

SAO-48 of 2011 (O&M)

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In the High Court of Punjab and Haryana at Chandigarh

SAO-48 of 2011 (O&M)
Date of Decision:29.8.2016

Major Singh

---Appellant

vs.

Balwinder Singh

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. BBS Sobti, Advocate
for the appellant

Mr. Amarjit Markan, Advocate
for the respondent

Rekha Mittal, J.

The present appeal has been directed against order dated 3.2.2011 passed by the District Judge, Ludhiana whereby appeal preferred by Balwinder Singh (unsuccessful defendant) against the judgment and decree 26.11.2007 passed by the Additional Civil Judge (Senior Division),

Khanna has been allowed, judgment and decree was set aside and the matter was remitted to the trial court for disposal of the suit along with civil suit titled “Nirmal Singh vs. Balwinder Singh” pending in the trial court.

Counsel for the appellant has submitted that Major Singh filed a suit for possession by way of specific performance of agreement to sell dated 5.1.2001 on the premise that the respondent/defendant agreed to sell the suit land for a sale consideration of Rs. 2,10,000/- and received Rs. 2,00,000/- as earnest money. The sale deed was agreed to be executed and registered on 1.1.2004. He always remained ready to perform his part of the agreement and is still ready and willing to do so. The suit was contested by Balwinder Singh by filing written statement. He denied execution of agreement to sell, receipt of earnest money and his liability to execute the sale deed on the basis of agreement to sell propounded by the plaintiff. The defendant raised a plea that he borrowed Rs.50,000/- and Rs. 10,000/- respectively and had been paying interest at the rate of 2% per month. In the year 2001, the plaintiff insisted upon him either to return the amount of Rs. 1,00,000/- or to execute some document as security. Since he was not in a position to return loan amount, he executed document dated 5.1.2001 as

security and never intended to sell suit land.

The trial court framed issues, permitted the parties to adduce evidence in support of their respective claims and the proceedings culminated in the judgment and decree dated 26.11.2007 whereby suit of the appellant for specific performance of the agreement was allowed. The Court of appeal on the basis of application filed by one Nirmal Singh, a stranger to the agreement to sell and adopting a unique procedure unknown to law, accepted the appeal, set aside the judgment and decree and remanded the case for decision afresh alongwith civil suit titled “Nirmal Singh vs. Balwinder Singh” pending in the Court. It is vehemently argued that the order passed by the Court of Appeal, by no stretch of imagination can be brought within the ambit and purview of relevant provisions of Order 41 of the Code of Civil Procedure (in short “CPC”) dealing with remand of a case by the Court of Appeal. It is prayed that the impugned order may be set aside and the matter may be remitted to the Court of Appeal to decide the appeal, in accordance with law.

Counsel for the respondent, on the contrary, has submitted that Rule 23-A of Order 41 CPC empowers the Court of Appeal to reverse the

decree if a retrial is considered necessary. It is argued that as a suit was filed by Nirmal Singh against respondent Balwinder Singh for specific performance of agreement to sell qua the suit land, in order to avoid conflicting judgments being passed in two different suits. one filed by the appellant and the other by Nirmal Singh wherein the defendant is common, the Court of Appeal rightly set aside the judgment and decree and remitted the matter to the trial court for decision of the suit filed by the appellant alongwith the suit filed by Nirmal Singh titled “Nirmal Singh vs. Balwinder Singh.

I have heard counsel for the parties, perused the paper book particularly the order impugned.

In para 9 of the order, there is reference to an application filed by one Nirmal Singh on the plea that prior to the agreement in question, Balwinder Singh (appellant therein) had executed an agreement of sale in respect of suit land dated 12.6.2000 and possession thereof is with him and he is protected under Section 53-A (wrongly mentioned as 53) of the Transfer of Property Act. He has filed a suit for specific performance of agreement which is pending in the trial court. He challenged the agreement

of sale propounded by Major Singh on the premise that the same is a sham document, result of conspiracy between the parties to frustrate his claim on the basis of agreement of sale dated 12.6.2000. Another application was moved for setting aside the judgment and decree for disposal of the suit along with civil suit titled “Nirmal Singh vs. Balwinder Singh” pending in the Court of Civil Judge (Junior Division), Ludhiana.

The Court of Appeal in view of its observation recorded in para 11 to 14 of the judgment eventually concluded in para 16, quoted hereinunder:-

“Needless to say the application of one Nirmal Singh for his impleadment in this appeal becomes redundant and is hereby dismissed, while application for remand of suit, after setting aside judgment and decree for disposal of suit along with civil suit titled Nirmal Singh vs. Balwinder Singh, now pending in the Court of Sh. Balwant Singh, Civil Judge (Junior Division), Ludhiana, is accepted.”

The Court dismissed application of Nirmal Singh for

impleadment having become redundant but at the same time allowed his application for remand of suit after setting aside the judgment and decree passed in favour of Major Singh. It is astonishing rather mystifying that if Nirmal Singh could not be a party either in the suit instituted by the appellant or in the appeal preferred by respondent Balwinder Singh, how and under what provision of law, an application of a third party to the lis could be entertained by the Court to set aside the judgment and decree and remit the matter to the trial court for decision afresh. The reasoning adopted by the court and the manner in which the appellate court has proceeded with to set aside the judgment and decree without finding any fault in the findings recorded by the trial court cannot stand the test of judicial scrutiny and liable to be set aside. The contention raised by counsel for the respondent by relying upon the provisions of Rule 23-A is misconceived and merits rejection. The Court has not reversed the decree passed by the trial court with the findings that a retrial is considered necessary by invoking Rule 23-A, therefore, the said provision is not available for being invoked by the respondent/judgment debtor.

For the foregoing reasons, the appeal is allowed, the impugned

order is set aside and the matter is remitted to the Court of Appeal for decision of the appeal on merits. However, any application filed by the respondent before the Court of Appeal would be decided, in accordance with law.

Parties through their counsel are directed to appear before the Court of Appeal on 30.9.2016.

(Rekha Mittal)
Judge

29.8.2016
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No