
(2015) 01 SHI CK 0029

In the High Court Of Himachal Pradesh

Case No : RSA No. 379 of 2002 and C.O. No. 52 of 2003

Mohan Azad

APPELLANT

Vs

Partap Singh Chauhan

RESPONDENT

Date of Decision : 05-01-2015

Acts Referred:

Citation : (2015) 01 SHI CK 0029

Hon'ble Judges : Tarlok Singh Chauhan, J.

Bench : Single Bench

Advocate : Neeraj Gupta, for the Appellant; Sameer Thakur, Advocates for the Respondent

Final Decision : Allowed

Judgement

Tarlok Singh Chauhan, J.—This appeal of the defendants- appellants is directed against the judgment and decree dated 15.7.2002 passed by the learned Additional District Judge, Shimla whereby he reversed the judgment and decree passed by the learned Sub Judge Ist Class, Rohru and decreed the suit of the plaintiffs.

2. The case of the plaintiff as pleaded is that he is an orchardist, who in order to transport his apple crop to the market on 8.8.1995, hired a truck bearing No. HIN 5286 through the appellants. The said truck was not registered at that time with the Union being run by the appellants, as a result whereof an amount of Rs. 100/- against receipt was paid on 8.8.1995. Thereafter the plaintiff insured his 415 apple boxes vide Growers Beneficial Scheme No. 000159 dated 8.8.1995 by paying Rs. 300/- as insurance fee to the appellants. Unfortunately this truck alongwith the consignment met with an accident in which entire consignment of 415 boxes was badly damaged and spoiled and became unmarketable. Based on such averments a suit for recovery of Rs. 1,10,000/- was filed.

3. The defendants filed written statement wherein a number of preliminary objections were taken which included maintainability, the receipt No. 000159

being tampered with and duplicate thereof not bearing any cutting were taken. It was further alleged that plaintiffs- respondents had not mentioned the G.R. and challan number vide which 415 boxes of apple were loaded in the truck, which met with an accident. The alleged insurance was cancelled by the defendant appellant No. 3 and the plaintiff was therefore not entitled to claim any compensation from the defendants. On merits, the defendants had denied the averments made in the plaint and it was emphatically denied that receipt was to be entered prior to loading of 415 boxes in the truck or that the value of such apple was Rs. 1,10,000/-. The factum of issuance of receipts for Rs. 100/- and Rs. 300/- was admitted, but it was asserted that insurance would have been valid only when the truck was produced before the office of the Union and was inspected by the officials of the Union at its office at Hatkoti. It was denied that officials of the Union had visited the spot and collected the apples from the spot, rather it was asserted that the insurance was cancelled on finding that truck had already been met with an accident before the insurance was done. The cutting on the receipt of insurance was denied.

4. Replication was filed by the plaintiff, in which he reiterated his claim as set out in the claim and denied the assertion of the defendants. On the pleadings of the parties, the learned trial court framed the following issues:--

- "1. Whether the plaintiff is entitled to the suit amount? OPP.
2. Whether the suit is neither maintainable, nor tenable as alleged? OPD.
3. Whether the apple involved in the accident had been taken away by the plaintiff himself and he is therefore not entitled to the suit amount? OPD.
4. Relief."

5. After recording evidence and evaluating the same, the learned trial court dismissed the suit. Aggrieved by the judgment and decree passed by the learned trial court, the plaintiff preferred an appeal before the learned lower appellate court, who vide his judgment and decree dated 15.7.2002 has been pleased to decree the suit.

6. Aggrieved by the judgment and decree passed by the learned lower appellate court, the defendant -appellant has filed the present appeal. On 4.12.2002, this court admitted the appeal on the following substantial questions of law:--

- "1. Whether the Lower Appellate Court has exceeded its jurisdiction in allowing the plaintiff- respondent to lead additional evidence in appeal when the basic requirement of the Code of Civil Procedure were not complied with?
2. Whether the Lower Appellate Court has exceeded its jurisdiction in relying upon the inadmissible evidence Exhibit AW 1/A to Exhibit AW 1/E which has materially effected the judgment and decree, to the detriment of the defendant-appellants?
3. Whether the Lower Appellate Court has acted with material illegality and

irregularity in not dismissing the suit of the plaintiff- respondent being not maintainable against the defendant- appellants, with whom there was no privity of contract? Was not the suit liable to be dismissed for non-joinder of the necessary parties i.e. the Shimla Truck Operators Union Sawara (Registered), a Registered Society of which the Defendant- Appellants were the office bearers?"

7. On the other hand, the plaintiff No. 1/objector filed cross-objections, being C.O. No. 52 of 2003, which have been admitted on the following substantial question of law:--

"Whether on the proper consideration of the pleadings and the evidence the suit should have been decreed for the full amount of the insurance claim at the proved market rate with future interest (from the date of suit to date of decree and from the date of decree to the date of payment) at commercial rate and with cost as prayed in the suit?" 8. I have heard the learned counsel for the parties and have also gone through the records of the case.

Substantial question of law No. 1.

9. It is vehemently argued by the learned counsel for the appellants that learned lower appellate court has erred in permitting the plaintiff-respondents to lead additional evidence in appeal. However, I do not find any reason whereby the appellant can be permitted to take exception to the leading of additional evidence. The reason being that when a party was unable to produce the evidence in the trial court despite exercise of due diligence, the appellate court has ample power to allow the same. Therefore, this substantial question of law is accordingly answered against the appellants.

Substantial question of law No. 3.

10. The learned counsel for the appellants has strenuously argued that the learned lower appellate court has acted with material illegality and irregularity in not dismissing the suit of the plaintiffs as being not maintainable, because there was no privity of contract between the parties and further the suit was liable to be dismissed for non-joinder of necessary parties. While on the other hand, Mr. Sameer Thakur, learned counsel for the respondents has vehemently argued that these objections having been not taken before the learned court i.e. the trial court, are now not available to the appellants.

11. I find considerable force in the contention of the respondents, because admittedly the objection as set out in this question of law is being raised for the first time before this court. In the written statement filed by the defendants-appellants no plea regarding maintainability of suit for want of privity of contract and the suit being bad for non-joinder of necessary were taken. Even before the first appellate court, such pleas were not raised. The question of privity of contract and non-joinder of necessary parties are not pure questions of law but are mixed questions of law and facts and therefore, cannot be raised for the first time in second appeal. Accordingly, this question is answered against the

appellants.

Substantial question of law No. 2.

12. The learned counsel for the appellants has vehemently contended that the learned lower appellate court has exceeded its jurisdiction in relying upon inadmissible evidence vide Ex. AW 1/A to Ex. AW 1/E, which has materially effected the judgment and decree to the detriment of the defendant-appellants.

13. The learned lower appellate court admitted the aforesaid documents by way of additional evidence, which were simply tendered. A perusal of these documents would show that not only are they interpolated but the same have not been proved in accordance with law. Mere admission of documents in evidence does not amount to its proof. Further mere exhibition of documents would not dispense with the proof of such documents. In other words, mere marking of exhibit on a document does not dispense with its proof.

14. That apart, it would be seen that the sum total of the apple boxes mentioned when calculated on the basis of Ex. AW 1/A to Ex. AW 1/E does not tally with the apple boxes mentioned in the plaint. In the plaint, the plaintiff- respondent has specifically stated that there were 415 apple boxes in the truck bearing No. HIN 5286 at the time of accident, whereas the sum total of the apple boxes calculated on the basis of Ex. AW 1/A to Ex. AW 1/E works out to be 440. There is no explanation forthcoming from the side of plaintiff-respondent with regard to this discrepancy. It was incumbent upon the plaintiff- respondent to prove and establish on record the exact number of apple boxes but the plaintiff-respondent has failed to discharge this burden. The discrepancy in the number of apple boxes is fatal to the case of the plaintiff- respondent. Accordingly, this substantial question of law is answered in favour of the defendant-appellants.

Substantial question of law framed in C.O. No. 52 of 2003.

15. In view of the findings recorded against substantial question of law No. 2 above, this question has been rendered redundant and therefore need not be answered.

16. In view of the findings on substantial question of law No. 2 above, the appeal is accordingly allowed and the suit of the plaintiff-respondents is ordered to be dismissed, while the cross-objections preferred by the objector are also dismissed.