

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO No. 93 of 2016 (O&M)

Date of Decision: 27.05.2019

Municipal Corporation, Gurgaon through its Joint Commissioner Sh. Y.S. Gupta

...Appellant

VERSUS

Rajesh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Deepak Sabharwal, Advocate
for the appellant.

Mr. Suresh Kumar Kaushik, Advocate
for respondent no. 1.

SURINDER GUPTA, J. (Oral)

Heard.

Plaintiff-Rajesh filed suit seeking the relief of mandatory injunction directing the defendants-appellant to execute and register sale deed of the suit property in his favour. He also sought the relief of permanent injunction restraining the defendants from dispossessing the plaintiff from the land in question. The suit was dismissed. Plaintiff filed appeal and learned Ist Appellate Court took note of certain evidence on record and made some observations regarding claim of plaintiff. However, instead of deciding the appeal on merit, it referred the case back to learned trial Court with observations in paras 19 and 20, as follows:-

“19. Therefore, it is not proper to decide the matter in issue only on the basis of admissions or judgments of other courts. This Court is of the view that the facts admitted by the defendants are required to be proved by

documentary evidence. Therefore, in view of the admissions by the witness of the defendants, it becomes necessary as to whether the plaintiff occupied the part of the suit property either earlier to 2000 or in the year 1948. The learned trial Court cannot or should not have decided the matter lightly but strictly on the basis of evidence. The Court could ask for another proof in support of the averments of the plaintiff when those are coupled with the admissions of witness of the defendants.

20. *Therefore, the judgment of the learned trial Court to the effect that plaintiff is not in possession over the suit property earlier to 16.11.2000 or without examination of the fact as to why the resolution could not be passed in his favour if he was in possession over the suit property earlier to 16.11.2000 are the factors which are required to be decided afresh.”*

Learned counsel for the appellant has argued that order passed by learned Ist Appellate Court is not within the parameters as prescribed under Order XLI Rule 23 or 23A CPC for remanding a case for fresh trial. In appeal, learned Ist Appellate Court could look into the entire evidence produced by parties, reappraise the same and then proceed to decide the appeal on merit. Direction given by lower Appellate Court in para 20 of the judgment (referred above) could not be a reason to remand the case.

Learned counsel for respondent no. 1 has argued that learned Ist Appellate Court has taken note of statement of Jai Bhagwan, *Patwari*,

who was examined as DW-1 to draw the inference that the house in question was constructed over *khasra* no. 789 earlier to the year 1948. In view of above fact, learned trial Court was directed to look into the fact as to why despite his possession over the suit property resolution could not be passed in his favour by *gram panchayat* and then to decide the case on merit. Directions as given by learned Ist Appellate Court amount to framing of an additional issue to the effect as to why despite possession of plaintiff resolution was not passed in his favour by *gram panchayat* that he is in possession of suit property. On framing of additional issue the matter was rightly sent back to learned trial Court for decision afresh.

On giving a careful thought to submissions of learned counsel for parties, I am of the considered opinion that order passed by lower Appellate Court is not in accordance with provisions of Order XLI Rule 23 or 23A CPC. The suit was not decided on preliminary issues, as such, order of remand could not be passed under Order XLI Rule 23 CPC. Learned Ist Appellate Court has not reversed the findings of learned trial Court in appeal and has passed order that retrial is considered necessary. It has merely referred to certain evidence on record and observed that the judgment of learned trial Court is without examining the fact as to why resolution by *gram panchayat* could not be passed in favour of plaintiff if he was in possession over the suit property earlier to 16.11.2000. Learned Ist Appellate Court has not framed any additional issue or called for the findings of learned trial Court on that issue as per provisions of Order XLI Rule 25 CPC. So far as re-appreciation of evidence on record is concerned, learned Ist Appellate Court is competent to look into entire evidence produced by the parties and arrive at its own conclusion. In case learned Ist

Appellate Court is of opinion that some material issues arise, which have not been decided by learned trial Court it could frame the same and then call for the report of learned trial Court as per provisions of Order XLI Rule 25 CPC.

As a sequel of my above discussion, this appeal has merit and the same is accepted. Order dated 30.07.2016 passed by learned Ist Appellate Court being not legally tenable is set aside. Parties are directed to appear before learned Ist Appellate Court/successor Court on 05.07.2019, on which date appeal file shall be taken on board and proceeded further to decide the same in accordance with law.

Till 05.07.2019, further process to take possession of suit property shall not be initiated by the appellant.

May 27, 2019

jk

**(SURINDER GUPTA)
JUDGE**

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

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