

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL REVISION APPLICATION NO.63 OF 2010

M/s. Haji Yusuf Abdul Karim
Gagan through its Proprietor
Mohd. Aslam Abdul Habib .. Applicant

Versus

Sunder Provisions Store
Through its Proprietor
Ishwar Bhikulal Jaiswal .. Respondent

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Mr. R.F. Totala, Advocate for the Applicant
Mr. Zareef Khan Y. Pathan, Advocate for the respondent

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CORAM : MANGESH S. PATIL, J.

DATE : 23-03-2022

PER COURT :

. This is a revision by the original plaintiff.

2. A suit for recovery of money stated to be due on account of credit purchases made by the respondent from his shop was decreed by the trial court, however, the lower appellate court has allowed the respondent's appeal and dismissed the suit.

3. I have heard the learned advocates of both the sides finally.

4. The Rule was issued on 21-09-2010.

5. Learned advocate Mr. Totla for the applicant would submit that a well reasoned judgment of the trial court has been set aside by the lower appellate court for flimsy and unsustainable reasons. The applicant had led evidence to demonstrate and substantiate his stand about the respondent having purchased goods on credit from his shop. The accounts were maintained in the ordinary course of business. Those original accounts were also brought by the witness, who had himself maintained it. After comparing with the true copies, the originals were returned. In view of Section 34 of the Evidence Act, the evidence that was available before the courts below was sufficient enough to prove the respondent having made the purchases and was due and payable the amount. There was no perversity or arbitrariness in the judgment and order passed by the trial court, still, the lower appellate court has caused interference simply by referring to only one circumstance that the original bill no.4414 was not produced under which the respondent was alleged to have made the credit purchase.

6. Mr. Totla would further submit that sufficient evidence was led before the trial Court to make out a ground for leading

secondary evidence and in its discretion the trial court had allowed the applicant to lead such secondary evidence in the form of a photo copy of the bill. There was no necessity of seeking any permission from the court as has been laid down by the supreme court in the matter of **Dhanpat Vs. Sheo Ram (deceased) through legal representatives and others; (2020) 16 SCC 209**. He would further submit that even in the absence of such bill, there was sufficient evidence to reach a conclusion about respondent's liability as against which the respondent had not stepped into the witness box to deny the claim on oath. All these circumstances were rightly appreciated by the trial court. The lower appellate court has referred to irrelevant facts and circumstances and ignored the relevant ones. The judgment and order under challenge is perverse, arbitrary and capricious and is liable to be quashed and set aside.

7. Per contra, learned advocate Mr. Pathan for the respondent justifies the judgment and order under challenge. He would submit that the primary evidence to witness the transaction of the credit purchase was the original bill no.4414. The applicant had never called upon the respondent to produce the original. The copy that was laid in as a secondary piece of evidence was not admissible. It did not bear respondent's signature. No permission was sought to

lead secondary evidence. The ledger books alone were not sufficient to prove the claim. He relies on the decision in the case of **Zenna Sorabji and others Vs. Mirabelle Hotel Co. (Pvt.) Ltd and others, AIR 1981 Bombay 446**. He would further submit that the lower appellate court has considered all the aforementioned facts, circumstances and the evidence and has given plausible reasons to reverse the judgment of the trial court.

8. Admittedly, the applicant sought to prove the claim on the premise that he runs a business, maintains the accounts and a credit purchase was made by the respondent, which was witnessed by the bill no.4414. Admittedly, the original bill was not produced on record nor its office copy, but only a photo copy was produced, permitted to be led in evidence and was exhibited by treating it as having been duly proved as secondary evidence of the original, by the trial court, whereas the appellate court has reversed that aspect and non-suited the applicant.

9. It is to be noted that though the bill was the best evidence to prove the claim, only its photo copy was produced on record. The evidence was led to demonstrate that perhaps the original office copy was lost in a fire which was reported to police.

Admittedly, no permission was sought before leading secondary evidence. But as has been laid down in the matter of **Dhanpat** (supra), the only requirement to lead secondary evidence is to demonstrate existence of the circumstances which permit a party to lead it and no application for permission to produce is necessary. Therefore, the first reason from the lower appellate court's judgment not to look into copy of the bill no.4414 because of absence of application seeking permission is not sustainable in law.

10. The lower appellate court then seems to have got swayed away by the fact that the secondary evidence of the bill was being sought to be led in the form of a photo copy which was not admissible in evidence.

11. It is necessary to note that in fact, the photo copy of the bill was produced while filing the suit. Since it was a suit for recovery of money due and payable on account of credit purchase, evidence was led in the form of the applicant's testimony (PW-1) and his employee Yakub (PW-4) who used to write the accounts. Evidence was also led to demonstrate that the applicants shop caught fire and everything was destroyed. A police report was lodged and even a witness from police department PSI Mr. Khot (PW-2) was

examined. In view of such state-of-affairs and the evidence, the matter should have been appreciated in the right perspective as was done by the trial court.

12. It is not that the applicant was attempting to prove the liability of the respondent solely on the basis of the bill No.4414, albeit, it could have been an additional piece of evidence.

13. Even apart from such a bill, there was sufficient evidence led before the trial court wherein Yakub (PW-4) specifically stated that he was in the employment of the applicant and was maintaining the accounts. The original account books were brought by him and on its comparison with the true copies, which were already filed on record, the originals were returned. Even an opportunity to conduct cross-examination was availed of by the respondent, but nothing could be elicited so as to disprove not only the testimony of employee Yakub (PW-4), but even the account books duly proved by him to be in his hand writing.

14. If such were the books of accounts which were apparently maintained in the ordinary course of business, certainly it was a relevant fact under Section 34 of the Evidence Act. The lower

appellate court has merely proceeded to demonstrate how the bill no.4414 was not duly proved, but ignored the fact that the transaction could be established even on the basis of such books of accounts.

15. In the matter of **Zenna Sorabji** (supra) the claim was sought to be established on the basis of bundle of sheets which this Court refused to recognize as the books of accounts. It was also held that mere production of a bound ledger book was not sufficient unless it was corroborated with corresponding day book along with *rojmel*. In the matter in hand, the trial court in its judgment specifically pointed out that it was not that a ledger alone was produced, *udhar nond wahi* was also produced. *Khatawani* was there and the witness, who had maintained it in his hand writing in the ordinary course, was examined as a witness. Therefore, the respondent is not entitled to reap any benefit from the decision in the case of **Zenna Sorabji** (supra). There was sufficient and cogent evidence before the trial court to prove the transaction even if the credit bill no.4414 was to be ignored. The learned judge of the lower appellate court seems to have clearly overlooked and discarded the testimony of Yakub (PW-4) without even bothering to mention the reasons not to rely upon his testimony.

16. In view of above state-of-affairs, I have no hesitation to conclude that the trial court had duly considered the evidence on record in arriving at the conclusion about the claim having been duly proved and there was no illegality or infirmity in appreciation of evidence, still, the lower appellate court has reversed the judgment of the trial court for no sound reasons. The judgment under challenge is clearly perverse, arbitrary and capricious, which empowers this court to undertake a scrutiny in this revision.

17. The Civil Revision Application is partly allowed.

18. The impugned judgment and order of the lower appellate court is quashed and set aside.

19. The judgment and order of the trial court is confirmed with a modification that the applicant would be entitled to future interest on Rs.18,128.88 ps. @ 6% per annum only.

20. Costs in cause.

(MANGESH S. PATIL)
JUDGE