

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO No. 16 of 2007 (O&M)

Date of Decision: 17.05.2019

Devki Nandan @ Dwarka and others

....Appellants

VERSUS

Om Parkash (since deceased) through LR's.

...Respondents

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Arun Jain, Sr. Advocate with
Mr. Sachin Mittal, Advocate
for the appellants.

Mr. Pankaj Jain, Advocate
for the respondent.

SURINDER GUPTA, J.

This is appeal against order dated 11.01.2007 passed by Additional District Judge, Fast Track Court, Gurgaon (now Gurugram), remanding the case to learned trial Court.

2. Plaintiff-Om Parkash (since deceased), now represented by his legal heirs, filed suit seeking declaration that he is owner of suit property and defendants be restrained from raising shops over it.

3. In the suit defendants filed counter-claim alleging that the suit property is part of *khasra* no. 630 and 632 owned by them. The suit was decreed and the counter-claim was dismissed.

4. In appeal, Additional District Judge vide order dated 11.01.2007 remanded the case with direction to learned trial Court as follows:-

- (i) To implead Mahender Singh, brother of plaintiff, as proforma defendant.

- (ii) Defendants shall be given an opportunity to file rejoinder to replication and then issues arising out of the counter-claim shall be framed.
- (iii) Opportunity shall be provided to parties to lead evidence.
- (iv) Demarcation of suit property shall be got effected by appointing some senior revenue officer on payment of equal expenses by both the parties.

5. The question, which arises for consideration, is that as to whether learned Ist Appellate Court could remand the case for the reasons as stated above?

6. Learned trial Court has framed issues on the pleadings of parties including the issue as to whether suit property is part of *khasra* nos. 630 and 632 as alleged by defendants in their counter-claim. Even if learned Ist Appellate Court is of the opinion that vital issues have been left to be framed, the procedure to be followed in appeal is prescribed under Order XLI Rule 25 CPC, which reads as follows:-

“25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from—
Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such

case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time.”

7. From perusal of above rule, it is evident that learned Ist Appellate Court could frame additional issues and then send the case to learned trial Court to record evidence with direction to return the case with its findings on additional issues. Learned Ist Appellate Court instead of adopting the procedure as prescribed under Order XLI Rule 25 CPC, adopted a short-cut method to dispose of the appeal by calling upon learned trial Court to frame additional issues. Order of learned Ist Appellate Court on this score, as such, is not sustainable in the eyes of law.

8. So far as direction to learned trial Court to implead Mahender Singh, brother of plaintiff, as proforma defendant is concerned the same is also not tenable as plaintiff has not claimed any relief against Mahender Singh and being *dominus litis* he could not be directed to implead any party as proforma defendant.

9. The direction of learned Ist Appellate Court to learned trial Court to appoint some senior revenue officer as local commissioner for the purpose of demarcation is not tenable as it has been pointed out that three local commissioners have already been appointed in this case. In case, learned Ist Appellate Court deem it appropriate to frame additional issue in this case and send the same to learned trial Court, in that eventuality it can

also appoint a local commissioner, if so required, with direction to conduct demarcation and submit report before learned trial Court. Learned trial Court may also be given necessary direction to refer to the report submitted by local commissioner or Appellate Court could call upon the report of local commissioner on its own record and proceed further in accordance with law.

10. As a sequel of my above discussion, this appeal has merit and is accepted. Order dated 11.01.2007 passed by learned Ist Appellate Court is perverse and not sustainable in the eyes of law, as such, is set aside.

11. Parties are directed to appear before learned Ist Appellate Court/successor Court on 31.05.2019, on which date appeal file shall be taken on board and proceeded further to decide the same in accordance with law.

May 17, 2019

jk

**(SURINDER GUPTA)
JUDGE**

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No