

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

**SAO No.53 of 2015 (O&M)
Date of Decision: January 17, 2019**

Daya Nand

.....PETITIONER(s).

VERSUS

Chander Singh @ Bhairo Singh (now deceased) through his LR's and others.

....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Mukesh Rao, Advocate
for the appellant.

Mr. Alok Jain, Advocate
for the respondents.

SURINDER GUPTA, J.(Oral)

Heard.

Plaintiff/appellant-Daya Nand filed suit seeking reliefs as follows:

- (i) Declaration to the effect that sale deed dated 21.06.2006 executed by defendants No.2 to 9 in favour of defendant No.10/respondent No. 1 in respect of land measuring 36 Kanals 2 Marlas out of land measuring 45 Kanals 2 Marlas as fully described in the head note of the plaint is illegal, null and void and not binding on the rights of the plaintiff.
- (ii) Mandatory injunction directing defendants No.1 to 9 being the legal heir of deceased Mahabir son of Sh. Deda son of

Sh. Har Dutt to execute the sale deed and get the same registered in favour of plaintiff by way of specific performance of agreement dated 16.01.2006 executed by Mahabir, predecessor-in-interest of defendants No.1 to 9.

- (iii) For possession of the land measuring 45 Kanals 2 Marlas to the plaintiff.

Defendants No.1 to 7 filed written statement contesting the claim of plaintiff while defendant No.10/respondent No. 1 filed separate written statement with the plea that he is a bonafide purchaser of the land in question as he purchased the same vide sale deed dated 21.06.2006.

The trial Court framed the following issues on 16.03.2007:

1. *Whether the plaintiff is entitled to the relief of declaration as prayed for ? OPP*
2. *If issue No.1 is proved, whether the plaintiff is entitled to the relief of injunction as prayed for? OPP*
3. *Whether the plaintiff has no locus standi to file the present suit? OPD*
4. *Whether the plaintiff is estopped by his own act and conduct from filing the suit? OPD*
5. *Whether the plaintiff has no cause of action to file the suit? OPD*
6. *Whether the suit is not maintainable in the present form? OPD*
7. *Relief.*

While recording findings of issues No.1 and 2 in favour of plaintiff, learned trial Court looked into the aspect of readiness and willingness of the plaintiff to perform his part under agreement dated 16.01.2006, proof of execution of this agreement by Mahabir, plea of

defendant No.10 that he is a bonafide purchaser of the suit land and recorded findings on all these issues.

Defendant No.10 filed appeal before Additional District Judge, Bhiwani challenging the decree passed by the trial Court. In para 4 of his grounds of appeal, he took plea regarding decree passed by the trial Court as follows:

4. *That the learned trial Court has erred in deciding issues No.1 and 2 and 7 (Relief) in favour of the respondent/plaintiff and against the appellant/defendant No.10 and has further erred in holding that the appellant/defendant No.10 is not bonafide purchaser and the sale deed dated 21.06.2006 executed by the defendants No.2 to 9 in favour of the appellant/defendant No.10 is illegal and is result of collusion and set aside and the learned trial Court has further erred in directing the defendants No.1 to 9 to get the sale deed executed in favour of the respondent/plaintiff on receiving the balance sale consideration within the period of 30 days from the date of decree and further erred in restraining the appellant/defendant No.10 from alienating the suit property to any other party or creating any third party interest in the suit land.*

Learned Additional District Judge, Bhiwani vide order dated 13.03.2015 decided the appeal with observations in para 3 of the order which reads as follows:-

3. *A perusal of the issues dated 16.03.2007 reveals that the issues regarding execution of alleged sale deed, bonafide purchaser and readiness and willingness of the parties were not framed, which are necessary for adjudication of a*

case of specific performance of contract. Accordingly, the impugned judgment and decree dated 1.11.2011, passed by the learned trial Court is hereby set aside and the learned trial Court is directed to frame proper issues firstly and to proceed further in the present case. Both the parties are directed to appear before the Court on 23.03.2015. Lower court record be sent back along with the copy of this order and file of Appellate Court be consigned to the record room, after due compliance.

The grounds on which the case was remanded to the trial Court are non-framing of issues regarding execution of sale deed in favour of defendant No.10, his plea that he is a bonafide purchaser and readiness and willingness of the parties to perform their part of the contract.

Learned counsel for the appellant has argued that so far as the plea of respondent No. 1-Chander Singh, that he was a bonafide purchaser of the land is concerned, learned trial Court has recorded specific findings that he is not a bonafide purchaser of the suit property. The Ist Appellate Court could look into the legality and validity of this finding. In case, he is held to be a bonafide purchaser, sale deed in his favour could be held to be a valid document. If finding of the trial Court is affirmed, the sale deed in favour of defendant No. 1 Chander Singh loses its validity. The trial Court has also recorded finding regarding readiness and willingness of appellant to perform his part of agreement and these findings could also be evaluated by the Ist Appellate Court while deciding appeal on merits. The appellant has not raised any plea for remand of the case in his grounds of appeal, as such, order passed by the

learned Additional District Judge, Bhiwani is not tenable in the eyes of law. In support of his contention, he has relied upon observations of Hon'ble Apex Court in the case of ***Syeda Rahimunnisa versus Malan Bi (Dead) by LRs & Anr. Etc. 2016 (4) R.C.R. (Civil) 774.***

Learned counsel for the respondents has argued that the appellant had claimed three reliefs in this case which includes the relief of specific performance of agreement dated 16.01.2006 and setting aside sale deed in favour of defendant No.10/respondent No 1. The Civil Court has not framed any specific issue on these pleas of the appellant. Even if, the plea of appellant that defendant No.10/respondent No. 1 is not a bonafide purchaser of the suit land, is upheld in appeal, still, he could not seek possession of the suit land till he proves that agreement was validly executed. In support of his contentions, he has relied upon the observations of the Hon'ble Apex Court in cases of ***Corporation of Madras and another versus M.Parthasarathy and others, (2018) 9 Supreme Court Cases, 445; J.Balaji Singh versus Diwakar Cole and others, (2017) 14 Supreme Court Cases 207*** and ***Diva Exports versus Shalimar Video Company and others, (2014) 16 Supreme Court Cases 194.***

Both the counsel have referred to the provisions of Order 41 Rule 23, 23(A) and 25 of Code of Civil Procedure (for short CPC), which deal with the remand of the case by the Appellate Court. The suit was not decided on preliminary point, as such, provisions under Order 41 Rule 23 CPC are not applicable to the facts of the case. The Ist Appellate Court has also not resorted to the provisions under Order 41 Rule 25 CPC by

framing any issue while remitting the matter to the Court and calling a report as per provisions under Order 41 Rule 25 CPC. It is not disputed that order to appellate Court is not as per provisions of Order 41 Rule 23 or 25 CPC. Order 41 Rule 23 (A) CPC reads as follows:-

“23-A Remand in other cases-where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23”.

The Ist Appellate Court has not reversed finding of trial Court on any issue or point in controversy. It mainly stressed on the fact that issues on plea of parties that defendant No. 10 is bonafide purchaser and readiness and willingness of plaintiff to perform his part of contract were not framed.

It is correct that specific issue in this regard were not framed but learned trial Judge has discussed all these points in his judgment while recording the findings on merit. The Ist Appellate Court could either to proceed under Order 41 Rule 25 CPC to frame additional issues, if any is left undecided and proceed to decide the same on the basis of evidence on file, as parties were aware of controversy in this suit and led the evidence or to call for the report of trial Court on any issue framed by it, if no finding on that issue had been recorded and then to decide the appeal on merit. The appellant in his grounds of appeal had not sought the remand of case, rather has challenged the findings recorded by the trial Court whereby he was not held to be a bonafide purchaser of the suit land vide sale deed dated 21.06.2006.

The citations referred by learned counsel for the respondent No. 1 are not applicable to the facts and circumstances of the case, as in case of **Corporation of Madras and another** (supra), the Ist Appellate Court after allowing the additional evidence had proceeded to decide the case without providing opportunities to other party to rebut the evidence while in other two cases additional evidence was allowed and matter was remanded. In this case, no additional evidence was sought or allowed.

Keeping in view the above facts, I am of the considered opinion that the proper course for Ist Appellate Court was to proceed further to decide the appeal on merits or to proceed as per provisions of Order 41 Rule 23, 23(A) and 25 CPC. Order dated 13.03.2015 passed by the Additional District Judge, Bhiwani, is not sustainable in the eyes of law, as such, the same is set aside. Appeal is allowed.

Parties are directed to appear before the Ist Appellate Court/Successor Court, Bhiwani on 14.02.2019. The Ist Appellate Court will take the appeal on board and proceed to decide the same, in accordance with law, in view of the above observations.

January 17, 2019.
Jyoti-II

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No