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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

SAO-48-2010 (O&M)

Date of Decision: 21.12.2015

HARBANS SINGH

.....Appellant

Vs.

MOHINDER SINGH AND ANOTHER

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. D.S. Gurna, Advocate
for the appellants.

Mr. R.P.S. Ahluwalia, Advocate
for the respondent No.1.

Mr. Sanjay Jain, Advcoate
for respondent No.2.

- 1. Whether Reporters of local papers may be allowed to see the judgment ?**
- 2. To be referred to the Reporters or not ?**
- 3. Whether the judgment should be reported in the Digest?**

RAJ MOHAN SINGH, J.

- 1) This appeal has been filed by plaintiff-Harbans Singh
against the judgment dated 12.6.2010 passed by Additional District

Judge, Patiala vide which judgment and decree dated 15.6.2009 passed by Additional Civil Judge (Senior Division), Patiala has been set aside and the case has been remanded back to the trial Court to decide the suit afresh after impleading Manjit Singh as defendant No.2 to the suit.

2) Plaintiff filed suit for specific performance and for possession on the basis of agreement to sell dated 08.07.2005 in respect of 16 kanals of land executed in favour of plaintiff by the defendant whereby defendant agreed to execute the sale deed in favour of plaintiff and received an amount of Rs.3 lacs as earnest money. Total sale consideration was agreed as Rs.12 lac. The date for execution of sale deed was fixed as 31.12.2005 on payment of remaining sale consideration of Rs.9 lacs. The agreement was scribed by the document writer at the instance of the defendant, after receipt of earnest money thereby admitting the contents of the agreement, defendant thumb-marked the agreement. Lakhwinder Singh and Daljit Singh attested the agreement besides the plaintiff. The agreement was entered in the register of the document writer at serial No. 211 dated 08.07.2005. On the target date i.e. 31.12.2005, the plaintiff requested the defendant to get the sale deed executed and offered the amount of the stamp paper and another expenses along with remaining sale consideration, but the defendant put off the matter on the one pretext or the other. 31.12.2005 and 1.1.2006 were Saturday and Sunday, therefore, on

2.1.2006, plaintiff requested the defendant to come to the office of Sub-Registrar, Patiala and also offered the sale consideration and amount of stamp charges etc, but defendant did not reach the office of Sub-Registrar. Plaintiff remained present in the office of Sub-Registrar along with remaining sale consideration and amount towards stamp paper and registration charges till 05:00 p.m. The plaintiff got his presence marked along with an affidavit in the office of Sub-Registrar on 2.1.2006 and was ready and willing to perform his part of obligation. When the plaintiff came to know that the defendant is contemplating to alienate the suit land to Gurdeep Singh and Gurmit Singh sons of Mohinder Singh and has also executed an agreement in this regard, the plaintiff filed the suit.

3) Defendant contested the suit on all counts and claimed that agreement is forged and fabricated and also pleaded that the plaintiff has filed false and frivolous suit against the defendant in the name of his wife and plaintiff is hesitant in coming to the Court and suit is bad for non-joinder of necessary parties. Factum of agreement to sell was denied. Defendant alleged that he never executed any alleged agreement and the same is forged and fabricated and is result of fraud and misrepresentation. Defendant did not receive any amount of Rs.3 lacs as earnest money nor intended to sell the land. Question of executing agreement to sell dated 8.7.2005 did not arise at all. It has been pleaded by the defendant that on 19.6.2003, defendant agreed to sell his land

measuring 16 kanal to the plaintiff and in pursuance of said agreement, plaintiff was put into possession of the land. Plaintiff failed to perform his part of agreement and therefore agreement was cancelled in November 2004, but the plaintiff intended to cultivate the land on payment of theka at the rate of Rs.15,000/- per acre per annum. Defendant received Rs.30,000/- from the plaintiff and allowed him to cultivate the land for one year. Plaintiff promise to surrender the possession of the land to the defendant by November, 2005. In December, 2005, plaintiff stated in the village that defendant has agreed to sell the land to him, upon which defendant met him and plaintiff informed him that he has obtained his thumb impression on an agreement to sell as well as on the register of the document writer. When the plaintiff took him to Tehsil Complex, Patiala on the pretext of executing thekanama in favour of plaintiff and thereafter plaintiff also handed over a copy of alleged agreement to sell dated 8.7.2005 to the defendant. Thereafter, defendant showed the same to his sons and then came to know that on 8.7.2005, plaintiff by way of fraud and misrepresentation took the defendant to Tehsil office on the pretext of executing thekanama in favour of the plaintiff and in collusion with the document writer, his thumb impressions were obtained fraudulently on the alleged agreement to sell dated 8.7.2005 as well as in the register of the document writer. Thereafter, altercation took place between the plaintiff and the

defendant at the house of the plaintiff. Plaintiff admitted his misdeed and acknowledged that the plaintiff had not paid anything to the defendant on 8.7.2005 and further promised that he would not act on the alleged agreement to sell. Defendant took back the possession of the land from the plaintiff. It has been denied that the alleged agreement to sell dated 8.7.2005 was scribed at the instance of the defendant or the defendant received the earnest amount to the tune of rupees 3 lacs from the plaintiff. The document writer did not read over the contents of the alleged agreement to the defendant at the time of obtaining his thumb impression by way of fraud and misrepresentation. Lakhvinder Singh or Baljeet Singh or any other person was not present. Defendant claimed that the agreement to sell is null and void and is a result of fraud and fabrication. Question of readiness and willingness does not arise in the aforesaid context. Suit is claimed to be false and frivolous. After filing replication by the plaintiff, trial court framed the following issues:-

“1) Whether the defendant executed agreement dated 8.7.05 in favour of plaintiff and received Rs.3 lacs from the plaintiff on 8.7.2005?OPP

2) Whether the plaintiff is entitled for the relief of specific performance of contract and sale deed dated 8.7.05 pertaining to the property in dispute?OPP

3) Whether the suit is not maintainable?OPD

4) Whether the plaintiff has filed false and fabricated suit on the basis of forged and fabricated document?OPD

5) Whether the plaintiff has not come to the court with clean hands?OPD

6) Whether the suit of the plaintiff is liable to be dismissed with exemplary costs of Rs.20,000/-? OPD

7) Whether the present suit is bad for non-joinder of necessary parties?OPD

8) Whether plaintiff has no cause of action to file the present suit?OPD.

9) Whether agreement dated 7.2.05 is illegal, null and void and is result of fraud played upon defendant by plaintiff?OPD.

10) Relief."

4) Both the parties led evidence. Trial Court took issues number 1 and 2 jointly and held the same in favour of the plaintiff. Execution of agreement to sell has been proved. Issues number 3 to 8 were not pressed by the defendant. In this way, suit was decreed for possession by way of specific performance of agreement to sell dated 8.7.2015 in favour of the plaintiff. Defendant was directed to execute the sale deed within three months from the date of passing of the decree, failing which, plaintiff shall deposit the balance sale consideration within 15 days, after the expiry of 3 months and also to file an application for execution of the decree.

5) Feeling dissatisfied with the judgment and decree of the trial Court, defendant filed appeal before the lower appellate Court. During the pendency of the appeal, Manjit Singh S/o

Kulwant Singh filed an application for impleading him as party in the appeal on the ground that the appellant Mohinder Singh has sold 44 kanals 1 marla of land including the suit land to him vide registered sale deed dated 21.3.2006 pursuant to agreement to sell dated 18.6.2005 for a total sale consideration of Rs.20,25,000/-. A mutation number 3346 has been sanctioned in the name of Manjit Singh on 3.4.2006. After the purchase of the suit land, Manjit Singh has installed a tubewell after incurring huge expenses and also got an electric connection of the tubewell in the suit land. Manjit Singh has made improvements in the suit land by spending lacs of rupees. Earlier there was an electric motor of 7.5 HP which has been increased to 12.5 HP in May/June 2007 and thereafter, it was increased to 15 HP in June 2009. On the basis of sale deed, Manjit Singh claimed himself to be owner in cultivating possession of the suit land. He claimed that on the basis of subsequent agreement to sell, plaintiff-Harbans Singh is not entitled to get the sale deed in respect of 16 kanals of land in khasra No.11 and 12. He claimed that it was the duty of the vendor-Mohinder Singh or the vendee-plaintiff to give intimation to the applicant-Manjit Singh regarding pendency of suit for specific performance between them. Neither the vendor nor the vendee gave any intimation to the applicant and therefore, he could not know about the pendency of suit. This application was contested by the plaintiff, however, Mohinder Singh admitted the contents of this application to be correct.

Plaintiff-Harbans Singh contested the application by taking objection that the same is not maintainable and application is time barred. Manjit Singh has no locus for impleadment as party to the appeal. Plaintiff took the plea that on the basis of agreement to sell dated 8.7.2005, he has filed the suit for specific performance against the vendor- Mohinder Singh on 8.2.2006. Mohinder Singh appeared and filed written statement on 9.6.2006, but he did not disclose the factum of sale deed dated 21.3.2006 in favour of the applicant in the written statement. Statement of Mohinder Singh was recorded in the Court on 28.4.2008, but at that time also Mohinder singh did not disclose the factum of execution of sale deed dated 21.3.2006 in favour of Manjit Singh. When the plaintiff came to know about execution of sale deed in favour of Manjit Singh, then the plaintiff applied for certified copy of sale deed and produced in the lower Court as Ex.P7. Harbans Singh claimed that the sale deed is the result of collusion and fraud and therefore, application moved by Manjit Singh is not maintainable. Mohinder Singh, appellant before the lower appellate Court submitted that Manjit Singh has filed the application for impleadment on the basis of agreement to sell dated 18.6.2005 and consequent sale deed dated 21.3.2006 and therefore, he has no objection to the application moved by Manjit Singh. He again denied the factum of receiving earnest amount from Harbans Singh on the basis of agreement to sell dated 8.7.2005 and did not agree to execute the

sale deed on the target date. Harbans Singh submitted that he has proved the execution of agreement to sell dated 8.7.2005 by Mohinder Singh and has also proved factum of payment of Rs.3 lacs as earnest money and therefore, he is entitled to get the sale deed executed on filing of the suit. Lower Appellate Court has held that since Manjit Singh has purchased the suit land during pendency of suit on the basis of agreement to sell which was prior to agreement to sell in favour of the plaintiff and on the basis of that agreement, Mohinder Singh executed sale deed of big chunk of land measuring 44 marlas in favour of Manjit Singh on 21.3.2006 and on the basis of that sale deed, mutation has already been sanctioned in favour of Manjit Singh on 3.4.2006, therefore, in order to prove the factum of alleged agreement to sell dated 18.6.2005 executed by Mohinder Singh in favour of Manjit Singh is genuine or not, it would be necessary to implead Manjit Singh as necessary party in the suit. With this background application was allowed by the lower appellate Court and judgment and decree of the trial Court dated 15.6.2009 has been set aside and the case has been remanded back to the trial Court to decide the suit afresh after impleading Manjit Singh as defendant no.2 in the suit.

6) Learned counsel for the appellant has argued that the trial Court decreed the suit after giving elaborated findings under issues no.1, 2 and 9 and the lower appellate Court without setting aside the findings on aforesaid issues has remanded the case in

utter violation of provisions in terms of Order 41 Rule 23, 23A and 25 CPC. Learned counsel relied upon **Suraj Bhan Versus Gram Panchayat Juppa Khurd 2001 (4) RCR (Civil) 666** to contend that Lower Appellate Court could have asked for report under particular issue by framing additional issue and remand was wholly illegal. In **Kartar Singh Vs. Punjab and Sindh Bank and Others 1988 (2) RRR 334**, it has been observed that re-trial by the trial Court is considered necessary only when the Court gives findings on all the issues and the same are set aside by the Lower Appellate Court. The judgment of the trial Court is not to be reversed as a matter of course. In **Harikishan vs. Smt. Anandi 2006 (4) RCR (Civil) 540**, this Court comes to the conclusion that framing of an additional issue and remand of the case on that premise without following procedure in terms of Order 41 Rule 23, 23A and 25 is wholly unjustified. The appellate Court could have asked for the report from the trial Court on the particular additional issue alone. In **P.Purushottam Reddy Vs. M/s Pratap Steels Limited 2002, (2) RCR (Civil) 70**, Hon'ble Apex Court while interpreting Order 41 Rule 23A and 25 CPC ruled that Rule 23 CPC applies only when the trial Court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues. Rule 25 contemplates a limited remand to try on such issues as are referred to it for trial. Lower appellate Court cannot have recourse to its inherent powers to make a remand where

express provisions are available dealing with the situation. The appellate court could have decided the appeal itself on the basis of available evidence as the trial Court has already decided all the issues. Since the remand ordered by the lower appellate Court does not specify under what category the case has been treated for remanding the case before the trial Court. Lower Appellate Court has not reversed the findings recorded under issues no.1, 2 and 9. Solely on the basis of acceptance of application for impleadment of Manjit Singh, the case has been remanded back. It is a settled principle of law that remand cannot be ordered in routine manner to fill lacuna in the evidence for either of the party. The Lower Appellate Court could have exercised powers in terms of Order 41 Rule 23 A and Rule 25 CPC and should have identified the grounds on which remand is to be made to the trial Court for fresh decision. In **Zarif Ahmed (D) through LRs and Another versus Mohd. Farooq 2015 (1) RCR (Civil) 794**, the Hon'ble Apex Court has discussed the powers of Appellate Court to remand the case in rare situation i.e. when the trial Court has disposed of the suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues. Remand makes the parties to wait for final decision of a case for the period which is avoidable in nature. Though Section 107 CPC empowers the Appellate Court to remand a case but at the same time it simultaneously empowered the Court to take additional evidence or to require such evidence

to be taken, it is not a healthy practice to remand a case to the trial Court unless it is necessary to do so as it makes the parties to wait for final decision which can be avoided. The reference was also made to **P. Purushottam vs. Pratap Steels' case (Supra)** to arrive at such a conclusion.

7) In **Smt. Bachahan Devi and Another vs. Nagar Nigam Gorakhpur and Another 2008 (RCR) Civil 367**, the Hon'ble Apex Court held that in a case of framing of fresh issues by the Appellate Court and the defendant having amended the written statement during pendency of first appeal, the Appellate Court, after framing fresh issues, should have exercised discretion under Order 41 Rule 25 CPC and can record the evidence itself and decide the case on merits. The Appellate Court can remand the case on limited issue but this exercise should have been adopted rarely and not in a routine manner. In the event of framing additional issues, the order of remand should not be passed as a matter of course. The Appellate Court has a power to analyse the factual position and can decide the issue and also the additional issue. Even otherwise, the discretion under Order 41 Rule 25 could have been exercised by the Lower Appellate Court. Perusal of the impugned judgment passed by the Lower Appellate Court shows that the Lower Appellate Court has not set aside the findings recorded under issue No.1, 2 and 9 nor any additional issue has been framed by the Lower Appellate Court. The case has been

remanded back to the trial Court with a direction to implead subsequent vendee and then proceed to decide the suit on merits. Since the Lower Appellate Court has not complied with the requirement of Order 41 Rule 23 or 23A or Rule 25 CPC, therefore, it is a fit case in which Lower Appellate Court can be asked to pass fresh judgment on merits, highlighting the grounds and category on which the case is being remanded. Lower Appellate Court would be at liberty to pass appropriate judgment in the light of observations made by the Hon'ble Apex Court in aforesaid judgments.

8) Impleading of Manjit Singh as necessary party by the Lower Appellate Court is fully in consonance with the law laid down by **Kasturi Vs. Iyyamperumal and Others 2005 (2) RCR (Civil) 691.** In **Sumtibai and Others Vs. Paras Finance Company Mankanwar and Others 2007 (4) CCC 593 (SC),** wherein the Hon'ble Apex Court has held that if third party shows some semblance of title or interest in the property in dispute, that party can be impleaded as party to the suit. Reference can be made to the judgment of Hon'ble Apex Court in **Thomas Press (India) Limited Vs. Nanak Builders and Investors (P) Ltd. and others, 2013 (2) Law Herald SC 1240.** To this extent the Lower Appellate Court shall not decide the controversy so far as necessity of impleading Manjit Singh is concerned, however, so far as nature of remand is concerned whether the case needs to be

remanded to the trial Court or otherwise, Lower Appellate Court would be obligated to take decision on merits in view of discussion made above.

9) Therefore, the impugned judgment passed by the Lower Appellate Court is set aside. The case is remanded back to the Lower Appellate Court with a direction to pass appropriate judgment in the light of Order 41 Rule 23, 23A and 25 CPC in accordance with law. Both the parties are directed to appear before the Lower Appellate Court on 29.1.2016.

21.12.2015

SwarnjitS

**(RAJ MOHAN SINGH)
JUDGE**