unwarranted, without jurisdiction and perverse, thus, not sustainable in the eyes of law. Resultantly, the findings are set-aside. The Lower Appellate Court is directed to decide the appeal on merits. Let this exercise be undertaken within a period of four months. This Court is sanguine of the fact that the Lower Appellate Court shall make endeavour to decide the controversy as the matter is quite old as parties are litigating since 1992.

The parties, through their counsel, are directed to appear before the Lower Appellate Court on 27.9.2018.

Appeals stand allowed.

August 30, 2018 **(AMIT RAWAL)**
ramesh **JUDGE**

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