IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.4741 of 2018 (O&M)
Date of Decision:21.01.2019

Kharab Health Foods, Karnal and another
......Appellants

Versus

Balwinder Singh Wahi and another ...... Respondents

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. S.S.Kharb, Advocate
for the appellants.

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LISA GILL, J.

Appellant-defendants are aggrieved of judgment and decree dated 18.07.2013, passed by the learned Civil Judge (Jr. Division), Ludhiana, as well as judgment and decree dated 19.07.2016, passed by the learned District Judge, Ludhiana.

Brief facts necessary for the adjudication of the case are that respondent-plaintiffs filed a suit for recovery of ₹2,42,392/- as detailed in the plaint. It was pleaded that the plaintiffs were dealers/ suppliers/ distributors of different types of cheese namely Italian Pizza cheese, Cheddar cheese, processed slice cheese, paneer and cream etc., and appellant no.1-defendant was stated to be a manufacturer and supplier of Italian Mozzarella cheese, cheddar cheese, gouda cheese, Pizza cheese, natural honey, baker products, ice cream, khoa, paneer, dahi and SFM. Plaintiff and defendants were claimed to have business dealings since long. In the course of dealings, defendants used to sell different types of cheese to the plaintiffs in routine. An open, mutual and current account was maintained by the parties. Plaintiffs used to pay the amounts in routine intermittently on account of the purchase of the goods. It was pleaded that the plaintiffs were to receive a sum of ₹17,228.70/- as opening balance as on 01.04.2008 from the defendants. Thereafter, payments in routine were being remitted by the plaintiffs and defendants had been selling the goods as detailed in the plaint. It was stated that there was an outstanding balance of ₹2,08,968.70/- as on 18.01.2004 against the defendants. Plaintiffs were to receive this amount from the defendants along with interest, but despite request, the defendants were not making the payment. Legal notice was served by the plaintiffs on 03.03.2005, but no reply was sent. Another legal notice-cum-reminder by way of registered AD/UPC dated 03.05.2005 was sent by the plaintiffs, but still neither any reply was sent nor payment made. Hence the suit was filed.

Defendant-appellants resisted the suit. Various preliminary objections were taken in the written statement. Averments on merits were controverted. It was denied that any amount was due towards the plaintiffs. It was pleaded that the total purchase made by the plaintiffs during the period from 01.04.2003 to 18.01.2004 was amounting to ₹6,17,850/- and the total payment received by the defendants from the plaintiffs was ₹5,30,000/-. A sum of ₹27,000/- by way of demand draft was sent by the plaintiffs to the defendants which had been duly accounted for on 22.12.2003. Thereafter, as per orders of the plaintiffs, goods vide bill No. 989, amounting to ₹4952/- on 26.12.2003, goods amounting to ₹9360/- vide bill No. 103, dated 07.01.2004 and goods amounting to ₹7800/- vide bill no. 1014 dated 18.01.2004 were sent to the plaintiffs by the defendants. It was denied that there was outstanding balance of ₹2,08,968.70/- as on 18.01.2004 and that the plaintiffs were entitled to receive this amount rather a sum of ₹87,850/- was due and payable by the plaintiffs to the defendants which he had failed to pay in-spite of requests. It was further pleaded that the defendants paid a sum of ₹20,112/- to the Excise and Taxation Department on account of non submission of C-Form by the plaintiffs as an amount of ₹1,07,062/- was due and payable by the plaintiffs to the defendants. Dismissal of the suit was prayed for.

Counter claim was filed by the defendants with a specific prayer that an amount of ₹1,07,062/- was payable by the plaintiffs towards the defendants. It was prayed that the counter claim filed by the defendants be allowed.

From the pleadings of the parties, following issues were framed by the learned trial Court:-

1. Whether the plaintiff is entitled to recover the suit amount of ₹2,42,392/- as detailed in the heading of the plaint along with interest at the rate of 12% p.a., from 18.01.2004 till filing of the suit?OPP
2. Whether the suit is not maintainable in the present form? OPD
3. Whether the plaintiffs are liable to pay ₹1,07,962/- along with interest to the defendants?OPD
4. Whether the counter claim is not maintainable in the present form?OP
5. Relief.

Both the parties led evidence in support of their respective claims/stands.

Learned trial Court on considering the facts and circumstances as well as evidence on record concluded that the plaintiffs had successfully proved their case. Suit for recovery of ₹2,08,068.70/- along with interest at the rate of 9% from 18.01.2004 till actual realization was decreed and counter claim filed by the present appellants was dismissed.

Two appeals were preferred by the present appellants challenging the decision in the suit as well as dismissal of the counter claim. Civil Appeal No. 48 of 2013 was partly allowed by the learned District Judge, Ludhiana to the extent that respondent-plaintiffs were held entitled to recover a sum of ₹1,78,352/- instead of ₹2,08,968.70/- from the appellant-defendants. Civil Appeal No. 49 of 2013 challenging dismissal of the counter-claim was dismissed vide common judgment and decree dated 19.07.2016 passed by the learned District Judge, Ludhiana.

Present appeal has been filed by the appellants challenging the decision in Appeal no. 48 of 2013. Appellants have not challenged the dismissal of the counter-claim.

Learned counsel for the appellants submits that both the learned Courts below have erred in decreeing the suit filed for recovery preferred by the plaintiff-respondents. Evidence on record does not support such a finding as returned by both the learned Courts below. Liability of the appellant-defendants to pay the amount in question is not proved in any manner. Learned counsel for the appellant further argues that the question of law which arises for consideration in this appeal is whether a person who is insolvent can even raise a claim for recovery as preferred by the plaintiff-respondents. It is submitted that two cheques dated 04.11.2003 and 17.11.2003 had been issued by the plaintiff in lieu of their liability towards the produce supplied by the present appellants. These cheques were dishonoured on 11.11.2003 and 18.11.2003 respectively. Therefore, there is no question of any recovery *qua* the present appellants. It is thus prayed that the present appeal be allowed and the judgments and decrees passed by the learned Courts below be set aside. Consequently, suit filed by the plaintiff-respondents be dismissed throughout.

I have heard learned counsel for the appellants and have gone through the file with his assistance.

In my considered opinion, both the learned Courts below have rightly held that liability of the appellant-defendants to pay the amount in question is duly proved from the evidence on record. Business dealings between the plaintiffs and the appellants are admitted. It is further admitted that there was an open, mutual and current account with reciprocal debit and credit in the accounts maintained by the defendants from time to time. To prove their case, plaintiff no.1 himself appeared as PW-2. Relevant evidence as thoroughly discussed by the learned Courts below has been produced on record by the plaintiffs.

It is relevant to note that appellant-defendant no.1 i.e. the proprietor of defendant-appellant no.1 did not even step in the witness box. It is her husband, who appeared as DW-1. In his cross-examination DW-1-Suresh Kumar, has clearly admitted that it is appellant no.2, his wife who is looking after the business activities. Power of attorney had been given to him to depose in this case due to her ailment. However, no medical certificate was placed on record. Conduct of the said witness has been rightly commented upon adversely by the learned Courts below. DW-1 even expressed ignorance about the signatures of his wife. He could not tell the details of the bills received by the defendants from the plaintiffs. He even went to the extent of stating that he could not read the written statement as he had some cataract problem. As per the statement account for the year 2003-04, Ex.D-3, it is admitted by the appellants that an amount of ₹5,30,000/- in total was received by them. Goods worth ₹3,38,260/- were purchased by the plaintiffs from the defendants during the financial year 2003-04. Thus, excess payment of ₹1,91,740/- was evident. A sum of ₹13,388/- paid by the appellants as sale tax was deducted from the said amount of ₹1,91,740/-. Two notices Ex.P-60 and Ex.P-66 served by the plaintiffs upon the defendants are admitted by DW-1. It is thus rightly held by the learned District Judge, Ludhiana that the plaintiff-respondents are entitled to a sum of ₹1,78,352/- from the appellants.

An argument vehemently urged by learned counsel for the appellants is that once two cheques dated 04.11.2003 and 17.11.2003 were issued by the plaintiffs to the present appellants in lieu of their liability for the purchase supplied by the present appellants, there was no question of any recovery from the appellants. It is to be noted at this juncture that there is no pleading in the written statement in respect to the said two cheques as mentioned above. No evidence has been led by the appellants to this effect.

An application under Order 41 Rule 27 read with Section 151 CPC has been filed along with the present RSA for producing additional evidence/documents i.e., counter foil and pay-in-slip of the deposited cheques purportedly issued by respondent no.1 for being read in evidence. Apart from the fact that no such pleadings are available in the written statement filed by the present appellants, there is indeed nothing on record which would reflect that these facts were not in the knowledge of the appellant-defendants and despite due diligence, the said evidence could not be led before the learned trial Court.

At this stage, it is reiterated that appellant no.2, did not even step in the witness box to prove her case. The said application for leading additional evidence is clearly misconceived and is accordingly dismissed. No plea of the plaintiff-respondent being insolvent was ever raised by the appellants at any state prior to filing of this appeal, neither was it ever their case that any such cheques were given by the plaintiff in discharge of any liability. Such a plea is clearly untenable, hence rejected. The appellants have admittedly not challenged the dismissal of their counter-claim.

Learned counsel for the appellant-defendants is unable to point out any question of law much less substantial question of law which may be involved for consideration in this regular second appeal. No interference is called for by this Court in this regular second appeal.

No other argument has been raised.

Present appeal is, consequently, dismissed with no order as to cost.

[LISA GILL]
Judge

21.01.2019
s.khan

Whether speaking/reasoned : Yes/No.

Whether reportable : Yes/No.