

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

**SAO No.6 of 2016 (O&M)
Date of Decision: January 17, 2019.**

Khushal Singh

.....APPELLANT(s).

VERSUS

Bhagat Singh and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Rohit Ahuja, Advocate
for the appellant (s).

Mr. Lokesh Sinhal, Advocate
for respondent No.1.

SURINDER GUPTA, J.

Heard.

Plaintiff-respondent No.1 filed suit seeking relief as follows:-

- (i) Decree of permanent injunction to restrain defendant No.1 from interfering in peaceful use and occupation of the shop marked as CEFG as shown in the site plan and taking possession of the shop from the plaintiff illegally and forcibly
- (ii) Restraining defendant No.1 from taking over possession over the portion of the property owned by Jawahar Singh (since deceased) shown with letters GHI (GFHI), LMJK, NOSRT (WOSRT) or restraining or excluding the plaintiff and other legal heirs of Jawahar Singh from joint user, enjoyment and possession over the above properties;
- (iii) In the alternative, decree of possession by way of partition by

metes and bounds of the share of plaintiff;

(iv) In case, plaintiff is dispossessed during pendency of the suit, a decree of possession.

On the pleadings of the parties, learned trial Court framed the issues as follows:-

1. Whether the plaintiff Sh. Bhagat Singh is in possession of the suit property as per Will dated 25.5.1995 and is entitled to injunction, as prayed for?OPP
2. Whether the suit of the plaintiff is not maintainable in the present form?OPD
3. Whether the plaintiff has no locus standi and cause of action to file the present suit?OPD
4. Whether the plaintiff is estopped by his own act and conduct from filing the instant suit?OPD
5. Relief.

Learned lower Court returned the findings on issue No.1 against the plaintiff and other issues were decided against the defendant as the same were not pressed and the suit of the plaintiff was dismissed.

Plaintiff preferred appeal, wherein he moved application under Order 6 Rule 17 Civil Procedure Code before the first Appellate Court to include the plea in his plaint that in case, he is found out of possession of his shop CEF, then a decree for possession be also passed in favour of plaintiff-respondent No.1. That application was allowed. The first Appellate Court vide order dated 03.11.2015, remanded the case to the trial Court for fresh decision with the observations in para 13 and 14 of the judgment as follows:-

“13. After going through the judgment, plaint and written statement, it is apparent that learned trial court

has failed to frame proper issues and such as the partition claimed by the plaintiff regarding property no.2 and in addition to the question of court fee that has now arisen on the various prayers of the plaintiff submitted in the plaint regarding which the learned trial court needs to give proper opportunity to both the sides to first place on record the amended plaint, amended written statement, if any, framing of proper issues as per discussion above and giving fair opportunity to both the sides to lead fresh further evidence and after completion of the above proceedings and then pass judgment in consonance with the same.

14. Resultantly, the appeal is accepted and matter is remanded back to the learned trial court to decide afresh in the light of above observation. I also direct the learned trial court to make sure that suit is decided within a period of six months from the date of receiving of the original file and the copy of the judgment before him as it is an old case pending since 2007.”

Learned counsel for the defendant-appellant has argued that as per the provisions of Order 41 Rule 25 CPC, the first Appellate Court could frame additional issues and refer those issues for trial and seek the report from the trial Court. The first Appellate Court has not set aside the findings of trial Court on issue No.1, as such, even after remand, trial Court will remain bound by that finding. The proper course before the first Appellate Court was to frame additional issues as arise from the pleadings and refer the matter to trial Court for report.

Learned counsel for plaintiff-respondent No.1 has argued that the trial Court while dismissing the suit, has not discussed all the reliefs as

claimed by the plaintiff-respondent No.1. In appeal, amendment sought by the plaintiff-respondent No.1 regarding possession of the shop as shown with letters CEFG in the site plan was also allowed and fresh finding on this aspect is required. The first Appellate Court keeping in view all these facts has rightly remanded the case for fresh decision.

Order 41 Rule 25 CPC read 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.

Admittedly, all the reliefs as sought by the plaintiff were not decided by the trial Court and the issues with regard to all the reliefs were also not framed. As per provisions of Order 41 Rule 25 CPC, proper course for the first Appellate Court was to frame additional issues as arise in this case and then refer the matter to the trial Court/successor Court with direction to allow the parties to lead evidence, if required and to send the report. The first Appellate Court after allowing amendment, remanded the case to the trial Court with direction to obtain the amended pleadings as per

the order allowing amendment, record fresh evidence and decide the case afresh without looking into this aspect that the findings of the trial Court on issue No.1, wherein it had decided the factum of Will and possession of parties, was not set aside.

Keeping in view the above facts, this appeal has merits and the same is accepted. Impugned judgment dated 03.11.2015 is set aside. Parties are directed to appear before the first Appellate Court on 04.02.2019. First Appellate Court/Successor Court will take the appeal (Civil Appeal No.164 of 01.10.2013 CIS No.CA0000688/2013) on board, take the amended pleadings, frame additional issues if required and then proceed to decide the appeal as per observations above.

January 17, 2019.
Sachin M.

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned: ***Yes/No***

Whether Reportable: ***Yes/No***