

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

RSA No.806 of 2012 (O&M)

Date of Decision.06.10.2016

Municipal Committee, Loharu

.....Appellant

Vs.

Jagdish Kumar and others

.....Respondents

Present: Mr. Raman B. Garg, Advocate
for the appellant.

Mr. Shubham Kaushik, Advocate
for the respondents.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J. (ORAL)

C.M. No.2170-C of 2012

For the reasons stated in the application, delay of 250 days in re-filing the appeal is condoned.

Application is allowed.

RSA No.806 of 2012

The appellant-plaintiff is aggrieved of the judgments and decrees passed by the Courts below whereby the appellant-plaintiff was not given effective opportunities and the evidence was closed.

Mr. Raman B. Garg, learned counsel for the appellant-plaintiff submits that the suit for declaration was instituted on 19.02.2009. The issues were framed on 01.06.2009 and the case was fixed for plaintiff's evidence on 15.09.2009, 19.11.2009 and 26.02.2010. On 26.02.2010, evidence of both the plaintiff and the defendant was closed, much less, the suit was dismissed by invoking the provisions of Order 17 Rule 3 CPC.

The appeal against the same has also met with the same fate.

He further submits that in case opportunity is granted subject to terms and conditions by fixing the time line, the plaintiff would lead/close the evidence.

Per contra, Mr. Shubham Kaushik, learned counsel appearing for the respondents submits that sufficient opportunities have been availed by the plaintiff. Even otherwise, the suit instituted was not maintainable.

I have heard learned counsel for the parties, appraised the paper book and records of the Courts below. The aforementioned zimni orders reads thus:-

*“Present: Sh. R.K. Pawaria, Adv. for plaintiff.
Sh. A.K. Saini, Advocate for defendants No.1, 2 and
8 to 17.
Defendants No.4 to 7 already ex parte.*

*No PW is present. On request, now case stands
adjourned to 19.11.2009 for evidence of plaintiff, subject to
last opportunity. Arguments on stay application shall also be
heard on the date fixed, subject to last opportunity.*

*-sd-
Dated 15.09.2009 (Rajni Yadav)
ACJ (SD), Loharu*

*Present: Sh. R.K. Pawaria, Adv. for plaintiff.
Sh. A.K. Saini, Advocate for defendants No.1, 2 and
8 to 17.
Defendants No.4 to 7 already ex parte.*

*No PW is present. On request of Ld. Counsel for plaintiff now
case stands adjourned to 26.2.2010 for PWs, subject to
payments of Rs.300/- as costs in legal aid fund. Another last
opportunity. Arguments on stay application shall also be
heard on the date fixed. Another last opportunity.*

*-sd-
Dated 19.11.2009 (Rajni Yadav)
ACJ (SD), Loharu*

Present: Sh. R.K. Pawaria, Adv. for plaintiff.

Sh. A.K. Saini, Advocate for defendants No.1, 2 and 8 to 17.

Defendants No.3 to 7 already ex parte.

Cost not paid. No PW is present. No reason was given as to why witnesses not present despite last opportunity. Since, plaintiff has already availed sufficient opportunities for its evidence, therefore, further adjournment for the purpose is not justified. Therefore, plaintiff evidence is closed by court order.

In view of the fact that no evidence has been adduced on behalf of plaintiff in support of his case, learned counsel for defendant stated at Bar that he did not wish to adduce evidence in support of case of defendant. Accordingly, defendant evidence has also been closed by court order. Arguments heard. Vide my separate detailed judgment of even date, present suit has been dismissed under Order 17 Rule 3 CPC. There shall be no order as to costs. Decree sheet be prepared accordingly and file be consigned to record room, after due compliance.”

-sd-

*Announced in open court
Dated:26.2.2010*

*(Rajni Yadav)
ACJ (SD), Loharu”*

In my view, appellant-plaintiff has not been granted effective opportunity as only on the first date, the Court had imposed the entire liability on the plaintiff by treating the next date as last opportunity. Courts below ought not to have indulged into putting such onerous task on the plaintiff. Of course the trial could not be delayed and the plaintiff should not take evidence as a matter of right and there has to be reasonableness/justification. In my view, this exercise should have been undertaken by the lower Appellate Court by setting aside the judgment and decree and remanded back the matter but as the destiny would have it, the suit is of the year 2009 and regular second appeal filed in the year 2012 and order is being passed in 2016. All this time spent in litigation could

have been saved.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure, so there is need to frame the substantial questions of law or not. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at paras 27 - 29]”

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State

after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal, aforementioned.

For the reasons aforementioned, the judgments and decrees passed by the Courts below are set aside and the matter is remitted back to the trial Court with the following directions:-

“The appellant-plaintiff shall submit the list of witnesses and seek dasti summons if necessary. The trial Court shall afford three effective opportunities to the parties to conclude the evidence and dispose of the suit as expeditiously as possible and preferably within a period of ten months.”

The appeal stands allowed in the above terms.

The learned counsel for the parties/parties are directed to appear before the Court below on 18.11.2016.

(AMIT RAWAL)
JUDGE

October 06, 2016
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No