

**In the High Court of Punjab and Haryana at Chandigarh**

**RSA- 1174 of 2016 (O&M)  
Date of Decision: 17.7.2019**

**Jaibir (deceased) through LR's and others**

**---Appellants**

**versus**

**Tek Ram**

**---Respondent**

**Coram: Hon'ble Mrs. Justice Rekha Mittal**

**Present: Mr. Mukesh Rao, Advocate  
for the appellants**

**Mr. Manjeet Singh, Advocate,  
for the respondent**

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**Rekha Mittal, J.**

**CM No. 3298-C of 2016**

Prayer in this application is for impleading legal representatives of Jaibir Singh appellant No. 1 (since deceased) and permission to LR's to file the present appeal.

In view of averments made in the application supported by an affidavit of Manjeet and arguments advanced by counsel for the applicants, the application is allowed and persons mentioned in para No. 1 of the application are allowed to be brought on record as legal representatives of Jaibir (since deceased) appellant No. 1, for the purpose of present lis only, subject to just exceptions and they are also permitted to file the instant appeal.

Disposed of accordingly.

**Main case**

The present appeal directs challenge against judgment and

decree dated 30.11.2015 passed by the Additional District Judge, Rohtak whereby appeal against judgment and decree dated 7.4.2011 passed by the Additional Civil Judge (Senior Division), Rohtak (hereinafter referred to as “the trial court”) was allowed and decree has been passed in favour of the respondent-plaintiff for specific performance of agreement to sell dated 12.9.2005, in view of the relief detailed in para 45 of judgment of the Court in Appeal.

Counsel for the appellants has submitted that the trial court answered issue No. 1 “Whether the plaintiff is entitled for decree of specific performance as prayed for? OPP” against the respondent-plaintiff with the observations that since the agreement of sale already stood cancelled, suit for specific performance of the said agreement is not maintainable and eventually the suit was dismissed. It is further argued that in view of findings on issue No. 1, the trial court did not advert to question of readiness and willingness of the respondent-plaintiff to perform his part of the agreement and whether the respondent-plaintiff is entitled to discretionary relief of specific performance of agreement of sale or otherwise. It is further argued that once the appellate court had set aside findings of the trial court qua non-maintainability of suit for specific performance on the basis of agreement in question, it was obligatory for the first appellate court to remit the matter to the trial court for deciding other issues involved in the case. Counsel would pray that judgment and decree passed by the court in appeal may be set aside and the matter be remitted to the trial court for deciding other issues involved in the case in view of findings of the first appellate court that suit on the basis of agreement of sale is maintainable.

Counsel for the respondent-plaintiff has supported judgment passed by the court in appeal with the submission that since the first appellate court has the same powers as that of the trial court and can re-appreciate the factual and legal controversy involved in the suit on the basis of materials available on record, judgment passed by the court in appeal cannot be faulted with.

Be that as it may, it is undisputed position of the case that the trial court decided the question of specific performance of agreement to sell propounded by respondent-plaintiff only on the question of maintainability of the suit as the agreement was held to be cancelled by the appellants-defendants after service of notice Ex. P6. The trial court neither decided the question of validity of agreement to sell, readiness and willingness of the respondent-plaintiff to perform his part of the agreement and entitlement of the respondent-plaintiff to seek specific performance of agreement or the alternative relief of recovery. Since the trial court decided the suit only on the question of maintainability of the suit and has not recorded findings on other issues, the appellate court by reversing findings of the trial court in respect of maintainability of the suit was required to remit the matter to the trial court for deciding other issues involved in the case. In this context, reference to provision of Order 41 Rule 23 of the Code of Civil Procedure, 1908 (in short "CPC") is pertinent, reads thus:-

Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a

copy of its judgment and order to the Court from whose decree the appeal is preferred. ,which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

In view of the above, judgment and decree passed by the first appellate court except deciding the question of maintainability of the suit is set aside and the matter is remitted to the trial court for deciding the case afresh except going into the question of maintainability of the suit.

For the foregoing reasons, the appeal is allowed. Judgment and decree passed by the first appellate court is set aside subject to the aforesaid observations. The matter is remitted to the trial court for decision of the case afresh, in the terms indicated above. Parties through their counsel are directed to appear before the trial court on 26.8.2019. The trial court shall dispose of the suit within a period of three months of the parties putting in appearance. In case, the matter is eventually carried in appeal by either of the parties before this court, it would be open for the appellants to challenge findings of the first appellate court on the question of maintainability of the suit.

**(Rekha Mittal)**  
**Judge**

**17.7.2019**

PARAMJIT

Whether speaking/reasoned : Yes

Whether reportable : Yes/No