

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

RSA No.1256 of 2015 (O & M)  
Date of Decision:21.03.2018

Rajiv Saini

...Appellant

Versus

Municipal Corporation, Ludhiana and another

...Respondents

**CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL**

Present: Mr. Puneet Jindal, Senior Advocate with  
Mr. Varun Goyal, Advocate and  
Ms. Aman Rani, Advocate  
for the appellant.

Mr. R.S. Bajaj, Advocate  
for the respondents.

\*\*\*

**ANIL KSHETARPAL, J.**

This regular second appeal has been filed by the plaintiff against the order passed by the learned First Appellate Court remanding the case to the learned trial Court.

In the considered opinion of this Court, regular second appeal is maintainable only against the decree passed by the learned First Appellate Court. However, a miscellaneous appeal is maintainable in this Court against the order passed by the learned First Appellate Court remanding the case to the learned trial Court under Order 43 Rule 1(u) of the Code of Civil Procedure. Hence, the present appeal i.e. RSA has been treated as a miscellaneous appeal and is being decided.

Father of the plaintiff is alleged to have participated in a public auction held on 20.01.1983 by the Municipal Corporation. He was declared highest bidder with regard to plot No.17 and is said to have deposited 1/4<sup>th</sup> of

approval by the Commissioner Municipal Corporation, Ludhiana. It is the case of the plaintiff that his father had been requesting the authorities to issue sale certificate and accept the balance sale consideration and deliver possession, however, the authorities did not exceed to the request and father of the plaintiff always remain ready and willing to perform his part of the contract. Plaintiff served a notice on the defendants under Section 396 of the Punjab Municipal Corporation Act, 1976 on 04.08.2007 calling upon the defendants to receive the balance amount of sale consideration and execute the sale deed and deliver possession. Since there was no response, hence, the suit was filed.

Suit was contested. It was pleaded that in fact public auction was never approved by the Commissioner Municipal Corporation and the public auction was cancelled vide order dated 08.02.1984 with respect to plot Nos.16 to 24. Hence, it was pleaded that the sale deed cannot be executed.

During the pendency of the suit, the plaintiff moved an application for permission to amend the plaint. The application filed by the plaintiff was allowed on 04.06.2010. Thereafter, the case was adjourned for filing reply to the amended plaint repeatedly. In spite of adjournment being granted subject to payment of cost, no reply was filed. Hence, defence of the defendant was struck off. After trial, the suit filed by the plaintiff was decreed. Defendant-Municipal Corporation along with Commissioner filed first appeal before the learned First Appellate Court. An application was moved for seeking permission to amend the written statement. Defendants wanted to take objections with regard to suit being barred by limitation, not maintainable and father of the plaintiff had at one stage applied for refund of the amount. Learned First Appellate Court after considering various aspects

defendants to amend their written statement. The Court after allowing the application for amendment formed an opinion that parties would be required to lead evidence in support of the amended pleadings and, therefore, remand would be necessary.

Learned counsel for the appellant has submitted that once the defence of the defendants was struck off under Section 35-B of the Code of Civil Procedure by the learned trial Court on non-payment of the cost, application for amendment of the written statement was not maintainable. Learned counsel has relied upon the judgment passed by a Full Bench of this Court reported as **“Shri Anand Parkash vs. Shri Bharat Bhushan Rai and another”** 1981 PLR 555 in support of his first submission. He has further submitted that as per proviso to Order 6 Rule 17 of the Code of Civil Procedure, the amendment of the pleadings cannot be permitted after commencement of the trial.

On the other hand, learned counsel for the respondents has submitted that respondent-Municipal Corporation is a Local Body, which is managing the public property for the welfare of the residence of the area. He submitted that counsel nominated by the Municipal Corporation to defend it in the learned trial Court had acted against the interest of the Municipal Corporation. When these facts came to the knowledge of the Corporation, first appeal was preferred after engaging a new counsel. He has submitted that the learned First Appellate Court has only allowed amendment of the written statement and ordered re-trial of the suit.

First argument of learned counsel for the appellant on first blush appears to be attractive, however, on close scrutiny, this Court does not find substance therein. Defence of the respondent/defendant-Corporation was

the amended plaint. Original written statement filed by the defendant-Corporation to the unamended plaint was already on the file. Striking off the defence has to be considered in the context it was made. The right of the Municipal Corporation to file amended written statement was forfeited. At that time, there was no application for amendment of the written statement. Learned First Appellate Court has allowed the application filed by the defendant-Corporation seeking permission to amend the written statement. Learned First Appellate Court has noticed these facts in detail and allowed the application.

A judgment passed by Full Bench of this Court of in the case of Shri Anand Parkash (supra) is interpreting the provisions of Section 35-B of the Code of Civil Procedure to lay down that on non-payment of the cost impose, the Court shall strike off the defence. There is no dispute with the aforesaid preposition. However, in the present case, the order by which defence was struck off is not being recalled. The facts of the present case are entirely different.

Second argument of learned counsel for the appellant is that as per proviso to Order 6 Rule 17 of the Code of Civil Procedure, amendment of the written statement could not be allowed after commencement of trial.

A careful reading of proviso to Order 6 Rule 17 of the Code of Civil Procedure proves that there is no absolute bar on entertaining the application for amendment after commencement of trial. Proviso to Order 6 Rule 17 of the Code of Civil Procedure provides that if the Court comes to a conclusion that in spite of due diligence, the party could not take up the matter before the commencement of trial, the application can be allowed. In the present case, learned First Appellate Court has noticed that a public

connivance of the officials of a concerned local body or its counsel. The Court has noticed that the correct facts were not brought to the notice of the learned trial Court, which resulted into a judgment against the Corporation. By way of amendment, defendant-Corporation wants to bring those facts on record. It is apparent from the conduct of the counsel, who was representing the Corporation before the learned trial Court noticed by the learned First Appellate Court that he did not perform his duty faithfully. Proviso to Order 6 Rule 17 of the Code of Civil Procedure is meant for such like cases. It has been pointed out by the learned counsel for the respondents that even after the suit was decided, during the pendency of the first appeal, previous counsel appeared before the learned Executing Court and allowed execution of the sale deed.

In these circumstances, this Court does not find any good ground to interfere with the order passed by the learned First Appellate Court remanding the case to the learned trial Court for deciding the matter afresh.

However, taking into consideration that the dispute is pending between the parties in the Court for more than 10 years, the learned trial Court is requested to expedite the trial of the case and make a sincere endeavour to decide the same within a period of one year from the date of receipt of certified copy of the judgment.

This appeal is dismissed.

21.03.2018  
*sheetal*

(ANIL KSHETARPAL)  
JUDGE

Whether Speaking/Reasoned: Yes/No  
Whether Reportable : Yes/No