

M/S. ROHINI TRADERS

v.

M/S. J.K. LAKSHMI CEMENT LTD.
(Civil Appeal Nos. 10041-42 of 2010)

FEBRUARY 03, 2015

[**RANJAN GOGOI AND R.K. AGRAWAL, JJ.**]

Code of Civil Procedure, 1908 – Or. XII r. 8 – Notice under – By the plaintiff seeking the defendant to file certain documents – Trial Court decreed the suit drawing adverse inference against the defendant for not filing the documents – In appeal, High Court set aside the decree remanding the matter for fresh trial – Review petition dismissed – On appeal, held: High Court rightly remanded the matter for fresh trial setting aside the decree – Trial court could not have drawn adverse inference against the defendant because it had produced the document before the court and the party was also examined vis-à-vis that document – It was the plaintiff who failed to place them on record.

Dismissing the appeals, the court

HELD: 1. The object of Order XII Rule 8 of the CPC is to facilitate the plaintiff or any other party to get a document on record which is not in their possession or in possession of the other party. If a document has been produced, then it is the duty of the party who has asked for such production to get it placed on record. If, however, the said document is not placed on record, then adverse inference against the party who has produced the same cannot be drawn, more so, when the party who has produced the said document before the Court has been cross-examined vis-à-vis that document. [Para 10] [987-H; 988-A-B]

A 2. The High Court was right in setting aside the judgment and decree passed by the trial Court and remanding the matter for fresh decision. Even though the respondent-Company had not brought on record any document before the trial Court, yet it had produced
 B certain documents mentioned at Item Nos. 3-6 in the notice dated 05.07.2006 and DW-1 was also cross-examined with regard to the same. It was the duty of the appellant to get the documents produced by the
 C respondent-Company under Order XII Rule 8 of CPC exhibited in the suit proceedings so that a true and correct finding either way could have been recorded by the trial Court. The appellant did not take any step to get those documents marked and exhibited before the trial Court. [Paras 7, 8 and 11] [986-F-G; 987-F-G, 988-C]

D *Badri Parshad and Anr. vs. Shanti Lal Seth and Ors. AIR 1941 Lahore 228; Union of India vs. Firm Vishudh Ghee Vyopar Mandal AIR 1953 All. 689 – referred to.*

Case Law Reference:

E AIR 1941 Lahore 228 referred to Para 5
 AIR 1953 All. 689 referred to Para 5

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 10041-10042 of 2010.

F From the Judgment and Order dated 07.11.2008 of the High Court of Delhi in R.F.A. No. 406 of 2007.

Dilip Singh, Parmanand Pandey for the Appellant.

G M. L. Lahoty, Pabam K. Sharma, Gargi B. Bharali, Himanshu Shekhar for the Respondent.

The Judgment of the Court was delivered by

H R.K. AGRAWAL, J. 1. These appeals have been filed against the orders dated 07.11.2008 and 16.12.2008 passed

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[R.K. AGRAWAL, J.]

by the High Court of Delhi at New Delhi in RFA No. 406 of 2007 and R.P. No. 415 of 2008 respectively. Vide order dated 07.11.2008, the High Court allowed the appeal filed by M/s J.K. Lakshmi Cement Ltd. -respondent herein and set aside the judgment and decree dated 14.03.2007, passed by the Additional District Judge, Delhi in Suit No. 125 of 2004, while restoring the suit filed by M/s Rohini Traders - appellant herein for trial afresh as per the observations made in the judgment.

Brief Facts

2. (a) The appellant claims itself to be a sole proprietorship concern working as third party commission agent of the respondent-Company. The appellant claimed a sum of Rs. 12,05,231/- as dues to be payable by the respondent-Company as on 31.03.2004. Several requests were made to the respondent-Company to pay the amount due but to no effect. Even after serving a legal notice dated 09.04.2004 to the respondent-Company, it remained un-complied with. The appellant filed a suit praying for decree of Rs. 14,21,250/- including the principal amount as also interest at the rate of 18 per cent per annum. The suit was contested by the respondent-Company on the ground that it was barred by limitation as also on merits. The claim of the appellant was denied and it was stated that as per the record of the respondent-Company, a sum of Rs. 4,62,000/- is liable to be paid by the appellant to the respondent-Company. Other claims made by the appellant were also denied.

(b) During the pendency of the suit, the appellant served a notice dated 05.07.2006 under Order XII Rule 8 of the Code of Civil Procedure, 1908 (in short 'the Code') calling upon the respondent-Company to produce and show to the Court on the first date of hearing of the suit the following documents, viz.,

1. Purchase Orders pertaining to the order placed by the plaintiff;

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- A 2. Original record of the TDS Certificate issued by the company to the plaintiff;
3. Details of the payment made to the plaintiff;
- B 4. Details of the payment received from the party whom order was placed by the plaintiff;
5. Copy of the Ledger of the company related to the plaintiff from the Financial Year 1997 to 2004; and
- C 6. Copies of the Balance Sheets filed in the Income Tax Department and ROC for the years 1997 to 2004.

(c) It appears that the documents were not produced on the first date of hearing. However, during the course of the hearing one Shri R.K. Gupta, General Manager of the respondent-Company (DW-1) appeared before the Court and produced the documents mentioned at Item Nos. 3-6 and also stated that Item Nos. 1 and 2 would be available with the appellant. The appellant did not make any endeavor to get the documents produced by the respondent-Company on record and to mark them and exhibited.

(d) The trial Court, vide judgment dated 14.03.2007, decreed the suit in favour of the appellant herein for a sum of Rs. 14,21,250/- along with the interest at the rate of 9 per cent per annum from the date of institution of the suit till the date of its realization. The trial Court held that the respondent-Company had failed to explain as to why it had not placed on record its books of accounts and other related papers as asked for in the notice under Order XII Rule 8 of the Code and drew an adverse inference.

(e) Feeling aggrieved, the respondent-Company preferred an appeal before the High Court of Delhi.

(f) The High Court, after considering the material on record, came to the finding that the witness of the respondent-Company

(DW-1) was cross-examined in support of the documents produced by him in the Court pursuant to the notice under Order XII Rule 8 of the Code. However, since the documents were neither exhibited nor brought on record, the High Court felt it proper in the interest of justice to restore the suit for further trial with certain directions. A
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(g) An application seeking review of the judgment and order dated 07.11.2008 was filed whereupon the High Court re-summoned the trial Court record and re-perused the testimony of DW-1 from which it gathered that the witness had brought all the documents pertaining to the notice dated 05.07.2006 with respect to Item Nos. 3-6 and the other documents were with the appellant and the witness was also cross examined in respect of the documents so produced. The review application was, therefore, dismissed. C
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(h) Against the said orders, the appellant has preferred these appeals before this Court.

3. Heard Shri Sunil Kumar, learned senior counsel for the appellant and Shri M.L. Lahoty, learned counsel for the respondent-Company. E

Contentions:

4. Learned senior counsel for the appellant submitted that the respondent-Company had not filed any document before the trial Court in support of its claim made in the written statement. Further, it had not complied with the notice dated 05.07.2006 under Order XII Rule 8 of the Code requiring it to place certain documents before the Court at the time of first date of hearing and, therefore, an adverse inference ought to have been drawn and which was rightly drawn by the trial Court. According to him, the High Court ought not to have remanded the matter for fresh trial only on the ground that such documents were produced before the Court by DW-1. F
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5. Learned senior counsel has relied upon a decision of H

A the Lahore High Court in *Badri Parshad and Another vs. Shanti Lal Seth and Others* AIR 1941 Lahore 228 and submitted that the documents so produced are to be given in evidence and must be admitted in *toto*. He further relied on a decision of the Allahabad High Court in *Union of India vs. Firm Vishudh Ghee*

B *Vyopar Mandal* AIR 1953 All. 689 wherein it was held that the provision of Order XII Rule 8 of the Code refers to notice to produce documents at the time of the hearing, so that if they are not produced, the party calling for them may give secondary evidence of the same. According to him, as the respondent-

C Company has failed to produce the documents mentioned in the notice dated 05.07.2006 under Order XII Rule 8 of the Code, the trial Court had rightly drawn an adverse inference and decreed the suit on the basis of the evidence on record.

D 6. Learned counsel for the respondent-Company, however, submitted that even though the respondent-Company had not filed any document before the trial Court yet it produced the same before the Court as asked for in the notice dated 05.07.2006 and DW-1 was also cross-examined by the appellant. Therefore, the trial Court ought not to have discarded

E the documents so produced by the respondent-Company. The High Court had rightly remanded the matter for fresh trial.

Discussion:

F 7. We have gone through the materials on record and find that even though the respondent-Company had not brought on record any document before the trial Court yet it had produced certain documents mentioned at Item Nos. 3-6 in the notice dated 05.07.2006 and DW-1 was also cross-examined with regard to the same. The relevant portion of the statement made

G by Shri R.K. Gupta (DW-1) in the cross-examination is as under:-

H "However, I have brought the documents required by the plaintiff in terms of the notice dated 05.07.2006 vide Item Nos. 3 to 6 and the record in terms of Item Nos. 1 and 2

of the said notice would be available with the plaintiff.”

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“I cannot say if payment to M/s Rohini Traders was being made on transaction to transaction basis or consolidatedly. I have seen the statement of account from which it is clear that payments have been made both ways i.e., transaction to transaction as well as month to month. It is correct that the last entry in the statement of account is dated 30.04.2003. It is correct that till date we have not filed any suit against the plaintiff for recovery.”

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The claim of the appellant is that if the facts mentioned in the said documents are taken into consideration, it may just be possible that the claim of the appellant may not stand.

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8. At this juncture, it is relevant to quote Order XII Rule 8 of the Code which is as under:-

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“Notice to produce documents.—Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.”

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9. From a reading of the aforesaid provision as also the law settled on this aspect, we are of the view that it was the duty of appellant herein to get the documents produced by the respondent-Company under Order XII Rule 8 of the Code exhibited in the suit proceedings so that a true and correct finding either way could have been recorded by the trial Court. It is not in dispute that the appellant did not take any step to get those documents marked and exhibited before the trial Court.

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10. The object of Order XII Rule 8 of the Code is to facilitate the plaintiff or any other party to get a document on

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- A record which is not in their possession or in possession of the other party. If a document has been produced then it is the duty of the party who has asked for such production to get it placed on record. If, however, the said document is not placed on record, then adverse inference against the party who has produced the same cannot be drawn, more so, when the party who has produced the said document before the Court has been cross-examined vis-à-vis that document.

11. In our considered opinion, the High Court was right in setting aside the judgment and decree passed by the trial Court and remanding the matter for fresh decision. The directions given by the High Court do not call for any interference.

12. In view of the above discussion, the appeals fail and are hereby dismissed with no order as to costs.

Kalpana K. Tripathy

Appeals Dismissed.