

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

**SAO NO.29 of 2012
Date of decision:-18.09.2015**

Krishna Devi ... Appellant

Versus

Municipal Corporation, Bathinda and another ... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:- Mr. Rahul Rampal, Advocate
for the appellant.

Mr. Rajinder Sharma, Advocate
for respondent No.1.

RAJ MOHAN SINGH, JUDGE

[1] This appeal has been filed by defendant No.2 against the judgment dated 16.03.2012 passed by Additional District Judge, Bathinda, vide which judgment and decree dated 22.11.2010 passed by Civil Judge (JD) Bathinda were set aside while accepting application under Order 41 Rule 27 CPC read with Section 151 CPC, and case was remanded back to the trial Court for decision afresh after affording opportunity to the plaintiff to lead additional evidence.

[2] Plaintiff-Municipal Corporation Bathinda filed a suit for declaration and permanent injunction on the ground that plaintiff-corporation got constructed 40 shops known as Meat Market and leased out the same to different persons. Some open space was left in front of the shops for proper utilisation of the shop area. Shops No.39 and 40 were of 92.93 square yards and the same were leased out to the defendant No.1 as per scheme. Subsequent notification issued by the Government gave option to the tenants to purchase the shops at concessional prices. Defendant No.1 opted to take benefit of the option and

deposited Rs. 24,567/- for each shop. Ownership rights of the shops were given to the defendant No.1. On 04.06.2002 Corporation came to know that defendant No.1 has got executed two sale deeds in his own favour regarding these shops without any authorisation. He further executed another sale deed in favour of defendant No.2 by mentioning area of the shop as 80 square yards. Show cause notice was issued by the plaintiff to the defendants and sale deeds were challenged on the ground that the plaintiff-Corporation never authorised defendant No.1 to get the sale deeds executed and registered in his own name. Sale deeds were executed in the absence of vendor and the area mentioned therein is more than the actual area as per record.

[3] Defendants contested the suit on all customary pleas. On merits, it has been contended that the person who has filed the suit is not a competent person. Defendant No.1 was lawfully allotted the shops on payment and letter of allotment was issued in his favour and thereafter, he was competent to execute the sale deeds. After completion of pleadings, following issues were framed by the trial Court:-

1. Whether the plaintiff is entitled to the relief of declaration as prayed for? OPP.
2. Whether the plaintiff is entitled to relief of permanent injunction as prayed for? OPP.
3. Whether the plaintiff has no locus standi or cause of action to file the present suit? OPD.
4. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD.
5. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction? OPD.

6. Relief.

Both the parties have led their respective evidence on the aforesaid issues.

[4] Trial Court has observed that since counsel for the defendants has not argued on merits and simply raised legal issues, therefore, trial Court proceeded to discuss the issues first before appreciating the evidence on merits.

[5] Trial Court on the basis of evidence available on record concluded in the following manner:-

(a) The first legal objection raised by defendants is to the effect that the suit has not been filed by any authorised or competent person. Municipal Commissioner of other Corporation is authorised under Section 394 of Punjab Municipal Corporation Act, 1976 to institute such like proceedings and he can delegate his powers to any other officer subordinate to him for instituting legal proceedings. In Para No.1 of the plaint, plaintiff has mentioned that vide Resolution No.143 dated 25.05.2005 and vide Office Order dated 30.05.2005, Commissioner has delegated his powers to Executive Officer, through whom the suit has been filed. However, the plea remained confined to the pleadings as no evidence was lead. The only evidence lead is in the form of PW-1 Harbans Lal, who has not deposed any single word in this regard nor the plaintiff took any step to place the aforesaid material on record i.e. resolution and office order. Trial Court took the view that the case has not been filed through authorised/competent person on behalf of the Municipal Corporation.

(b) The second legal objection is to the effect that the suit is totally time barred. The evidence of the plaintiff is to the effect that the plaintiff came to know about the execution of sale deed in question only on 04.06.2002 and thereafter, suit was filed, but during cross-examination the plaintiffs witness admitted that right from the date of registration of the sale deed, they were

aware of this fact. This witness also admitted that the matter pertained to the year 2001. Trial Court observed in the aforesaid context that the suit has been filed beyond period of limitation.

(c) The third question as posed is to the effect that suit is not maintainable as the relief of possession has not been sought by the plaintiff. Apparently, plaintiff is not in possession and the challenge has been made to some documents, therefore, the plaintiff should have claimed possession because mere declaration qua document of title in favour of defendant will not help to the cause of the plaintiff as the possession of the premises would remain with the defendant. Trial Court discussed the aforesaid plea and found that the shops were sold to defendant No.1 and he is the rightful owner, though the sale deed has not been executed as per Rules, therefore, plaintiff need not to seek possession of the shops. So far as the area is concerned, mere recital in the sale deeds that possession has been transferred to defendant No.2 by defendant No.1 will not suffice to fill the requirement of evidence of taking possession by defendant No.2 on the spot. In view of aforesaid, trial Court held that it was not the requirement on behalf of the plaintiff to seek relief of possession.

[6] On the basis of aforesaid issues raised by the defendants, trial Court ultimately held that since the suit has been filed beyond limitation by an un-authorised person and found that it would not be appropriate to discuss the evidence as the same would be futile exercise. In this way the trial Court held that suit has been filed beyond limitation and by an un-authorised person. Accordingly, issues No.1 and 2 were decided against the plaintiff and issue No.3 was decided in favour of defendant. Issue No.4 was decided in favour of the defendants. No arguments were raised qua issue No.5. Therefore, this issue was decided against the defendants. Consequently, suit was dismissed.

[7] Feeling aggrieved, against the judgment and decree dated 22.11.2010 passed by Civil Judge (JD) Bathinda, the plaintiff preferred first appeal before the Lower Appellate Court and the Lower Appellate court vide its judgment dated 16.03.2012 set aside the judgment and decree dated 22.11.2010 while accepting application under Order 21 Rule 27 and remanded the case back to the trial Court for deciding fresh after affording opportunity to plaintiff to lead additional evidence.

[8] Perusal of the trial Court judgment and decree shows that even though the suit has been dismissed on the ground of limitation and for want of authority in favour of person who filed the suit but still the trial Court decided all the issues. Lower Appellate Court in appeal filed by plaintiff-Municipal Corporation held that the trial Court has dismissed the suit on technical grounds without going into merits of the suit. The suit was dismissed by holding that the same has not been filed by competent person and is also barred by limitation. Lower Appellate Court while referring to Section 394 of the Municipal Corporation Act, observed that Commissioner of the Corporation is fully competent and authorised to institute the suit himself or could have delegated the powers to any other subordinate officers. A proper resolution and office order were issued. Resolution No.43 dated 25.05.2005 was passed by the Municipal Corporation and Office Order was also issued to that effect. However, these documents could not be brought on record during the trial of the suit. Further FIR No.333 dated 06.06.2005 under Section 420 IPC was also registered against defendant No.1 on the basis of letter (Exhibit P-17) of the plaintiff-Corporation. This FIR also could not be brought on record. Lower Appellate Court felt necessity of these documents to be proved on record by way of additional evidence and ultimately held that the trial Court fell in error while dismissing the suit on technical

ground without going into merits of the case. Lower Appellate Court held that an opportunity is required to be given to the plaintiff-appellant to lead additional evidence in order to prove Resolution No.43 dated 25.05.2005, Office Order No.33/9 dated 30.05.2005 and FIR No.333 dated 06.06.2005 as these documents are just and proper for effective adjudication of the case. The Appellate Court while accepting the application under Order 41 Rule 27 CPC read with Section 151 CPC set aside the judgment and decree of the trial Court and remanded the case back to the trial Court for decision afresh after affording reasonable opportunity to the plaintiff to lead additional evidence.

[9] Perusal of the Lower Appellate Court judgment reveals that findings under all the issues have not been discussed. Now question arises as to what are the findings recorded by the trial Court under different issues. Perusal of issues No.1, 2 and 3 arises regarding relief of declaration, permanent injunction and cause of action are totally dependent upon maintainability of the suit. Once the suit itself is found to be time barred and is not filed by authorised person, cumulative effect of these issues would dismiss the suit. Issue No.4 is also to the effect that in case of no authorisation in favour of person filing the suit, plaintiff is estopped by his own act and conduct. Issue No.5 was not pressed by the defendant during the trial, therefore, it could be found that the decision under issues No. 1 to 4 is totally dependent upon the maintainability of the suit either on the basis of limitation and on the basis of proper authorisation in favour of person who filed the suit. Therefore, in view of aforesaid Lower Appellate Court was not legally obliged to reverse trial Court findings on these issues, as issue in question is totally technical in nature which would decide fate of the suit itself by necessary interpretation of evidence under all the issues.

[10] Now the question arises for determination before this Court is

whether:-

“Appellate Court is justified in remanding the case in toto particularly when the issue was of technical nature for which Appellate Court could have taken the additional evidence of its own or could have summoned report of the trial Court on that technical issue?”

[11] It is a settled principle of law that once application for additional evidence is accepted by the Lower Appellate Court, two options are available before the Lower Appellate Court. Firstly, Lower Appellate Court could have recorded evidence on its own or it could have directed the trial Court to do so. The Lower Appellate Court could not have directed the trial Court to dispose of the suit after taking evidence. Such order of remand can be made only in terms of Order 41 Rule 23 or under Order 41 Rule 23 (A). Since the remand has been made only on the basis of acceptance of application for additional evidence, therefore, the Lower Appellate Court was not justified in remanding the case in toto particularly when the decision of the suit itself is based on technical issue which would decide issues No.1 to 4 simultaneously. Therefore no separate findings are required to be given by the trial Court under each of the issue which were already decided by the trial Court i.e. the only issue which is relevant in the context of application for additional evidence. If additional evidence is sufficient to prove the suit even regarding limitation and the competence of person filing the suit, then in such an eventuality the Lower Appellate Court could have decided the appeal itself without making remand of the case to the trial Court or could have asked for the report of additional evidence from the trial Court. In any case, remand of the case in toto before the trial Court in considered opinion of this Court is apparently unjustified.

[12] In view of aforesaid, the appeal is accepted. Impugned judgement

dated 16.03.2012 passed by Additional District Judge Bathinda is set aside. In the light of facts mentioned above, case is remanded back to the Lower Appellate Court for passing fresh order in accordance with law.

September 18, 2015
vanita

(RAJ MOHAN SINGH)
JUDGE