

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

RSA No. 1883 of 2016 (O&M)
Date of Decision : 11.11.2016

Satpal Sharma and others

....Appellants

Versus

Karta Virender and Vikram HUF

....Respondents

CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA

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

Mr. Vikram Singh, respondent in person.

Surinder Gupta, J. (Oral)

Heard.

2. The short point raised by learned counsel for appellants in this appeal is that after dismissal of suit filed by plaintiff under Order XXXVII Rule 2 of the Code of Civil Procedure vide judgment dated 29.08.2011, plaintiff filed appeal, which was accepted without notice to defendants-appellants.

3. Facts of the case are not required to be referred for the decision of above point raised by learned counsel for appellants.

4. In suit filed by the respondent under Order XXXVII Rule 2 CPCP, defendants-appellants have put in appearance but later on they were proceeded *ex parte*. However, the suit was dismissed by learned Civil Judge (Junior Division), Karnal vide judgment dated 25.07.2008 and plaintiff filed appeal against the judgment dismissing his suit, which was allowed by Additional District Judge, Karnal vide judgment dated 28.04.2009 with the observation in para 6 of the judgment, which reads as follows:-

“6.No doubt, the court is not expected to collect
evidence on behalf of plaintiff but if the court wanted to

satisfy itself than at least some opportunity should have been granted to appellant to summon the record of the criminal court where the documents had been got exhibited by the appellant especially when the photo copies of all the documents had been placed on record. In these circumstances, the impugned judgment and decree cannot be sustained and is liable to be set aside and the same are accordingly set aside. The matter is remanded back to the learned trial Court to decide the suit in accordance with law.”

5. In support of his contention, plaintiff-respondent produced evidence before learned Civil Judge (Junior Division) but the suit was again dismissed vide judgment and decree dated 29.08.2011. Not satisfied, plaintiff-respondent filed appeal, which was admitted vide order dated 03.10.2011 passed by Additional District Judge, Karnal and the same is reproduced as follows:-

“Appeal received by assignment. It be checked and registered. There are some arguable points in this appeal. It be admitted. Since the respondents were ex parte before the learned trial court, so there is no need to issue process against them and their service is dispensed with. Trial court records be summoned for 22.11.2011.”

6. Ist Appellate Court then decreed the suit for recovery of ₹1,00,145/- with costs and interest.

7. Learned counsel for appellants has argued that suit of plaintiff was dismissed by trial Court, as such, appellants were not required to take any further action in the matter and the fact that they have not taken leave to defend does not effect their right, title or interest in any manner. There is no law that in appeal they were required to seek leave to defend again. Ist

appellants but the appeal of plaintiff was decided without notice to them.

8. The respondent while relying on observations in case of **M/s D. Shanalal and etc. vs. Bank of Maharashtra, AIR 1989 Bombay 150 (1)** has argued that where the defendant in a suit filed under Order XXXVII Rule 2 failed to obtain leave to defend or to comply with conditional order passed by the Court, he continues to suffer under the same disability. Applying the same principle to the present case, he argues that appellants, who have no defence at all, were not required to be heard before the Ist Appellate Court. He has also placed reliance on observations of Apex Court in case of **M/s Mechelec Engineers & Manufacturers vs. M/s Basic Equipment Corporation, 1976 (4) SCC 687**, wherein it has been observed that this Court cannot interfere with the discretion exercised by Courts below in granting unconditional leave under Order XXXVII Rule 2 CPC.

9. The point under consideration in this appeal is that plaintiff has sought to recover certain amount from appellants and Civil Judge (Junior Division), Karnal did not find the suit maintainable under Order XXXVII Rule 2 CPC. He filed appeal and Ist Appellate Court directed the trial Court to take evidence and again on taking the evidence Court was not convinced that plaintiff has any case to be allowed the right to recover the suit amount. In these circumstances, when appellants had further gone in appeal, Ist Appellate Court was required to look into the facts and circumstances and hear the appellants before accepting the appeal. No doubt, appellants have not obtained any leave to defend but the Court below has not found the case maintainable and the evidence produced by plaintiff as sufficient to prove his case. In these circumstances, while differing with the observations of Civil Judge (Junior Division), Ist Appellate Court must have issued notice

to the appellants so as to provide them an opportunity to put-forth their plea, if any. So far citations referred by learned counsel for the respondent are concerned, the same are not applicable to facts and circumstances of the case. In case of *M/s D. Shanlal (supra)*, the defendant had not obtained leave to defend and decree was passed. It was under these circumstances that Bombay High Court has observed that defendant, who did not obtain the leave and failed to comply with conditional order continues to suffer with same disability. The observations in *M/s Mechelec Engineers' case (supra)* are altogether on different facts and circumstances, as such, have no relevance in this appeal.

10. In view of my above discussion, I am of the considered opinion that it will be appropriate and in the interest of justice that appellants be given opportunity of being heard by Ist Appellate Court before the civil appeal is finally decided. Consequently, this appeal has merit and the same is accepted. First appeal filed by respondent is remanded for fresh decision on merit after giving opportunity to both parties to address arguments. File be sent to learned District Judge, Karnal, who will keep the appeal with himself or entrust the same to some other competent Court, where the parties will appear on 03.12.2016 and the Court so entrusted with the appeal will decide the same within a period of six months of its receipt.

November 11, 2016
jk

(SURINDER GUPTA)
JUDGE

Whether speaking/Reasoned

Yes/No

Whether Reportable

Yes/No