

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

**SAO No.66 of 2011 (O&M)
Decided on: 18.03.2016**

Dilbag Singh and another

....Appellants

Versus

Surinder Pal Singh and others

....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

Present: Mr. Harsh Aggarwal, Advocate
for the appellants.

Mr. Amit Jain, Advocate
for respondents No.1 and 2.

REKHA MITTAL J.

The present appeal (SAO) has been directed against the judgment dated 29.08.2011 passed by the Additional District Judge, Ludhiana, whereby the appeal preferred by the respondents/defendants against the judgment and decree dated 22.03.2006 passed by the Civil Judge (Senior Division), Jagraon (hereinafter to be referred as 'the trial Court') has been allowed, the judgment and decree passed by the trial Court is set-aside and the matter is remanded to the trial Court for decision afresh after carefully and properly scrutinizing the evidence (oral and documentary) adduced by the parties.

The appellants/plaintiffs filed a suit for declaration claiming to be co-owners in equal share *qua* the suit land on the allegations that Charanjit Kaur and Surinder Pal Singh-defendants sold land measuring 15 kanals 10 marlas vide sale deed dated 26.04.1995.

Baljit Singh-defendant No.3 sold 13 kanals 4 malras of land vide sale deed dated 22.11.1989 to the plaintiffs and mutation on the basis of aforesaid sale deeds was sanctioned in their favour. A civil litigation was pending between some parties including Charanjit Kaur and Sukhdev Singh and others in connection with the same land. The said suit was dismissed vide judgment and decree dated 27.05.1986 but during pendency of appeal, matter was compromised, Charanjit Kaur, etc. were declared owners of land measuring 158 kanals 12 marlas and Malkit Singh and others of land measuring 80 kanals. The decree was framed on 20.08.1997 as per directions issued by the High Court of Punjab and Haryana. The possession as per decree was exchanged and mutation was also sanctioned in respect of the decree. The land measuring 19 kanals 9 marlas has gone out of the aforesaid sale deeds as per the compromise and the plaintiffs are entitled to get equal area from remaining land of the defendants and also entitled for possession of the same.

Defendants No.1 and 2 filed their joint written statement raising certain preliminary objections *inter alia locus standi* of the plaintiffs to file the suit; suit being not maintainable in the present form; suit without any cause of action; not properly valued for the purpose of court fee and jurisdiction and the plaintiffs being estopped by their act and conduct to file the suit. The factum of execution of sale deed dated 26.05.1995 and delivery of possession of land measuring 15 kanals 10 marlas in pursuance of the sale was admitted. They have no concern with sale deed dated 22.11.1989 as well as mutation No.3977.

It is averred that plaintiffs had full knowledge regarding the previous litigation. In spite of passing of decree, possession was not changed nor delivered by the defendants.

Defendant No.3-Baljeet Singh did not contest the proceedings and was proceeded against *ex parte*.

The trial Court framed the following issues for determination:-

1. *Whether the plaintiffs are entitled for declaration as prayed for? OPP.*
2. *Whether the plaintiffs are entitled for possession of the suit property as prayed for? OPP.*
3. *Whether the plaintiffs have got no locus standi to file the present suit? OPD.*
4. *Whether the suit of the plaintiff is not maintainable? OPD.*
5. *Whether the plaintiffs are stopped by their act and conduct to file the present suit? OPD.*
6. *Whether the plaint does not disclose any cause of action against the answering defendants No.1 and 2? OPD.*
7. *Whether the plaint has not been properly valued for the purpose of court fee and jurisdiction? OPD.*
8. *Relief.*

After having heard counsel for the parties in the light of materials on record and submissions made by counsel for the parties, the learned trial Court answered Issues No.1 and 2 in favour of the

appellants/plaintiffs whereas Issues No.3 to 7 were decided against the respondents/defendants with the observations that the same were not pressed by counsel for the defendants. As a natural corollary, suit of the plaintiffs was decreed and they were declared co-owners in equal shares i.e. $\frac{1}{2}$ share each with rights appurtenant thereto of land measuring 19 kanals 9 marlas out of land measuring 32 kanals 17 marlas, detailed in headnote of the plaint.

The judgment and decree passed by the trial Court was assailed by Surinder Pal Singh and Charanjit Kaur-respondents No.1 and 2 and the First Appellate Court allowed the appeal, set-aside the judgment and decree of the trial Court and the matter was remitted to the trial Court for decision afresh.

Counsel for the appellants has argued with vehemence that the order of remand passed by the First Appellate Court, in no manner whatever, falls within the purview of Order 41 Rule 23 or 23-A of the Code of Civil Procedure (in short 'CPC'). It is argued that assuming though not admitting that the trial Court had failed to take into consideration any evidence adduced by the appellants, the Appellate Court is well within its power to consider that evidence as the Appellate Court is empowered to re-appraise and re-appreciate the entire evidence in order to find out if the decision by the trial Court on the issues or a particular issue is liable to be sustained or otherwise. It is further argued that as there was no dispute between the parties with regard to execution of sale deeds and the decision in the litigation vide documents Ex.DX/1 and DX/2, there was no reason for the Appellate

Court to set-aside the judgment and decree passed by the trial Court particularly in the circumstances that even the respondents never intended to lead any further evidence nor the trial Court has expressed any opinion that any fresh issues arises in the circumstances which has a bearing on the issues already decided by the trial Court. In support of his contention, he has referred to judgment of the Hon'ble Apex Court "**Municipal Corporation, Hyderabad vs Sunder Singh**", 2008(4) RCR (Civil) 850, wherein it has been held in para 11, quoted thus:-

"It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order XLI Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial Court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties."

Counsel for the respondents, on the contrary, has supported the judgment passed by the Court in appeal with the submissions that no prejudice would be caused to the appellants in case the trial Court re-considers the matter and decide the case afresh particularly in the circumstances that no fresh evidence is to be adduced by the parties. It is further argued that the learned trial Court did not advert to the documentary as well as oral evidence adduced and decided Issues No.1 and 2 on the basis of alleged admissions, therefore, no fault can be found in the judgment impugned. Another submission made by counsel

is that as the appellants were aware of the litigation in which Charanjit Kaur and Surinder Pal Singh were also a party and for that reason the respondents/defendants raised an issue with regard to *locus standi* and estoppel but the said issues were decided against the respondents by holding the same to be not pressed but the trial Court has not recorded statement of counsel for the defendants to this effect.

I have heard counsel for the parties and perused the records.

Before advertng to the submissions made by counsel for the parties, it would be appropriate to extract the observations made by the First Appellate Court in paras 13 to 15 of the judgment, reads thus:-

“13. A perusal of the record depicts that the respondents No.1 and 2 in support of their contention have placed on record documentary evidence in the shape of documents Ex.P1 to Ex.P10, whereas the appellants apart from the oral evidence have placed reliance of documents Ex.DX/1 and Ex.DX/2. A perusal of the judgment and decree passed by learned trial Court depicts that learned trial Court while deciding issues No.1 and 2 has not discussed any of the documents relied upon by the parties to the lis. So much so learned trial Court does not appear to have scrutinized and appreciated the oral and documentary evidence. It is settled principle of law that the Court while deciding a suit is required to critically examine oral and documentary evidence adduced by the parties and thereafter upon appraisal of the pleadings, evidence (oral and documentary) adduced by the parties and the arguments advanced by learned counsel for the parties, the controversy in the said suit is to be decided. A

civil suit is not to be decided simply on the basis of pleadings or some admissions made by the party in its pleadings. No doubt admission of one of the parties to the lis is an important factor but the suit can not be decided solely on the basis of any admission made by one of the parties to the lis. The other evidence is also required to be properly scrutinized and admission conjointly read with the other evidence is to be considered for effectively deciding the controversy.

14. In the present case a perusal of the judgment and decree under appeal depicts that learned trial Court without discussing the oral and the documentary evidence led by the parties, simply on the basis of admission made on the part of the appellants has decided issues No.1 and 2 in favour of the respondents. The other issues have been simply disposed of by observing that these issues were not pressed for by learned counsel for the appellant. Learned trial Court apart from other issues was also to decide issues with regard to the locus standi of the respondents to file this suit; the maintainability of the suit and further if the respondents were estopped by their own act and conduct to file the suit. The onus to prove these issues was on the appellants. These issues were required to be disposed of by learned trial Court after critically examining the evidence adduced by the parties. These are important issues in as much as in case the suit is not maintainable, the relief could have not been granted to the respondents No.1 and 2 and similarly if the respondents were not having any locus standi to file the suit and further the principle of estoppel was claimed against them, the decision on the issues by learned trial Court qua these facts could have important bearing on the merits/decision of the suit. In case learned lower court had gone deep into the evidence adduced by the parties to decide these issues

on merits, it would have great impact on the final outcome of the suit, since in case of decision of all these issues against the respondents No.1 and 2, the main relief could have not been granted to them. It was in between the respondents No1 and 2 and the Court to see if the suit was properly valued for the purpose of Court fee and jurisdiction. It is immaterial if this issue was not pressed for by learned counsel for appellants. Learned trial Court was to give its own findings.

15. Thus the act of learned trial Court in not deciding these issues on merits and further not carefully examining the oral and the documentary evidence is sufficient to hold that the findings of learned trial Court on issues have not been returned as per the settled principles of law. Thus the findings of the learned trial Court on all the issues are set-aside. The present case is remanded back to the learned trial Court for fresh decision after carefully and properly scrutinizing the evidence (oral and documentary) adduced by the parties. The parties are left to bear their own costs. The parties are directed to appear before learned trial Court on 19.09.2011. In view of facts that the parties are not to lead any evidence and learned trial Court is required to decide the case by giving detailed reasons while disposing of the suit on the basis of evidence already adduced by the parties, it is desirable that the suit be decided by the learned trial Court expeditiously and preferably within two months.”

Order 41 Rule 23 and 23-A CPC, germane to the controversy, are quoted hereinbelow for ready reference:-

“23. 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, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

23A. 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 retrial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.”*

Indisputably, Rule 23 is not attracted in the case as the trial Court has not disposed of the suit upon a preliminary point rather has decided the case on merits on all the issues framed for the purpose. The question that arises for consideration is *whether the order passed by the Appellate Court is covered within the ambit or purview of Rule 23A*. The answer, at a first glance, appears to be in the negative. A plain and casual reading of Rule 23A, makes it evident that in order to apply Rule 23A, two conditions are required to be satisfied:-

1. *The decree is reversed in appeal.*
2. *A re-trial is considered necessary.*

In the case at hand, the Appellate Court has not ordered re-trial nor re-trial has been considered to be necessary. Conversely, the

Court in concluding para 15 has held that in view of facts that the parties are not to lead any evidence, the trial Court is required to decide the case by giving detailed reasons while disposing of the suit on the basis of evidence already adduced by the parties. As neither the Court in appeal has framed any fresh issue(s) having a serious bearing on issues already determined nor the parties are to lead any evidence, there is no question of any re-trial being necessary in the circumstances of the present case to attract the provisions of Rule 23A, extracted hereinbefore. The Appellate Court has directed the trial Court to reconsider the materials already on record to decide the case afresh which by no stretch of imagination falls within the purview of Rule 23A. The re-writing of a judgment on the basis of materials already on record as has been allowed in the circumstances of the present case cannot be the scope of remand under Rule 23A. In this view of the matter, I find force in the contentions of counsel for the appellants that the impugned judgment passed by the Court in appeal cannot be allowed to sustain and liable to be set-aside.

So far as contention of counsel for the respondents that the trial Court has failed to consider any oral or documentary evidence on record, the Appellate Court is empowered to take note of materials, if any, and then decide if the judgment and decree passed by the trial Court is liable to be affirmed, reversed or modified, etc.

There is no such practice being followed in the trial Courts to record statement of a counsel with regard to non-pressing of an issue(s). This apart, contention of counsel for the respondents that in

absence of any such statement by counsel, the findings on Issues No.3 to 7 cannot be sustained, is a matter to be agitated before the Appellate Court but the same cannot justify the order of remand.

The Courts have consistently held that power of remand by the Appellate Court, is to be exercised with great care, caution and circumspection. It can neither be exercised by the Appellate Court to get rid of the case nor to give another life to litigation at the behest of an unsuccessful litigant. The Apex Court in ***Municipal Corporation's case (supra)*** has held that an order of remand should not be passed routinely and if the Appellate Court does not agree with the decision of the trial Court, it has to come with a proper finding of its own and cannot shirk its duty.

When the facts and circumstances of the present case are examined in the light of observations made in para 11 of the judgment in ***Municipal Corporation's case (supra)***, it can safely be held that the impugned judgment cannot stand the test of judicial scrutiny and deserves to be set-aside.

In view of what has been discussed hereinabove, the appeal is allowed, the judgment and decree passed by the First Appellate Court is set-aside. As a natural corollary, the appeal filed by Surinder Pal Singh and another is restored to its original status and number, to be decided by the First Appellate Court on its merits, in accordance with law. As the litigation between the parties is pending since the year 1999, the Appellate Court would puts its best endeavour to dispose of the appeal expeditiously preferably within a period of three months

from the date of receipt of certified copy of the order. Parties through their counsel are directed to appear before the Appellate Court on 29.04.2016.

(REKHA MITTAL)
JUDGE

18.03.2016

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