

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

**SAO No.32 of 2010(O&M)
Date of Decision: 09.08.2017**

Kulwant SinghAppellant

Versus

Mohinder Kaur ... Respondent

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

Present: Mr. Kewal Krishan, Advocate for
Mr. Premjit Kalia, Advocate
for the appellant.

Mr. Vikas Singh, Advocate
for the respondent.

RAJ MOHAN SINGH, J.(ORAL)

[1]. This appeal has been preferred by the appellant/defendant No.1 against the judgment dated 22.03.2010 vide which application under Order 41 Rule 27 CPC was allowed and the case was remanded to the trial Court for fresh decision.

[2]. Brief facts are that the plaintiff/respondent filed a suit for possession of the plot with consequential relief of mandatory injunction directing the respondent Nos.1 to 3 to remove the structures illegally constructed by the defendants over the suit property and also to hand over the vacant possession of the same. Permanent injunction was also sought restraining the defendant Nos.1 to 3 from transferring, alienating and mortgaging the suit property.

[3]. Trial Court dismissed the suit vide judgment and decree dated 08.06.2006.

[4]. The lower Appellate Court accepted the application for additional evidence in the background of the Local Commissioner Harbans Lal, retired Kanungo, who did not issue any notice to the defendants before giving demarcation report dated 18.10.2006. The lower Appellate Court by referring to the claims of the parties viz-a-viz. suit property accepted the application for additional evidence for examination of Harbans Lal, retired Kanungo, who had conducted the demarcation in respect of disputed khasra number on 18.10.2006. The Court also observed that though the plaintiff was not diligent to get the property demarcated from a revenue officer during pendency of the case, nor any application for appointment of Local Commissioner was made for conducting the demarcation, yet on account of said lapse, the plaintiff was held entitled to lead additional evidence.

[5]. The appeal was accepted by the Additional District Judge, Amritsar. Judgment and decree passed by the trial Court was set aside and the case was remanded to the trial Court for fresh decision after giving two opportunities to the plaintiff to lead additional evidence and two opportunities to the defendants to rebut the same at their own responsibility.

[6]. In my considered opinion, the aforesaid course adopted by the lower Appellate Court is not in consonance with the order 41 Rule 28 CPC. Under Order 41 Rule 28 CPC, the Appellate Court is obligated either to take such evidence of its own or direct the Court from whose decree the appeal is preferred or any other subordinate Court to take such evidence and send it to the Appellate Court.

[7]. The remand made by the lower Appellate Court in toto even without setting aside the findings recorded by the trial Court under different issues, in my considered opinion is not legally sustainable. The lower Appellate Court was under legal obligation to decide mode of taking additional evidence. Two options were available before the lower Appellate Court. The lower Appellate Court could have taken the additional evidence of its own or in alternative, could have referred the issue to the trial Court for specific finding/decision on additional evidence and to call for the report to that effect for ultimate decision of the appeal pending before it.

[8]. In view of above, I set aside the impugned dated 22.03.2010 passed by the lower Appellate Court and remand the case to the lower Appellate Court for decision of the appeal on the aspect of deciding mode of taking additional evidence in terms of Order 41 Rule 28 CPC and thereafter, lower Appellate

Court is directed to act in accordance with law.

09.08.2017	(RAJ MOHAN SINGH)
prince	JUDGE
Whether Reasoned/Speaking	Yes/No
Whether Reportable	Yes/No