

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. RSA No.2693 of 2009 (O&M)

Baldev Raj Sharma

..... Appellant

Versus

Smt. Kanta Devi and others

..... Respondents

2. RSA No.2924 of 2009 (O&M)

Sh. Janak Singh and another

..... Appellants

Versus

Smt. Kanta Devi and others

..... Respondents

Date of Decision: 19.03.2015

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Vipin Mahajan, Advocate,
for the appellant(s).

Mr. R.S. Chauhan, Advocate,
for Respondent No. 1.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.(Oral)

This order disposes of RSA No.2693 of 2009 titled *Baldev Raj Sharma vs. Smt. Kanta Devi and others* and RSA No.2924 of 2009 titled *Sh. Janak Singh and another vs. Smt. Kanta Devi and others*.

This Court would without any hesitation intercede in these twin matters as there is clearly discernible a rather serious flaw in the procedure adopted by the lower appellate court which has led to the passing of the first

appellate judgment reversing the judgment and decree of the trial Court. The serious issue raised before this Court by the learned counsel for the 11th defendant who claims to be a bona fide purchaser of corpus was that his client was not represented by counsel when the lower Judge's appellate judgment was delivered for the reason that he was not served with the summons in appeal and thus had no knowledge of the proceedings.

Having regard to the zimni orders in the order sheet, the judgment and decree and the recorded appearance of the parties in Civil Suit No.224 in the Court of the learned Additional Civil Judge (Sr. Division), Pathankot reveals that the 11th defendant, Baldev Raj Sharma, was represented by Mr. Rajiv Joshi, Advocate, before the trial Judge. It is obvious that the 11th defendant was not ex parte as asserted by the opposite counsel Mr. Chauhan to the contrary.

It is pointed out by Mr.Vipin Mahajan, appearing for the appellant i.e. the 11th Respondent, including his co-respondents No.8 & 9 were not served in appeal by the unsuccessful plaintiffs-respondents herein and resultantly the appeal was dismissed qua them under Order 9 Rule 2 CPC for non-filing of process fee which would have enabled the process serving agency to serve upon them the court summons.

The abrupt dismissal of the appeal under Order 9 Rule 2 CPC led to the filing of an application by the appellant praying for setting aside of the order dated December 10, 2003 which came up for hearing on April 07, 2004 before the learned Lower Appellate Court. Notice of the application was not issued but only copy of the application was directed to be supplied to the opposite party. In these circumstances, the Court should have issued

notice on the application and then called upon parties to supply copy to Sh. Ajay Dadwal, Advocate, the counsel opposite. If notice on the application for recall of the order under Order 9 Rule 2 CPC was not issued or served, the procedure adopted was improper and thus suffers from material irregularity. It is not known why but the application was kept pending without orders till the judgment and decree was passed on February 25, 2009 without caring to pass final orders on the application for restoration of the case qua defendant No.11. When this was the faulty procedure resorted to, then the appellant-11th defendant was grievously injured and prejudiced in his defence of the appeal which has led to a monumental miscarriage of justice. A perusal of the judgment of the Ld. ADJ (Adhoc) Fast Track Court, Gurdaspur reveals that the present appellant was not represented in appeal due to lack of service of summons on him for want of filing the process fee by the appellant/opposite party in the lower appellate court for which inaction he cannot be disadvantaged.

Mr. Mahajan points where the fatal flaw lies in the judgment in appeal where the appearance of Mr. Ajay Dadwal, Advocate counsel for defendant Nos.1 to 6 is alone recorded whereas he did not as a matter of fact represent the 11th defendant.

In the face of this slipshoddiness and material impropriety of the lower appellate court, this Court can do no better than to set aside the judgment in appeal in order to serve the ends of justice and remand the case to the learned lower appellate court for a fresh decision on merits after hearing the 11th defendant, who claims to be the bona fide purchaser of the suit corpus. Needless to say, this order has neither been passed nor touches

upon the facts of the case or expresses any opinion on merits or on any other aspect, other than in correction of the improper procedure followed by the first appellate court in the proceedings where the 11th defendant was neither heard nor represented and has led to a failure of justice.

For the foregoing reason, this appeal is allowed. The judgment and decree of the learned lower appellate court dated February 25, 2009 is set aside. The cases are remanded for a *de novo* decision in appeal after hearing the 11th defendant on his case.

Parties would appear before the learned lower appellate court 07.04.2015 which is presently functioning at the newly created Sessions Division at Pathankot carved out of the Sessions Division, Gurdaspur where the first appeal was decided.

Since the matter is already considerably delayed, it will, and I trust, be the earnest endeavour of the learned lower appellate court to decide the appeal expeditiously on remand and preferably within six months from the first date of effective appearance of the contesting parties. It is accordingly directed but with no order as to costs.

**(RAJIV NARAIN RAINA)
JUDGE**

19.03.2015
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