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

**SAO No.47 of 2013 (O&M)
Date of Decision: 24.08.2017**

PARMOD KUMAR GUPTA

.....Appellant

Vs

PUNJAB WAKF BOARD

....Respondent

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

Present: Ms. Sukhmani Patwalia, Advocate for
Mr. Vikas Singh, Advocate
for the appellant.

RAJ MOHAN SINGH, J. (Oral)

[1]. This appeal has been preferred by the defendant/appellant against the judgment dated 25.07.2013 passed by District Judge, Kapurthala whereby the case was remanded to the trial Court for fresh decision after granting one more effective opportunity to the plaintiff to lead its evidence. The order was however subject to payment of cost of Rs.5,000/-. Half of the cost was ordered to be deposited in the Legal Aid Fund and the remaining half of the cost was to be paid to the defendant.

[2]. In this case, notice of motion was issued on 06.09.2013

and thereafter the case was admitted on 15.09.2014. The stay granted on 19.03.2014 was made to be continued. Vide order dated 19.03.2014, it was observed that there was no representation on behalf of the respondent despite service. Even after admission of the appeal, the respondent remain unrepresented on record as none of the Advocate filed any power of attorney or memo of appearance on behalf of the respondent. On 29.08.2016, none appeared on behalf of the respondent and case was adjourned for 17.03.2017. On account of further adjournments, the case has been listed for hearing for today. Since none has appeared on behalf of the respondent even today, this Court proceeded to decide the case on merits.

[3]. Learned counsel for the appellant/defendant submitted that the defendant has not received half of the cost. The suit was filed by the Punjab Wakf Board for possession by way of ejectment of the defendant from the suit land. The suit was contested by the defendant/appellant. In the evidence of the plaintiff, the affidavit of PW-1 Bashir Ahmed Khan, Estate Officer was tendered in the *ex parte* evidence of the plaintiff when *ex parte* proceeding were initiated against the defendant on 28.05.2009. The application was filed by the defendant for setting aside the *ex parte* proceedings on 29.05.2009 and the

order proceeding against *ex parte* was set aside on 30.05.2009.

In order to prove the case of the plaintiff, two witnesses were examined. Bashir Ahmed Khan was examined in examination-in-chief as PW-1. Mohammad Iqbal was examined as PW-2. The evidence of PW-2 Mohammad Iqbal was not considered to be sufficient to prove the case of the plaintiff as he was a formal witness and was examined only to corroborate the evidence of PW-1.

[4]. Learned counsel further submitted that the evidence of PW-1 Bashir Ahmed Khan was of foremost importance and the entire case was rested upon his testimony. PW-1 Bashir Ahmed Khan was authorised to file the suit on behalf of the plaintiff-Board. The examination-in-chief by way of affidavit of Bashir Ahmed Khan was recorded during the period when the defendant was proceeded against *ex parte*. After 30.05.2009, the affidavit of PW-1 Bashir Ahmed Khan was not re-tendered and the evidence of the plaintiff was closed by the learned counsel appearing on behalf of the plaintiff-Board without ensuring recording of full statement of PW-1 Bashir Ahmed Khan. After period of about one year, an application was filed by the plaintiff seeking permission for cross-examination of PW-1 Bashir Ahmed Khan at the hands of the defendant. The said application was dismissed by the trial Court on 07.02.2011.

Concluding part of the said order is reproduced as under:-

“3. Heard. File perused the present case of Punjab Wakf Board is for possession by way of ejectment. The case was fixed for evidence of the defendant when the present application was filed. The plaintiff has examined rent controller Mohammad Iqbal to prove his case. The affidavit of Estate Officer was tendered but he was not produced for cross-examination and plaintiff closed his evidence but now, petitioner has filed application for permission to file affidavit of new Estate Officer in his place. Perusal of file shows that E.O. Bashir Ahmad was examined only when defendant was ex parte. He could not explain if as to how the examination of new Estate Officer is necessary. Rather during course of arguments, learned counsel for plaintiff stated that the evidence of rent controller is sufficient to prove the case of plaintiff. In view of these facts, permission to examine new Estate Officer will only lead to delay of the case. Thus, the application of plaintiff for examining the New Estate Officer is without merits and same is hereby dismissed. Now, for evidence of the defendant, to come up on 28.2.2011.”

[5]. Learned counsel further submitted that the aforesaid order dated 07.02.2011 was never assailed by the plaintiff in any forum and the same has already attained finality. Even another application was filed for the same relief which was also dismissed as not maintainable. In this way PW-1 Bashir Ahmed Khan was never cross-examined by the defendant and his testimony as PW-1 could not be relied upon and was rightly not

relied upon by the trial Court. The trial Court dismissed the suit of the plaintiff vide judgment and decree dated 12.05.2011. In the appeal filed by the plaintiff-Board, the lower Appellate Court took cognizance of the order dated 11.11.2009 vide which learned counsel for the plaintiff-Board closed the evidence of the plaintiff without ensuring recording of cross-examination of PW-1 Bashir Ahmed Khan after setting aside the *ex parte* proceedings against the defendant vide order dated 30.05.2009.

[6]. Learned counsel further submitted that the affidavit of PW-1 Bashir Ahmed Khan was tendered in examination-in-chief on 28.05.2009, i.e. the date on which the defendant was proceeded against *ex parte*. The lower Appellate Court formed an opinion that since the defendant has already been proceeded against *ex parte* and thereafter *ex parte* evidence of the plaintiff would entail in decree of the suit. However, the *ex parte* proceedings were set aside on 30.05.2009 and under this mis-conception the plaintiff could not produce PW-1 Bashir Ahmed Khan for cross-examination at the instance of the defendant. In view of aforesaid fact, the lower Appellate Court set aside the judgment and decree of the trial Court and remanded the case to the trial Court with direction to decide the case afresh after granting one effective opportunity to the plaintiff to lead its evidence.

[7]. Having considered the submission made by learned counsel for the appellant, I find that it was not a misconception in respect of order dated 11.11.2009 viz.-a-viz. order dated 30.05.2009 vide which *ex parte* proceedings *qua* the defendant were set aside. After about one year of the order dated 30.05.2009, the application was filed by the plaintiff itself seeking permission for cross-examination of PW-1 Bashir Ahmed Khan by the defendant. The said application was dismissed by the trial Court on 07.02.2011 and the said order was never challenged in any revision by the plaintiff. The said order was allowed to become final. Even second attempt was made by way of moving similar application and the same was also dismissed being not maintainable.

[8]. Perusal of the impugned order reveals that no reference has been made by the lower Appellate Court in respect of any challenge made to the orders passed by the trial Court on the applications filed by the plaintiff for cross-examination of PW-1 Bashir Ahmed Khan by the defendant. The observation made in respect of order dated 11.11.2009 in the light of setting aside the *ex parte* proceedings of the defendant vide order dated 30.05.2009 in my considered opinion is not sustainable. It was after closure of the evidence by the learned counsel for the plaintiff, the plaintiff filed two applications for

permission for cross-examination of PW-1 Bashir Ahmed Khan.

One of such application was dismissed on 07.02.2011 and the said order was allowed to become final by the plaintiff. The second application was not held to be maintainable.

[9]. Having not challenged the aforesaid orders, it cannot be said that the plaintiff was sufficiently prevented by not producing PW-1 Bashir Ahmed Khan for cross-examination by the defendant. Since the cost has not been accepted by the petitioner, therefore, in my considered opinion the remand of the case by the lower Appellate Court is not sustainable as it would amount to filling lacuna in the case of the plaintiff, particularly when the effort made during the trial was negated by the trial Court vide order dated 07.02.2011 and the said order had already attained finality.

[10]. In view of above, the impugned order is set aside and this appeal is accepted.

August 24, 2017

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Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No