

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

**RSA No.911 of 2019
Date of Decision: 04.02.2019**

M/S Patel Retail and another. ...Appellant
Versus

Saju Ninan, Proprietor, M/s Kevin-Craft, Ludhiana.Respondent

Coram : Hon'ble Mr. Justice B.S.Walia.

Present: Mr. Rajiv Sharma, Advocate for the appellants.

B.S. Walia, J.

[1] Regular Second Appeal has been filed by the defendants against judgment and decree dated 17.11.2018, passed by the learned Additional District Judge, Ludhiana, partly granting relief by directing payment of Rs.3,41,178/- as against judgment and decree dated 21.10.2016 for Rs.4,61,712/- passed by the learned Civil Judge (Junior Division), Ludhiana in Civil Suit No.214 of 2011.

[2] Learned Counsel contends that the Courts below allowed the claim of the respondent-plaintiff without there being any evidence on the record and despite Clause 8 of the agreement dated 07.05.2010 in view of which the territorial jurisdiction vested in the Courts at Mumbai only and the Court at Ludhiana did not have the territorial jurisdiction, besides the amount claimed in legal notice dated 09.11.2010 was Rs.4,08,116/- along with interest whereas the amount claimed in the civil suit was Rs.4,61,712/- along with interest @ 18% per annum.

[3] Brief facts of the case, leading to the Regular Second Appeal are that the respondent-plaintiff filed a suit for recovery of Rs.4,61,712/-

along with pendent lite and future interest @ 18% per annum from the date of filing of the suit till date of realization on the averments that he was manufacturing ready-made garments for supply to customers at different places as per their order, whereas the appellants-defendants were engaged in the business of delivery of goods through courier to persons at different places and had requested him to avail their services for delivery of garments to different parties by assuring that goods would be delivered within 9 days and if they failed to deliver the goods within the stipulated period of time, half freight would be charged and if the goods were delivered after 10 days, then no freight would be charged.

[4] That it was further pleaded that on said offer, the respondent-plaintiff booked orders for delivering goods to different customers and handed over parcels containing garments to the appellants-defendants for delivery as per details given in the plaint but the appellants-defendants failed to deliver the same till date of filing of the suit, besides, the respondent-plaintiff received complaints in writing from customers of the appellants-defendants having delivered goods in short supply in comparison to the orders placed. One Seematti of Kochi complained of delivery being short by three pieces, J.M. Textiles, Bangalore complained of one piece being short at the time of delivery, while S.L. Enterprises reported that the parcel was totally damaged and lot of pilferage had taken place from the parcel as a result of which they did not accept the parcel. Likewise, another customer, Karikkineth of Adoor complained that goods delivered were late by one month.

[5] That it was also mentioned that respondent-plaintiff on downloading proof of delivery, learnt that the appellants-defendants had deliberately not delivered goods to 11 customers of total value of Rs.2,80,379/- as per details given in the plaint and kept the same without justification. Besides, one consignment sent by the agent of the plaintiff worth Rs.70,000/- and another by M/s Shree Jai Lakshmi, Triruvalla worth Rs.1,11,333/- to be delivered to the respondent-plaintiff were also not delivered and illegally kept back by the appellants/defendants. Thus, consignments of total value of Rs.4,61,712/- were illegally withheld by the appellants-defendants despite requests by the respondents-plaintiffs to return the goods. Consequentially, left with no option, the respondent-plaintiff filed the civil suit.

[6] The appellants-defendants contested the civil suit by filing written statement inter alia taking preliminary objections of the suit not being maintainable, respondent-plaintiff not having come to Court with clean hands and having suppressed material facts, Court not having territorial jurisdiction to hear, try and adjudicate the civil suit. Writing alleged to have been given by the appellants-defendants that if the goods did not reach the destination within 09 days only half freight would be charged and if the assignment did not reach the destination within 10 days, no freight would be charged was denied. However, booking of assignments by the respondent-plaintiff to its different customers and handing over of the same to the appellants-defendants for delivery was admitted. It was also alleged that the respondent-plaintiff had not cleared the bills for deliveries made by the appellants defendants from 21.08.2010 onwards.

[7] On the pleadings of the parties, the following issues were framed:-

1. Whether the plaintiff is entitled for recovery of Rs.4,61,712/- along with interest as prayed for? OP
2. Whether the suit is not maintainable? OPD
3. Whether the suit is barred by limitation? OPD
4. Whether the court does not have territorial jurisdiction?
OPD
5. Relief.

[8] On the basis of evidence led by the parties and hearing afforded to them, issue No.1 was decided in favour of the respondent-plaintiff, while issue Nos.2 & 3 was also decided in favour of the respondent-plaintiff, as not pressed by the appellants-defendants. Likewise, issue No.4 with regard to territorial jurisdiction was decided in favour of the respondent-plaintiff and against the appellants-defendants and the respondent-plaintiff was held entitled to recover Rs.4,61,712/- from the appellants-defendants along with *pendent lite* interest @ 9% per annum from the date of filing of the suit, till decision of the case and future interest @ 6% per annum from the date of decision till actual realization.

[9] Appeal was filed by the appellants-defendants before the learned Additional District Judge, Ludhiana that the judgment and decree of the learned trial Court was against facts and law, evidence had been ignored and the judgment did not disclose as to how the amount of Rs.4,61,712/- had been arrived at. No evidence in respect thereto had been produced by the respondent-plaintiff, who had also admitted that he owed

Rs.9,032/- (Rs.9201/- as per Ex. P-66) to the appellants-defendants, which amount also was not held payable to them, that the appellants-defendants had duly delivered the consignments to the customers, interest *pendent lite* granted @ 9% per annum and future interest @ 6% per annum was illegal etc.

[10] The learned Additional District Judge came to the conclusion that on the basis of the pleading of the parties, availing of courier services of the appellants-defendants by the respondent-plaintiff had been admitted as also that the parcels' detailed in paragraph No.4 of the plaint were received by the appellants-defendants from the respondent-plaintiff for delivery to concerned addressees. The learned ADJ also recorded that in paragraph No.6 of the plaint, it had been clarified that actually 11 customers detailed in said paragraph were not delivered their parcels by the appellants-defendants and the aforesaid parcels were part of details given in paragraph No.4 of the plaint and that total cost of aforesaid parcels worked out to Rs.2,80,379/- whereas the appellants defendants in the written statement stated that they had delivered the parcels to the concerned addressees and had received acknowledgment but none of the acknowledgments claimed to have been received with regard to delivery of the parcels to the concerned addressees by the appellants-defendants were proved on the record. Accordingly, in the circumstances, the learned Appellate Court held that having failed to prove that the appellants defendants had delivered the parcels to the addressees, they were liable to return the cost of the parcels i.e. Rs.2,80,379/- to the respondent-plaintiff.

[11] Learned Appellate Court referred to documents relied upon by the respondent-plaintiff i.e. Exhibit P-12 being an uncontroverted consignment copy, whereby goods worth Rs.70,000/- were handed over by M/s Om, Bangalore in the name of the firm of the plaintiff to the appellants-defendants and on aforesaid basis held that the documents established that the appellants-defendants had received goods worth Rs.70,000/- as referred in the plaint but had not handed over the same to the respondents-plaintiffs. Therefore, the appellants-defendants was liable to pay the aforesaid amount also to the respondent-plaintiff. Reference was also made to Ex.P-23 i.e. a letter issued by Shree Jai Lakshmi Silks to the respondent-plaintiff Company Kevin Knitcraft regarding return of goods worth that amount and for issuance of debit note in respect thereto. However, the learned Additional District Judge, by observing that Exhibit P-23 no where disclosed the name of the appellants-defendants as the recipients of the goods of the said amount from said Jai Lakshmi set aside the liability of Rs.1,11,333/- fastened on the appellants-defendants on the aforesaid basis and in the circumstances held that the appellants-defendants were liable only for an amount of Rs.2,80,379/- + Rs.70,000/-, total Rs.3,50,379/-, while the respondent-plaintiff had to pay the appellants-defendants Rs.9201/-.

[12] The learned First Appellate Court further observed that there was nothing to show as to how the amount of Rs.4,61,712/- had been arrived at by the learned trial Court and that in all the respondent-plaintiff was entitled to recover only Rs.3,41,178/- while the plea with regard to interest being on the higher side was rejected on the ground that the

transaction between the parties was a commercial and contractual transaction. Accordingly, appeal was partly allowed and the appellants-defendants were held liable to pay only a sum of Rs.3,41,178/- to the respondent-plaintiff with interest as granted by the learned trial Court.

[13] Learned counsel has primarily argued on the ground that the Civil Court at Ludhiana did not have the territorial jurisdiction to entertain, try and decide the Civil Suit in view of Clause 8 of the agreement between the parties dated 07.05.2010 as per which, the jurisdiction in respect of any dispute between the parties was restricted to the Courts at Mumbai.

[14] I have considered the submissions of learned counsel for the appellants and perused the relevant record.

[15] There is no dispute with the proposition that where the parties by agreement restrict the jurisdiction to one of the two places which have the jurisdiction, such agreement is valid in the eyes of law and it is only where the parties confer jurisdiction on a place which does not have jurisdiction that the jurisdiction so conferred is bad in the eyes of law. However, the fact remains that although an issue was framed and was decided by the learned trial Court against the appellants-defendants, yet a perusal of the grounds of appeal before the learned First Appellate Court reveals that grievance in respect thereto was not made by the appellants-defendants before the learned first Appellate Court and although before this Court a number of factual pleas have been raised in the grounds, yet at the time of arguments, the sole point argued is that the judgment and decree of the learned first Appellate Court is legally unsustainable on the ground of

lack of territorial jurisdiction in view of clause 8 of the agreement between the parties.

[16] Despite query, learned counsel for the appellants has not been able to point out from the grounds of appeal or from the judgment and decree passed by the learned first Appellate Court of the plea with regard to clause 8 of the agreement having been raised before the learned first Appellate Court either in the grounds of appeal or at the time of arguments. Once a point which although available to a party was not raised and in the circumstances deemed to have been given up, leading to the passing of a judgment and decree by the first Appellate Court upholding while modifying the liability as determined by the judgment and decree of the learned trial Court, then in such circumstances, in second appeal, it is not open to the appellant/judgment debtor to contend that the judgment and decree of the first Appellate Court, is unsustainable on the ground of lack of territorial jurisdiction because the said point was never raised either in the grounds of appeal or at the time of arguments before the learned first Appellate Court. Having failed to agitate the point before the learned first Appellate Court, it does not lie in the mouth of the appellants to challenge the judgment and decree on the said ground as the judgment and decree passed by a Court cannot be challenged or held bad for non consideration of a plea, which was not raised by the appellant therein, out of his own free will. It would have been a different position, had the plea with regard to clause 8 of the agreement been taken in the grounds of appeal and agitated before the learned first Appellate Court at the time of hearing. Neither was the point with regard to clause 8 of the agreement taken in the grounds of

appeal, nor was it agitated at the time of hearing before the learned first Appellate Court. Therefore, in the circumstances, it is not open to the appellants to raise said point in second appeal.

[17] There is no dispute to the settled proposition of law that a new plea which was not raised before the lower Courts cannot be raised straightway for the first time before the Appellate Court. Reference in this connection can be made to the decision of Hon'ble the Supreme Court in case titled as '**Deepak Tandon and another versus Rajesh Kumar Gupta**' Civil Appeal Nos. 1537, 1538 of 2019, (arising out of S.L.P.(C) Nos.15585, 15586 of 2017), decided on 07.02.2019. Relevant extract of the same is reproduced as under:-

“17. In our considered opinion, the High Court committed jurisdictional error in setting aside the concurrent findings of the two Courts below and thereby erred in allowing the respondent's writ appeal and dismissing the appellants' application under Section 21(1)(a) of the Act, 1972 as not maintainable. This we say for the following reasons.

18. First, it is not in dispute that the respondent (opposite party) had not raised the plea of maintainability of the appellants' application under Section 21(1)(a) of the Act, 1972 in his written statement before the Prescribed Authority.

19. Second, since the respondent failed to raise the plea of maintainability, the Prescribed Authority rightly did not decide this question either way.

20. Third, the respondent again did not raise the plea of maintainability before the First Appellate Court in his appeal and, therefore, the First Appellate Court was also right in not deciding this question either way.

21. Fourth, it is a settled law that if the plea is not taken in the pleadings by the parties and no issue on such plea was,

therefore, framed and no finding was recorded either way by the Trial Court or the First Appellate Court, such plea cannot be allowed to be raised by the party for the first time in third Court whether in appeal, revision or writ, as the case may be, for want of any factual foundation and finding.

26. Seventh, the High Court exceeded its jurisdiction in interfering in the concurrent findings of fact of the two Courts below while allowing the writ appeal entirely on the new ground of maintainability of the application without examining the legality and correctness of the concurrent findings of the two Courts below, which was impugned in the writ appeal.”

Likewise, following the same principle of law, a plea not having been taken in the grounds of appeal or for that matter, at the time of arguments before the learned first Appellate Court, consequentially, the finding in respect thereto by the trial court attain finality before the first Appellate Court. Accordingly, the appellants are estopped from agitating the said point at the stage of second appeal, because of their own act and conduct as the order of the first appellate Court cannot be challenged before this Court on a plea which was never raised before the learned first appellate Court for its consideration. The order of a Court can be held to be bad only if a plea raised before it is not considered by it or is considered and wrongly decided by it. However, if a plea is not raised, the party cannot in second appeal question the validity of the order passed by the lower appellate Court by taking a plea not raised before the lower appellate Court. Therefore, the impugned order passed by the learned first Appellate

Court cannot be found fault with and does not warrant interference especially in view of the fact that as per law, the Civil Court at Ludhiana did have the jurisdiction to try and adjudicate the matter between the parties to the agreement and it was only because of the exclusion clause that the jurisdiction was vested solely with the Courts at Mumbai, as both the Courts at Mumbai and Ludhiana had the lawful jurisdiction to hear and decide the matter but the parties to the agreement by a specific clause i.e. Clause No.8 in the agreement dated 07.05.2010, decided to exclusively confer the jurisdiction on the Courts at Mumbai. In the said circumstances, the judgment and decree passed by the Civil Courts at Ludhiana, as well as the judgment and decree passed by the learned first Appellate Court cannot be said to be suffering from any jurisdictional error rather it was only a term and condition of the agreement between the parties, which was voluntarily given up by the appellants-defendants while filing the appeal against the judgment and decree of the trial Court before the learned first Appellate Court.

[18] Hence, the question with regard to jurisdiction as posed by the appellants is decided against them for the reasons as are mentioned above. Thus, no ground is made out warranting interference with the judgment and decree dated 17.11.2018, passed by the learned Addl. District Judge, Ludhiana. The appeal being bereft of merit is accordingly ***dismissed*** in *limine*.

(B.S.Walia)
Judge

February 04, 2019

'Rajneesh'

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No