

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

**RSA No.522 of 1998 (O&M)
Date of Decision-18.07.2016**

Bhuru ... Appellant

Versus

Chandgi Ram and others ... Respondents

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

Present: Mr. Akshay Bhan, Sr. Advocate with
Mr. Santosh Sharma, Advocate for the appellant.
Mr. Sanjay Mittal, Advocate for the respondents.

RAJ MOHAN SINGH, J.

[1]. This appeal was filed by Bhuru who was successor-in-interest of Matadeen/defendant in the original suit.

[2]. A suit for possession was filed by respondents against Matadeen brother of Bhuru on the ground that Matadeen had pre-empted the sale of 13 kanals of land in aforesaid Suit No.104 dated 24.05.1980 titled as Matadeen Vs. Chandgi Ram and others. The said land was sold by one Gopal son of Ganga Ram for a sale consideration of Rs.19500/- in favour of plaintiffs Chandgi Ram and others vide registered sale deed dated 20.06.1979. The suit was decreed by Sub Judge, First Class, Rewari vide judgment and decree dated 25.08.1981 subject to depositing Rs.19,500/- as a sale consideration of Rs.2437.50/- as stamp charges minus 1/5th pre-emption money already deposited by Matadeen. The amount was to be deposited on or before 25.09.1981.

[3]. Appeal against the judgment and decree dated 25.08.1981 was dismissed by Additional District Judge-II, Narnaul vide judgment and decree dated 31.05.1984. Matadeen remained successful in further appeals upto the level of Hon'ble Supreme Court. Matadeen had in execution of aforesaid decree statedly taken possession of the suit land on 05.03.1983.

[4]. Plaintiff-Chandgi Ram and others by way of suit for possession alleged that Matadeen pre-emptor in the suit for pre-emption had not deposited the full decretal amount of Rs.21937.50/- as per terms of the decree dated 25.08.1981 and deposit was made short by Rs.500/- and therefore, Matadeen did not acquire any right title or interest in the suit land and the alleged delivery of possession in pursuance to pre-emption decree was inconsequential or ineffective on the rights of the plaintiffs who were owners and possession of the plaintiffs in the suit land. They further claimed that the defendant be restraint from interfering in their possession. Alternatively, plaintiff pleaded that in the event of plaintiffs being not held to be in possession of the suit land on the date of filing of the suit or they were found to be dispossessed during pendency of the suit then a decree of possession of the suit land be granted in their favour and defendant be restraint from alienating the suit and creating any encumbrance over the suit property.

[5]. Defendant-Matadeen contested the suit. He claimed that he had duly deposited the decretal amount of Rs.21437.50/- as per terms of the decree-sheet in the above referred pre-emption suit and the plaintiffs had no *locus standi* and cause of action to file the present suit. The claim of the plaintiffs was stated to be contradictory inasmuch as that they claimed themselves to be owners in possession and on the other hand, they sought possession of the land in question.

[6]. After filing replication, parties went to trial on the following issues:-

“1. Whether the plaintiffs are owners in possession of the suit land, as alleged? OPP

2. Whether the suit is not maintainable in the present form? OPD

3. Whether the plaintiffs are estopped from filing the present suit by their own act and conduct? OPD

4. Whether the plaintiffs have no locus standi to file the present suit? OPD

5. Relief.”

[7]. Both the parties led their respective evidence to prove their case. Trial Court decreed the suit vide judgment and decree dated 06.09.1994, declaring the plaintiffs to be owners in possession of the suit land and defendant was restraint from interfering in the possession of the plaintiffs and creating any encumbrance on the strength of decree dated 25.08.1981 passed

in suit for pre-emption. The decree of pre-emption was held to be automatically dismissed on 25.09.1981 on account of non-deposit of the decretal amount as ordered by the Court.

[8]. Defendant-Matadeen went in appeal before the Lower Appellate Court against the judgment and decree of the trial Court. Lower Appellate Court dismissed the appeal vide judgment and decree dated 13.02.1998 thereby affirming the judgment and decree of the trial Court. That is, how, present regular second appeal came to be filed.

[9]. I have heard learned counsel for the parties and have also perused the record.

[10]. It was admitted case between the parties that defendant-Matadeen was successful in obtaining a decree of pre-emption by pre-empting the sale of the suit land vide judgment and decree dated 25.08.1981 passed by Sub Judge, First Class, Rewari in Civil Suit No.104 of 1980. The operative part of the judgment Ex.PW9/2A was in the following manner:-

“In view of my findings on the above said issues, suit of plaintiff for possession by way of pre-emption over the land in dispute is hereby decreed, subject to plaintiff depositing Rs.19500/- as sale price Rs.2437.50 paise as stamp charges (minus 1/5th pre-emption money, already deposited) on or before 25.09.1981. In case of default being made by plaintiff in depositing the said amount on or before that day, suit of plaintiff will be

deemed to have been dismissed. In either case parties are left to bear their own costs of these suit.”

[11]. Plaintiffs alleged that Matadeen made a deposit which was short by Rs.500/-. He was required to deposit Rs.21937.50/- consisting of Rs.19500/- as sale consideration and 2437.50/- as stamp charges. Out of total Rs.21937.50/-, Matadeen only deposited Rs.21437.50/- and therefore, a short tender of Rs.500/- was made by Matadeen. It was admitted by Matadeen while appearing as DW1 that he was required to deposit Rs.21500/- as sale consideration (less Zarapanjam) besides Rs.2437.50/- as stamp charges. He asserted that he made correct deposit and denied the deposit was short by Rs.500/-.

[12]. Before the lower Appellate Court, Matadeen-defendant also moved an application for leading additional evidence to the effect that copy of decree-sheet was very material piece of evidence in order to know whether decretal amount was paid or not. A copy of decree-sheet of aforesaid Civil Suit No.104 of 1980 dated 25.08.1981 sought to be tendered by way of additional evidence. A copy of judgment in Civil Suit No.104 of 1980 titled as Matadeen and Chadgi Ram and others decided on 25.08.1981 was already on record as PW9/2A. Matadeen claimed that there was mistake in the decree-sheet and therefore, he wanted to file the same on record as additional evidence and the document was very material for just decision of the case. The prayer of Matadeen for leading additional evidence was rejected by the lower Appellate

Court. The lower Appellate Court dismissed the appeal by relying upon the copy of judgment Ex.PW9/2A only.

[13]. In view of Full Bench judgment of this Court in **Ganpat Vs. Smt. Ram Devi and others 1977, PLR Page 1**, framing of question of law was having no effect on the maintainability of the appeal. However, in view of amendment of Section 100 CPC, framing of substantial question of law is *sine qua non* for maintaining regular second appeal in this Court. Prior to amendment, the appeal could have been filed on the ground set out in clauses (a) to (c) of Section 100(1) CPC. Now second appeal requires substantial question of law to be framed. The interference cannot be made only because the order is contrary to law, but when the disputed issues raised a substantial question of law. Limiting such a power in the Appellate Authority is based on public policy having roots in the maxim "*interest reipublicae ut sit finis litium*".

[14]. Though no substantial questions of law have been framed, however, this Court proceeded to consider:-

"Whether decree dated 25.08.1981 sought to be adduced as additional evidence before the lower Appellate Court was liable to be allowed in additional evidence being essential and material document for just and substantial justice between the parties?"

[15]. I have considered the material on record. Learned counsel for the appellant has vehemently argued that decree dated 25.08.1981 was a lawful decree and should have been allowed to be adduced in additional evidence before the lower Appellate Court. In the present appeal, appellant has assailed the non-acceptance of application for additional evidence before the lower Appellate Court in para 8 of the grounds of appeal which reads as under:-

“That the appellant wished to bring on the record the decree of the Court by way of additional evidence on the compliance of the decree was important, but this application has been wrongly dismissed and the lower Appellate Court has ignored the legal aspect that the decree is to be complied with. That even otherwise for the fault of the officials of the Court the bona fide litigant was not to suffer, as has been held by this Hon’ble Court.”

[16]. Apparently, judgment dated 25.08.1981 passed in the pre-emption suit was already exhibited as PW9/2A. Decree was the formal expression of the judgment and was in fact drawn along with judgment dated 25.08.1981. The said judgment and decree was affirmed in the appeal on 31.05.1984 and was further maintained right upto the Hon’ble Apex Court. In my considered opinion the decree drawn along with judgment dated 25.08.1981 should have been allowed by the lower Appellate Court in exercise of powers under Order 41 Rule 27 CPC.

[17]. According to learned counsel for the appellant, maxim “*Actus curiae neminem gravabit*” squarely applies to the instant case as according to pre-emption decree, the defendant-appellant was required to make the deposit of certain amount as shown in the decree. The decree holder made the deposit of requisite amount and if later on the amount was found deficient in terms of judgment than the error was attributable to the Court in drawing the decree and said mistake should have been rectified by the Court and parties were required to be relegated to the position as existed on the date of deposit. Learned counsel relied upon **Jang Singh Vs. Brij Lal and others, AIR 1966 Supreme Court 1631** and **Jatti and others Vs. Dhani and others, 1970 PLJ 562.**

[18]. On the other hand, learned counsel for the respondents placed reliance upon **Naguba Appa Vs. Namdev, 1954 AIR (SC) 50** to contend that the pre-emptor was required to comply with the directions regarding deposit of amount within the fixed time. The dismissal of the suit of pre-emption by reason of his default in not depositing the pre-emption amount within the time fixed was the result of mandatory provision in terms of Order 20 Rule 14 CPC and was not by reason of any decision of the Court. Apparently, word ‘decree’ has appeared in the context of Order 20 Rule 14 CPC. It is the decree against whom the appeal is to be preferred and alteration, if any, is to be made by the appellate Court in the decree itself because it is only the decree which is to be executed.

[19]. Learned counsel further emphasized that an omission to incorporate the direction in the decree that if the deposit was not made within the time fixed, the suit will stand dismissed, could not in any way affect the rights of the party. The emphasis tried to be projected was that the pre-emptor was bound to comply with the directions in the decree. If the decree was not drawn in accordance with the provisions of Order 20 Rule 14 CPC and it did not contain the direction to the effect that if the deposit was not made within the time fixed, the suit will stand dismissed was inconsequential because dismissal of the suit was the result of mandatory requirement of law in terms of Order 20 Rule 14 CPC and not by the reason of any decision of the Court and such omission to incorporate the direction in the decree could not in any way affect the rights of the party.

[20]. Having perused the aforesaid judgment, I am of the view that it was not the direction which was not contained in the decree, rather it was the exact amount which was not contained in the decree and the same was ordered to be made within a specified period. Instant case is not the case of not incorporating the direction regarding time within which the amount was to be paid, rather, it is a case of non-mentioning of exact amount in the decree which was required to be deposited within the time fixed, therefore, the cited judgment has no applicability to the facts of the instant case where the exact amount was in question and not the

direction regarding time within which the amount was to be deposited.

[21]. Learned counsel for the respondents also relied upon **Labh Singh and others Vs. Hardayal etc., 1977 PLR 417**. In the aforesaid case, the controversy was whether objections having not been taken in appeal would be deemed to have been waived in execution proceedings. It was held that such objections if taken in appeal were not barred by the principle of res judicata. There cannot be any dispute in respect of aforesaid proposition, but the fact remains whether non-mentioning of exact amount in the decree and deposit made by decree holder pursuant to the said decree would be fatal if the amount was ultimately found to be not in consonance with the judgment passed along with decree.

[22]. Learned counsel for the respondents also relied upon Dinesh minor son of **Rama Nand and another Vs. Lal Singh and others, 2007(2) RCR (Civil) 864** to contend that it was mandatory for the decree holder to deposit the pre-emption money within the time fixed by the Court in the decree. The perusal of this judgment also reveals that it was the decree which was to be perused and not the judgment. The direction in the context of amount was essentially a backbone for the controversy involved in the present case. The others judgments relied upon by learned counsel for the respondents i.e. **Mst. Ghammo Vs. Chahat, 1970 PLJ 176, Sulleh Singh Vs. Sohan Lal, 1975 PLJ 400, Jagtar Singh and**

another Vs. Kartar Singh and others, 1979 PLJ 205 (DB), Jit Singh and another Vs. Ram Murti, 1973 PLJ 716 (DB) and **Kirpa Ram Vs. Ghasi, 1981 PLJ 257** are the precedents dealing with default in making deposit of full decretal amount.

[23]. As per pre-emption decree drawn up in accordance with Order 20 Rule 14 CPC, the Executing Court has jurisdiction to decide the objections even if not taken up by the decree holder in appeal arising out of the said decree as the same was not taken away by Section 3 of Punjab Pre-emption Act, 1973.

[24]. In the light of discussion made hereinabove, only decree was to be complied with in the context of depositing or non-depositing of the amount within the time specified. In the instant case, a specific amount was mentioned in the decree and in the opinion of this Court, decree was to be complied with. It was not the case of the respondents that amount was not deposited within the time as specified in the decree. It was an amount itself which was claimed to be not requisite amount. In any case the amount mentioned in the decree was legally required to be ascertain for which an application under Order 41 Rule 27 CPC was moved before the lower Appellate Court. In considered opinion of this Court, application should have been allowed and thereafter, the lower Appellate Court should have decided the appeal on merits.

[25]. Order 41 Rule 23/23-A/25 CPC deals with a situation where the Court from whose decree an appeal is preferred, has

disposed of the appeal upon a preliminary point and the decree is reversed in appeal by the Appellate Court. The Appellate Court if thinks fit by order of remand may further direct the trial Court to try the issue/issues and remand the case to the Court from whose decree appeal is preferred and directions to return the suit on its original number and proceed to determine the suit on the basis of material available. Similarly, in terms of Order 41 Rule 23 CPC, the Court from whose decree, an appeal is preferred has decided the case otherwise than on a preliminary point and the decree is reversed in appeal and re-trial is considered necessary. The Appellate Court has powers under Order 41 Rule 23 CPC. Again in terms of Order 41 Rule 25 CPC, the situation arises where the Appellate Court frames issues and referred them to the trial Court, whose decree is appealed from, and in such case the Appellate Court may direct the trial Court to take additional evidence and return the evidence to the Appellate Court together with findings thereon within such time as may be prescribed by the Appellate Court.

[26]. At this juncture, without commenting upon the merits of the case in view of law laid down by different Courts including the Hon'ble Apex Court, lest it may prejudice the case of any side, it will be appropriate to direct the lower Appellate Court to admit additional evidence of the appellant. Since, the additional evidence which was sought to be produced before the lower Appellate Court

was a decree dated 25.08.1981, which was drawn in pursuance of

the judgment in pre-emption suit dated 25.08.1981 Ex.PW9/2A, therefore, the authenticity and genuineness of the decree was not in question. On acceptance of said decree in additional evidence, it would be lawful on the part of the lower Appellate Court to decide the appeal on its own merits.

[27]. According to this Court, it would be just and expedient to take recourse to the provisions of remand in terms of Order 41 Rule 23/23-A/25 CPC and remand this case to the lower Appellate Court with a direction to admit additional evidence sought to be adduced by the appellant and after acceptance thereof, lower Appellate Court would be obligated to decide the appeal on merits. As a result of this, this appeal is accepted and decree passed by the lower Appellate Court is set aside. This case is remanded back to the lower Appellate Court to decide the appeal afresh in the manner as indicated above.

(RAJ MOHAN SINGH)
JUDGE

18.07.2016

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