PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice Anil Kshetarpal.

MANDEEP JOON and another – Appellants.

Versus

SUBEEJAM SEEDS (INDIA) PVT. LTD and others – Respondents.

RSA-401-2021(O&M)

Civil Procedure Code, 1908 (V of 1908) Section 100 – Regular Second Appeal – Appellants cannot be permitted to put forth a new plea which was never taken before both the courts below – During hearing of the first appeal, plaintiffs did not object to the decree passed by the learned trial court on this aspect – In such circumstances, it would not be appropriate for the Court to permit the appellants to put forth new plea – Supreme Court did not lay down that a new plea, which is based on facts, should be entertained by the High Court for the first time in a Regular Second appeal.

Cases referred to:

1. (2010) 13 SCC 216, *Municipal Committee, Hoshiarpur v. Punjab State Electricity Board.*

2. (1996-3) PLR 799, *State of Haryana v. Dr. Prem Singh Mann.*

3. 2008(2) RCR (Civil) 688, *Kashmir Singh v. Harnam Singh.*

4. 1989 (2) APLJ 196, *Chanumolu Anil Kumar v. Vasu Cotton and Ginning Mills.*

Mr.P.K.Jain, for the appellants

JUDGMENT

Anil Kshetarpal, J. – *(20th July, 2021)* – The hearing of the case was held through video conferencing on account of restricted functioning of the Courts.

CM-2284-C-2021

For the reasons stated in the application, delay of 5 days in re-filing the appeal is condoned.

CM stands allowed.

CM-2285-C-2021

For the reasons stated in the application, delay of 92 days in filing the appeal is condoned.

CM stands allowed.

CM-2286-C-2021

Allowed as prayed for.

Main case

Defendant no. 2 and 3 have filed the present Regular Second Appeal against the concurrent finding of facts arrived at by the courts below while decreeing the suit for recovery of Rs.17,94,364/-. The point which arises for consideration is whether while hearing the Regular Second Appeal, it would be appropriate to permit a party to the suit to take up a entirely new point, which is based on appreciation of pleadings and evidence, for the first time.

2. Some facts are required to be noticed. The plaintiff-respondent no. 1 filed a suit for recovery of Rs.38,50,000/- against defendant no. 1 to 4. Defendant no.1 is a Private Limited Company whereas defendant no.2 and 3 are its Managing Director and Chairman respectively. The defendants appointed the plaintiff to be its clearing and forwarding agent for the paddy belt of Haryana. The contract between the plaintiff and the defendants was signed on 01.04.2008. The plaintiff, in accordance with the agreement, deposited the security amount of Rs.10,00,000/-. As per agreement, it was entitled to commission at the rate of 2.5% of the total turnover made from its godown. The total turnover from its godown was Rs.3,50,00,000/-. Hence, it is entitled to Rs.8,75,000/- on that account. The certain other amount was also due which inspite of demand being made, has not been paid.

3. Defendant no.1 to 3 filed a joint written statement contesting the suit. It was pleaded that there was no contract between the parties and the plaintiff did not facilitate the sale of seeds as claimed. The trial court on appreciation of evidence decreed the suit to the extent of Rs. 17,94,364/- with pendente lite and future interest at the rate of 8% per annum till realization of the decretal amount. Defendant no. 1 to 3 filed an appeal. The plaintiff also filed a cross appeal. The learned First Appellate Court on re-appreciation of evidence found no error in the judgment passed by the trial court. Consequently both the appeals were ordered to be dismissed.

4. The learned counsel representing the appellants contends that defendant no. 2 and 3 could not be made personally liable. He contends that plaintiff had entered into an agreement with defendant no.1 which is a limited Company. He further contends that the learned trial court without any basis passed a decree against the appellants/defendant no. 2-3 and hence, the judgement passed by the courts below suffers from patent error. He supported his arguments by relying upon the following judgments:-

1. *Municipal Committee, Hoshiarpur v. Punjab State Electricity Board and others*‘ [1] (2010) 13 SCC 216

2. *State of Haryana v. Dr. Prem Singh Mann*, [2] (1996-3) PLR 799.

3. *Kashmir Singh v. Harnam Singh*, [3] 2008(2) RCR (Civil) 688

4. *Chanumolu Anil Kumar v. Vasu Cotton and Ginning Mills,* [4] 1989 (2) APLJ 196

5. This Bench has carefully considered the submissions and perused the paper book.

6. The learned counsel representing the appellants does not dispute that the defendants while filing the written statement did not lay the foundation of the point put forth by him either in the pleading or in the evidence before the courts below. He further admit that even at the stage of final arguments, attention of the below courts was drawn to this aspect of the matter. However, he contends that since an admitted facts the point put forth arises, therefore, he should be permitted.

7. It may be noted here that the argument of learned counsel does not have any substance. The question whether any decree could have been passed against defendant no. 2 and 3 is not an abstract proposition of law. It was incumbent upon the defendants to plead, the aforesaid defence which is sought to be projected before this Court. The plaintiffs were entitled to be given an opportunity to counter the defence. Still further, defendants while leading evidence did not lead evidence also on this aspect. Even while addressing arguments, learned counsel representing the defendants did not object to the passing of the decree on the ground that no decree could be passed against defendants no.2 and 3. personally. It is well known that in appropriate cases, the court could lift the corporate veil. It is also not unknown that certain private limited companies are closely held or family owned. Still further, the liability of defendant no. 2 and 3 depends upon the contract and the value of evidence to be led by the parties. In such circumstances, this Bench is of the considered view that the appellants cannot be permitted to put forth a new plea which was never taken before both the courts below. During hearing of the first appeal, plaintiffs did not object to the decree passed by the learned trial court on this aspect. In such circumstances, it would not be appropriate for the Court to permit the appellants to put forth new plea.

8. Now let us analyse the various judgments relied upon by the learned counsel for the appellants. In the first judgment i.e *Municipal Corporation, Hoshiarpur* (supra), the High Court allowed the Regular Second Appeal while reversing the judgments passed by the courts below. The Supreme Court while setting aside the judgment of the High Court held that the Regular Second Appeal can be entertained only on a substantial question of law. The learned counsel representing the appellants relies upon para 24 and 25 of the judgment, which reads as under:-

“24. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eyes of law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (Vide: *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.*, (2010) 11 SCC 483).

25. In view of above, the law on the issue can be summarised to the effect that a second appeal lies only on a substantial question of law and it is necessary to formulate a substantial question of law before the second appeal is decided. The issue of perversity itself is a substantial question of law and, therefore, Section 103 C.P.C. can be held to be supplementary to Section 100 C.P.C., and does not supplant it altogether. Reading it otherwise, would render the provisions of Section 100 C.P.C. redundant. It is only an issue that involves a substantial question of law, that can be adjudicated upon by the High Court itself instead of remanding the case to the court below, provided there is sufficient evidence on record to adjudicate upon the said issue and other conditions mentioned therein stand fulfilled. Thus, the object of the Section is to avoid remand and adjudicate the issue if the finding(s) of fact recorded by the court(s) below are found to be perverse. The court is under an obligation to give notice to all the parties concerned for adjudication of the said issue and decide the same after giving them full opportunity of hearing."

9. On a bare reading of the afore-extracted portion, it is apparent that the Hon'ble Supreme Court did not lay down that a new plea, which is based on facts, should be entertained by the High Court for the first time in a Regular Second Appeal.

10. In the next judgment i.e *Dr. Prem Singh Mann* (supra), he had filed a suit for mandatory injunction to give him the payment of advance increments. The High Court in the context of Section 41(4) of the Specific Relief Act, 1963, held that the suit as filed was not maintainable. It was in these circumstances that the Court held that a new plea could be permitted because it not only to the root of the case but also not based on facts. Hence, the aforesaid judgment also does not help the appellants.

11. In *Kashmir Singh* (supra), the Supreme Court held that since the High Court failed to frame the substantial question of law, hence, while allowing the appeal the matter was remitted back to the High Court for re-decision.

12. Learned counsel also relies upon a Division Bench judgment of Andhra Pradesh High Court in *Chanumolu Anil Kumar* (supra). The High Court was examining the validity of a decree to recover in a revision petition filed against the order of the Executing Court. The Division Bench held in the facts of the case that there is no decree against certain individuals. Hence, the aforesaid judgment also does not lay down that in second appeal, a new defence is required to be entertained by the High Court.

13. Keeping in view the aforesaid facts, this Bench does not find any good ground to interfere with the findings of facts arrived at by the courts below. Hence, dismissed.

14. All the pending miscellaneous applications, if any, also stand disposed of.

S.S. – *Appeal disposed.*