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

SAO No.50 of 2014 (O&M)

Date of Decision: 01.12.2015

Kuldeep Kaur and others

.....Appellants

vs

Darshan Singh and others

....Respondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Rajinder Goyal, Advocate
for the appellants.

Mr. Amit Jain, Advocate
for the respondents.

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]. In this appeal, plaintiffs have assailed the judgment dated 30.05.2014 passed by Additional District Judge, Chandigarh vide which appeal has been accepted and the case has been remanded back to the trial Court after setting aside the same with the direction to allow the defendants to lead evidence on issue No.2 on the basis of reframed issue.

[2]. The original issue No.2 was to the following effect:-

“2. *Whether the Will dated 16.10.2002 is illegal,*

null and void? OPP.”

[3]. Now after re-casting of the issue No.2, the issue reads as under:-

“Whether Ajit Singh @ Inderjit Singh executed the Will dated 16.10.2002?OPD.”

[4]. The pleaded case of the plaintiffs is that they filed suit for declaration that the Will dated 16.10.2002 executed by Ajit Singh @ Inderjit Singh is illegal, null and void. Plaintiffs and defendant No.1, 5 and 6 are owners of House Nos.66 and 68, Sector 20-A, Chandigarh to the extent of 1/4th share each. Plaintiffs also sought relief of cancellation of transfer of ownership of House No.68, Sector 20-A, Chandigarh in the name of defendant No.2, besides seeking mandatory/temporary injunction seeking to restrain the defendants No.1 and 2 from alienating the suit land. They also seek to restrain defendants No.3 and 4 from issuing No Objection Certificate in favour of defendants No.1 and 2 and further seek mandatory injunction directing the defendants No.3 and 4 to transfer the ownership of both the houses in favour of plaintiffs and defendants No.1, 5 and 6 in equal shares.

[5]. Ajit Singh @ Inderjit Singh was owner of House Nos.66 and 68, Sector 20-A, Chandigarh. He died on 07.07.2003 leaving behind defendants No.1, 5 and 6 and Jaswinder Singh,

who died on 04.01.1994 leaving behind plaintiff No.1 as his widow and plaintiffs No.2 to 4 as his children. Plaintiffs were occupying the entire first floor of House No.66, Sector 20-A, Chandigarh comprising of three bed rooms, kitchen, latrine, bathroom and verandah being legal heirs of Jaswinder Singh. The ground floor of aforesaid house was occupied by defendants No.1 and 2, whereas second floor was occupied by defendant No.5 and his family.

[6]. Both the houses i.e. House Nos.66 and 68, Sector 20-A, Chandigarh were purchased by Ajit Singh @ Inderjit Singh from the funds of HUF being Karta as well as Manager of the family. The income was derived from agricultural pursuit in the village. House No.68 was in joint ownership of the family members under possession of tenants. Ajit Singh and sometimes defendant No.1 used to pay 1/4th share of rent to plaintiff No.1, but for the last 2/2½ years no rent was paid by the defendants No.1 and 2 on the ground that tenants were not paying the rent regularly.

[7]. After the death of Ajit Singh, plaintiffs became owner to the extent of 1/4th share in both the houses. Ajit Singh had orally divided the share in the property during his lifetime as per the occupation of the parties in House No.68. Plaintiffs have been occupying first floor of House No.68, whereas Lakhbir Singh

came in possession of first floor and defendant No.1 occupied the second floor of the aforesaid house.

[8]. In July 2005, the plaintiffs came to know about the execution of Will by defendant No.1 in favour of his wife Balwinder Kaur/defendant No.2 by misrepresenting Ajit Singh @Inderjit Singh in respect of House No.68, Sector 20-A, Chandigarh. According to Will both houses were divided into three equal shares, but in para No.2 of the Will the whole situation was changed by showing that House No.68, Sector 20-A, Chandigarh was bequeathed in favour of defendant No.2 alone. [9].

The Will was claimed to be fraudulent and was got executed by playing fraud by defendants No.1 and 2 in connivance with each other. The Will was bearing thumb impression of Ajit Singh, despite the fact that he used to put signatures on the documents. The Will was got drafted by Darshan Singh as per his own wishes. Darshan Singh got House No.68, Sector 20-A, Chandigarh and transferred the same in favour of his wife/defendant No.2 on the basis of alleged Will, but they did not get the ground floor of House No.66, Sector 20-A, Chandigarh which was transferred intentionally to avoid notice to plaintiffs from the Estate Office. Infact Ajit Singh during his lifetime had declared 1/3rd share in favour of each of his sons in both the houses, therefore, transfer

of ownership in favour of defendant No.2 entered by defendants No.3 and 4 was illegal and null and void.

[10]. Defendants No.1 and 2 have openly claimed to transfer the House No.68, Sector 20-A, Chandigarh, fraudulently and on coming to know about the Will and transfer of ownership. Plaintiffs got notice issued under Section 80 CPC to the defendants and also approached them to cancel the same. Seeing the pathetic attitude the suit came to be filed before the trial Court.

[11]. Defendants No.1 and 2 have contested the suit on all fronts. No replication was filed. On the basis of pleadings of the parties, following issues were framed by the trial Court:-

- “1. Whether the plaintiffs are occupying the entire 1st floor of House No.66, Sector 20-A, Chandigarh, through tenancy? OPP*
- 2. Whether the Will dated 16.10.2002 is illegal, null and void? OPP*
- 3. Whether the suit is not maintainable? OPD*
- 4. Whether the plaintiffs are not having locus standi to file the present suit? OPD*
- 5. Whether the suit of the plaintiff is bad for misjoinder of parties? OPD*
- 6. Relief.”*

[12]. Both the parties led their respective evidence to prove their case on the aforesaid issues.

[13]. Issue No.1 was decided in favour of plaintiffs and against the defendants by the trial Court. Onus of this issue was on the plaintiffs with regard to possession over the first floor of House No.66, Sector 20-A, Chandigarh through tenants. The defendants No.1 and 2 admitted the possession of plaintiffs No.2 to 4 over the said portion. Since the plaintiffs No.2 to 4 did not dispute the possession of plaintiff No.1, therefore, all the plaintiffs were found to be in possession of first floor of the above said house through their tenants, therefore, this issue was decided by giving the aforesaid findings.

[14]. Issues No.2 to 4 were jointly discussed by the trial Court and with reference to evidence on record the trial Court came to the conclusion that the Will relied upon by defendants No.1 and 2 is not admissible in evidence. The execution of Will has not been proved on record as required under law. The Will is held to be shrouded with suspicious circumstances. The trial Court held the Will to be illegal and plaintiffs have all the *locus standi* to file the present suit which was held to be maintainable by the trial Court. Issues No.2 to 4 were decided in favour of plaintiffs and against the defendants No.1 and 2.

[15]. Under issue No.5, the onus was on the defendants, but

the defendants did not lead any evidence, nor pressed the same, therefore, suit was held not bad for misjoinder of necessary parties. Under issue No.6, suit was ultimately decreed thereby declaring the Will dated 16.10.2002 to be illegal.

[16]. Plaintiffs and defendants No.1, 5, and 6 have been held to be owners of House Nos.66 and 68, Sector 20-A, Chandigarh to the extent of 1/4th share each. Transfer of House No.68, Sector 20-A, Chandigarh in the name of defendant No.2 alone has been set aside. Decree for mandatory injunction has been passed in favour of plaintiffs and against defendants No.3 and 4 to transfer the suit property to the extent of 1/4th share each in favour of plaintiffs collectively being legal heirs of Jaswinder Singh son of late Sh. Ajit Singh @ Inderjit Singh and defendants No.1, 5 and 6 on completion of formalities.

[17]. Feeling aggrieved against the aforesaid judgment and decree dated 24.09.2011 passed by the Civil Judge (Jr. Divn.), Chandigarh, defendants No.1 and 2 ventured to file appeal before the Additional District Judge, Chandigarh.

[18]. Lower Appellate Court observed that onus to prove the Will in question is always on a person who propounds the same. The propounder has to prove the execution of the Will and he is always under obligation to explain all types of

suspicion which may be pointed out about the Will in question.

[19]. The trial Court framed issue No.2 and onus to prove this issue was fastened upon the plaintiffs. According to lower Appellate Court, the onus was misplaced. With this background, the lower Appellate Court held that it would be appropriate if an opportunity is afforded to the defendants No.1 and 2 to lead evidence to prove the original Will. Lower Appellate Court also observed that it would be necessary and appropriate if issue No.2 is re-framed and the parties are given due opportunity to lead evidence on the issue so re-framed and it would enable the Court to adjudicate the controversy in an effective manner. The issue being re-framed reads as under:-

“Whether Ajit Singh @ Inderjit Singh executed the Will dated 16.10.2002 ? OPD.”

[20]. In the light of aforesaid, lower Appellate Court accepted the appeal, remanded the case back to the trial Court with direction to allow the defendants to lead evidence on issue No.2 so re-framed in the aforesaid manner and it was held that the plaintiffs would also be allowed to lead evidence in rebuttal. Parties were directed to be given two opportunities each to lead evidence on issue No.2 and, thereafter the case shall be decided afresh by the trial Court.

[21]. In order to appreciate the nature of remand, it would be

necessary to have a glance over necessary provisions in terms of Order 41 Rules 23, 23-A and 25 CPC.

[22]. Order 41 Rule 23 CPC deals with remand of case by Appellate Court where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded.

[23]. Order 41 Rule 23-A CPC deals with remand in other cases where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23 CPC.

In such eventuality Court has to set aside findings on all the issues and thereafter case can be remanded for fresh decision before the trial Court.

[24]. Order 41 Rule 25 CPC deals with the situation where the Appellate Court may frame issues and refer them for trial to the Court whose decree appealed from.

[25]. In the instant case since issue has been re-framed, therefore, the Court could have availed two options firstly the

lower Appellate Court could have recorded evidence of its own or it would have directed the trial Court to do so. Lower Appellate Court could not have directed the trial Court to dispose of the suit after taking such evidence without setting aside the findings recorded under all the issues. Such order of remand can only be made in terms of Order 41 Rules 23 or 23-A CPC that too after setting aside the findings recorded by the trial Court under all the issues.

[26]. Apparently, the lower Appellate Court has not touched the findings recorded under different issues. The findings under all the issues except issue No.2 remained intact, but the lower Appellate Court has remanded the case only on the basis of re-framing of issue No.2, thereby obligating the trial Court to record evidence on this issue and decide the suit afresh.

[27]. For decision of the suit afresh, the trial Court should be given free hand in terms of no impediment on all the recorded findings under different issues, otherwise trial Court would not be in a position to recall its own findings recorded under different issues, therefore, the impugned order of remand is totally silent about the nature of remand which is being made to the trial Court, whether it is under Order 41 Rule 23 CPC, Rule 23-A CPC or Rule 25 CPC?

[28]. It would be just and expedient to ask the lower

Appellate Court to apply its mind afresh and pass the appropriate order on the basis of available material that whether it intended to remand this case under Order 41 Rule 23 CPC, under Order 41 Rule 23-A or under 41 Rule 25 CPC?

[29]. With these observations, the impugned judgment of remand is set aside. The case is remanded back to the lower Appellate Court to decide the appeal afresh in the light of observations as mentioned above.

[30]. Disposed of.

December 01, 2015

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**(RAJ MOHAN SINGH)
JUDGE**