
IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

R.S.A.No. 2393 of 1996(O&M)

Date of decision: 03.07.2015.

Mohinder Singh and others

Appellants

Versus

Rajeev Deshwal and others

...Respondents

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA.

Present: Mr. R.P.S.Ahluwalia, Advocate for the appellants.

Mr. S.S.Ghangas, Advocate for respondent no.1.

Mr. Vaneet Soni, Advocate for L.Rs. of respondent no.8

Mr. Rakesh Kumar, Advocate.

G.S.SANDHAWALIA, J.

The present Regular Second Appeal has been filed by the plaintiffs-appellants whereby their suit for possession instituted on 7.5.1990 by way of pre-emption based on the sale deed dated 5.3.1990 was dismissed by the Sub Judge Ist Class, Kaithal vide judgment and decree dated 27.9.1993. The appellants filed Ist appeal before the Lower Appellate Court and the said appeal was dismissed on 5.6.1996 only on the ground that in view of the amendment carried out by the State Government the plaintiffs had no right of pre-emption on the basis of their claim as co-sharers. The operative part of the order reads as under:-

“At the very outset, counsel for the respondents argued that now a co-sharer has no right of pre-emption in view of the recent amendment in the law as it stands today, has been conceded by the learned counsel for the appellants. In view of the situation,

really the appellants/plaintiffs have no right of pre-emption on the basis of their claim as co-sharers. Therefore, having no merit, appeal is dismissed, leaving the parties to bear their own costs. Decree-sheet be prepared accordingly and file be consigned to record room, after due compliance.”

The plaintiffs thereafter filed present Regular Second Appeal which was initially dismissed on 17.10.1996 in limine. The matter was taken to the Apex Court by the plaintiffs-appellants and in view of the judgment of the Apex Court in **Shyam Sunder and another Vs. Ram Kumar and another 2001(8) SCC 24** whereby the issue of retrospectivity was decided by the Apex Court and it was held that rights of the parties in the light of law of pre-emption as it existed on the date of passing of the decree had to be seen and the Appellate Court was not required to take into note the substituted Section 15 introduced by the amending Act. The SLP filed accordingly was allowed and the matter was remanded to this Court for fresh decision vide order dated 14.1.2002.

The above sequence of events would thus go on to show that the First Appellate Court has failed to decide the issue on merits.

It is agreed between the counsel for the parties that the following substantial question of law would arise for consideration in the present Regular Second Appeal:-

“Whether the Lower Appellate Court was justified in not deciding the issue involved in appeal on facts and only dismissing the appeal on the ground that co-sharer has no right of pre-emption in view of the amendment effected by the State Government taking the right of pre-emption on the basis of co-sharer?

It is settled principle that the 1st Appellate Court is the final

Court of fact and this Court is only to decide the substantial question of law raised on the basis of factual findings of fact arrived at. In the absence of such final factual findings of fact having been recorded by the 1st Appellate Court, it would be inappropriate for this Court to decide the present Regular Second Appeal as it would necessarily have to dwell on the issue of facts. Even in view of the judgment of the Apex Court, the issue regarding the right of a co-sharer to file a suit on the basis of a pre-existing right which existed at the time of filing of the suit already stands decided in favour of the appellants.

In such circumstances, the question of law referred to above is answered in favour of the plaintiffs-appellants and the present Regular Second Appeal is allowed and the matter is remanded to the Court of District Judge, Kaithal for fresh decision on merits. The said appeal shall be decided by issuing notice to the concerned parties at the earliest preferably latest by 31st March, 2016.

July 03, 2015
Pka

(G.S.SANDHAWALIA)
JUDGE