IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

109

RSA-1781-1994
Date of decision : 15.01.2025

P.S.E.B. **..... Appellant**

versus

Dr. Kamal Gupta **..... Respondent**

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Munish Gupta, Advocate
for the appellant.

None for the respondent.

****

PANKAJ JAIN, J. (Oral)

1. Defendant is in appeal aggrieved of judgment and decree passed by both the Courts below. For convenience, parties hereinafter are referred to by their original position in the suit i.e. the appellant as defendant and respondent as plaintiff.

2. Plaintiff filed suit seeking decree of declaration to the effect that demand contained in memo No.5518 dated 15.12.1988 pertaining to the account in the name of the plaintiff for an amount of Rs.67,308.60/- is illegal and unconstitutional. As per the plaintiff, he is running hospital under the name and style of Kamal Hospital and is consumer of the electricity being supplied by defendant.

3. Plaintiff has been regularly paying for the electricity consumed as per the bill raised by the defendant. On 15.12.1988, Assistant Executive Engineer, Flying Squad, Khanna visited the premises of the plaintiff and inspected the connection in dispute. Meter

and installation were found to be in order. Still, Inspecting staff removed the meter without any reason and without any notice. Plaintiff was asked to sign the inspection report. Plaintiff refused to sign the same. The connection was disconnected. On 16.12.1988, plaintiff received memo No.5518 dated 15.12.1988 wherein demand of Rs.67,308.60/- has been raised from the plaintiff. The demand includes overhauling enhanced security, cost of meter and re-connection fee. The meter was never sent to M.E. Laboratory. A wrong report was made with respect to tampering of the seals. Working of the nursing home run by the plaintiff was seriously crippled without supply of energy. Thus, plaintiff prayed for decree of declaration that the demand raised is illegal, null and void.

4. Suit was contested by the defendants claiming that the suit for declaration was not maintainable. On merits, defendants claimed that the Flying Squad visited the premises of the plaintiff on 15.12.1988. On inspection, it was found that all the four M&T seals were found without spot welding, but pressed. One of the M&T seals on the right bottom side of the meter with impression OKs-25 MT was found fake and tampered. One seal on the right top side of the meter was also found tampered. The lash wire of this seal was just pressed inside and same came out on touching. Meter cover could be opened with tampering of the two M&T seals on the right side of the meter, providing access to the meter digit counter for an unauthorised abstraction of energy. The existence of fake and tampered seals supported by very low consumption compared to the sanction load constituted the case of theft of energy under clause 33 of the Abridged

conditions of supply read with Section 39 of the Indian Electricity Act, 1910. It being a case of theft, supply of energy was disconnected. Plaintiff was asked to deposit Rs.50,504.80/- as SOP charges, Rs.6928.80/- as electricity duty, Rs.9300/- as additional security apart from cost of meter and re-connection fee.

5. On the basis of pleadings, following issues were framed:-

> *"1. Whether the demand contained in memo No.5518 dated 15.12.1988 amounting to Rs.67,308.60 is illegal, unconstitutional? OPD*
>
> *2. Whether the suit is not maintainable? OPD*
>
> *3. Whether the plaintiff was indulging in theft of energy? OPD.*
>
> *4. Relief."*

6. While answering issue No.1 and 3, Court of the first instance found that Ex.D-2 i.e. the report of Flying Squad, all the four M&T seals were found without spot welding, but pressed. The impression was found fake and tampered. However, in the written statement, stand taken is that one number of M&T seal on the right bottom side of the meter was found fake and tampered with. Thus, the officials of the board are not sure whether the M&T seals were fake or tampered with. Fake seals mean the seal which is not original, but tampered means, the seal which is though original, but has been tampered with by the consumer. Jai Dayal Sharma appeared as DW-1 on behalf of defendants, testified that he does not know the difference between fake or tampered seals. As per Ex.D2, the meter was removed and sealed in the card board alongwith fake/tampered seals. However, the same was never produced in the Court. It was concluded by the Court of the first instant that mere righting by the officials of the Flying

Squad that the M&T seals were fake or tampered, cannot lead to the conclusion in the absence of cogent piece of evidence brought on record by the defendant. Finding that the defendant failed to prove case of theft against the plaintiff, Court of the first instance decreed the suit filed by the plaintiff.

7. In first appeal preferred by the defendant, the Ld. Lower Appellate Court found that from testimony of DW-2, it was proved that the electricity meter was found suffering from defects. However, Ld. Lower Appellate Court found that there was no evidence on record to prove that the electricity consumption was being shown less. Learned Lower Appellate Court recorded that as per admission made by the officials, no apparatus was used at the time of inspection to detect that plaintiff was consuming more electric energy, than being recorded in the meter. In the absence of there being any evidence to prove, more consumption than that recorded, theft of electricity is not made out against the plaintiff. Ld. Lower Appellate Court held that there being no record of the meter reading produced before the Court, tampering of meter digit cannot be presumed.

8. Learned counsel for the appellant while assailing the impugned judgment and decree passed by Court below submits that once the Ld. Lower Appellate Court recorded the finding that the meter installed at the premises of the plaintiff was found to be defective, the theft of electricity by the consumer stood proved and thus, Ld. Lower Appellate Court ought to have reversed the judgment and decree passed by the Trial Court and dismissed the suit filed by the plaintiff.

9. I have heard counsel for the appellant and have carefully

gone through the records of the case.

10. Section 39 of the Indian Electricity Act, 1910 defines ‘theft’. The same reads as under:-

> **“39. [Theft of energy**
>
> .-Whoever dishonestly abstracts, consumes or uses any energy shall be punishable with imprisonment for a term which may extend to three years, or with fine which shall not be less than one thousand rupees, or with both; and if it is proved that any artificial means or means not authorised by the licensee exist for the abstraction, consumption or use of energy by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of energy has been dishonestly caused by such consumer.”

11. Thus, the necessary ingredient to constitute theft under Section 39 of the Electricity Act, 1910 is dishonest abstraction and/or consumption or use of energy. Counsel for the appellant does not dispute that even if Ex.D-2 the inspection report is taken to be gospel truth, the same does not lead to the inference that there was any dishonest abstraction or consumption or use of energy by the plaintiff. There is no evidence on record to prove that the plaintiff dishonestly abstracted or consumed energy. The ignorance of the inspecting authorities regarding details of tampered seals or fake seals and the absence of evidence regarding dishonest abstraction has not helped the cause of the appellant. In these circumstances, both the Courts below rightly found that the defendants failed to prove theft of energy at the hands of the plaintiff and thus, the impugned memo raising demand accusing plaintiff of having committed theft of energy was rightly declared to be bad and unsustainable in law. Arun Kumar Verma, A.E.E. who was leading the Flying Squad while appearing as DW-2 admitted

his ignorance about the sanctioned load. He admitted that he he never applied any standard meter or other apparatus to determine if the consumption recorded by this meter was less than the actual reading of the meter.

12. Pure findings of fact have been recorded by the Courts below. Scope of second appeal has been explained by Supreme Court in ***Randhir Kaur vs. Prithvi Pal Singh & Ors., 2019(17) SCC 7,*** observing as under:-

> "xx xxx xx
>
> 11. The effect of the Constitution Bench judgment in Pankajakshi is that in second appeal, the scope of interference within the Punjab and Haryana High Court would be the same as Code of Civil Procedure existed prior to 1976 amendment. The provisions of Section 41 of the Punjab Act and of Section 100 of the CPC are pari materia.
>
> 12) Some of the judgments of this Court dealing with the scope of the old Section 100 are required to be discussed. In a judgment reported in ***Deity Pattabhiramaswamy v. S. Hanymayya & Ors***., ***AIR 1959 Supreme Court 57*** – Three Judges, while examining the scope of Section 100 of CPC, held as under:
>
> > "15. The finding on the title was arrived at by the learned District Judge not on the basis of any document of title but on a consideration of relevant documentary and oral evidence adduced by the parties. The learned Judge, therefore, in our opinion, clearly exceeded his jurisdiction in setting aside the said finding. The provisions of Section 100 are clear and unambiguous. As early as 1891, the Judicial

Committee in ***Durga Chowdhrani v. Jawahir Singh [17 IA 122]*** stated thus:

"There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be". The principle laid down in this decision has been followed in innumerable cases by the Privy Council as well as by different High Courts in this country. Again the Judicial Committee in ***Midnapur Zamindari Co. v. Uma Charan [29 CWN 131]*** further elucidated the principle by pointing out:

"If the question to be decided is one of fact it does not involve an Issue of law merely because documents which are not instruments of title or otherwise the direct foundation of rights but are merely historical documents, have to be construed."

16. Nor does the fact that the finding of the first appellate court is based upon some documentary evidence make it any the less a finding of fact (See ***Wali Mohammad v. Mohammad Baksh, 11 Lahore 199***). But, notwithstanding such clear and authoritative pronouncements on the scope of the provisions of Section 100 of the CPC, some learned Judges of the High Courts are disposing of second appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public. This case affords a typical illustration of such interference by a Judge of the High Court in

excess of his jurisdiction under Section 100 of the CPC. We have, therefore, no alternative but to set aside the decree of the High Court on the simple ground that the learned Judge of the High Court had no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence. In the result, the decree of the High Court is set aside and the appeal is allowed with costs throughout."

13. Later, in a judgment, reported in ***Kshitish Chandra Bose v. Commissioner of Ranchi 1981(1) RCR (Rent) 633 : (1981) 2 SCC 103*** - three Judges, of this Court held that the High Court has no jurisdiction to entertain second appeal on findings of fact even if it was erroneous. The Court held as follows:-

"11. On a perusal of the first judgment of the High Court we are satisfied that the High Court clearly exceeded its jurisdiction under Section 100 in reversing pure concurrent findings of fact given by the trial court and the then appellate court both on the question of title and that of adverse possession. In the case of ***Kharbuja Kuer v. Jangbahadur Rai [AIR 1963 Supreme Court 1203 : (1963) 1 SCR 456]*** this Court held that the High Court had no jurisdiction to entertain second appeal on findings of fact even if it was erroneous. In this connection this Court observed as follows:

"It is settled law that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact.

As the two courts approached the evidence from a

correct perspective and gave a concurrent finding of fact, the High Court had no jurisdiction to interfere with the said finding."

To the same effect is another decision of this Court in the case of ***R. Ramachandran Ayyar v. Ramalingam Chettiar [AIR 1963 Supreme Court 302 : (1963) 3 SCR 604]*** where the Court observed as follows:

> "But the High Court cannot interfere with the conclusions of fact recorded by the lower appellate court, however erroneous the said conclusions may appear to be to the High Court, because, as the Privy Council observed, however, gross or inexcusable the error may seem to be there is no jurisdiction under Section 100 to correct that error."

14. In another judgment reported in ***Gurdev Kaur & Ors. v. Kaki & Ors., 2006(2) RCR (Civil) 561 : (2007) 1 SCC 546***, the rationale behind permitting second appeal on question of law after the amendment was considered. It was held that after the 1976 amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The Court held as under:

> "71. The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Section 100 CPC have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to

> feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.
>
> xx xx xx
>
> 73. The Judicial Committee of the Privy Council as early as in 1890 stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, and they added a note of warning that no court in India has power to add to, or enlarge, the grounds specified in Section 100."

15. The Division Bench of Punjab and Haryana High Court in a judgment reported in ***Sadhu v. Mst. Kishni, 1980 AIR (Punjab) 85*** set aside the judgment of the learned Single Bench in an intra court appeal in terms of the provisions of law as it existed prior to 1976, and held as under:

> "12. The scope of second appeal as envisaged by section 100 of the Civil Procedure Code and section 41 of the Punjab Courts Act has been a matter of judicial scrutiny a number of times by this court as well as by the final court, that is, the Suprems Court of India. The learned counsel for the appellant has actually made a reference in this regard to ***Detty Paitabhiramaswami v. S. Hanymayya [AIR 1959 Supreme Court 57.], Madamanchi Ramappa v. Muthaluru Bojjappa [AIR 1962 Supreme Court 1633.], Bithal Dass Khanna v. Hafiz Abdul Hai [1969 S.C. Notes 481.]*** and ***Afsar Shaikh v. Soleman Bibi [(1976) 2***

SCC 142 : AIR 1976 Supreme Court 163.]. These pronouncements; in a nutshell, lay down that there is no jurisdiction to entertain a second appeal on the ground of a erroneous finding of fact, however gross or inexecusable the error may seem to be. Nor does the fact that the finding of the first appellate Court is upon some documentary evidence make it any the less a finding of fact. A Judge of the High Court has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate court based upon an appreciation of the relevant evidence. Their Lordships have further observed that the only ground on which such an appeal can be said to be competent is where there is an error in law or procedure and not merely on an error on a question of fact.

xx xx xx

14. In view of the above discussion, we are clearly of the view that the learned Single Judge exceeded his jurisdiction in setting aside the findings of the fact on issue No. 2. The provisions of section 100 being clear and unambiguous, there was no scope for interference with those findings. We thus allow the appeal and set aside the judgment of the learned Single Judge and affirm the judgment and decree passed by the District Judge. The parties are, however left to bear their own costs."

16. A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that

findings are erroneous, however, gross or inexcusable the error may seem to be. The findings of fact will also include the findings on the basis of documentary evidence. The jurisdiction to interfere in the second appeal is only where there is an error in law or procedure and not merely an error on a question of fact."

13. In the absence of any question of law, this Court cannot be asked to re-appreciate evidence in second appeal.

14. In view of above, the present appeal is dismissed.

(PANKAJ JAIN)
JUDGE

15.01.2025
Dinesh

Whether speaking/reasoned : Yes

Whether Reportable : No