

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO No. 70 of 2014 (O&M)

Date of Decision: 14.05.2019

Vasu Dev Khurana and others

...Appellants

VERSUS

Madan Sain Jain

...Respondent

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. S.D. Bansal, Advocate
for the appellants.

Mr. Rajinder Goyal, Advocate
for respondent.

SURINDER GUPTA, J. (Oral)

Heard.

2. Plaintiff-respondent filed suit seeking the relief of permanent injunction to restrain defendants-appellants from giving support of their roof on the wall of her shop shown with letters 'DAB' in the site plan attached with the plaint. Plaintiff also sought the relief that defendants be restrained from digging foundation adjoining the wall of plaintiff shown as 'AB' for construction of basement. The suit was dismissed.

3. Plaintiff filed appeal before Additional District Judge, Jhajjar and Ist Appellate Court remanded the case with observations in para 5 as follows:-

“5. From the above discussion and study of issues No.1&2, which are the core issues, it is clear that learned trial court has miserably failed to frame out proper issues. The shop possessed by the plaintiff/appellant is never in dispute. Her prayer in the suit is to restrain

defendants/respondents permanently from giving support of their roof upon the plaintiff's wall marked by letters DAB and shown in red colour in the site plan. Once the issues were framed wrongly, parties certainly have remained in a fix what to establish before the court through their evidence. Learned trial court while discussing both these issues in the impugned judgment has gone concluding that it is a suit for Permanent Injunction and regarding the ownership of the plaintiff over the shop, suffice it say that no deed of total (sic title) has been placed on record by the plaintiff in the course of trial of the present suit. No doubt thereafter learned trial court added one more line regarding wall marked DAB in the site plan (Exh.P1), but said line further strengthens that till last learned trial court itself was considering the suit being regarding the ownership of the plaintiff over the suit land/shop. As such learned trial court as well as parties to the proceedings could not focus themselves on the core issue for sole reason that issues in the case were running framed wrongly and improperly beyond the pleadings and contrary to the facts in dispute.”

4. Learned counsel for the appellants has argued that dispute in this case pertained to title over the wall shown as 'DAB' in the site plan and learned trial Court has categorically observed that plaintiff has failed to prove her exclusive ownership and possession over this wall. The suit of

plaintiff seeking the relief of injunction was dismissed. Learned Ist Appellate Court committed error while observing that learned trial Court has decided the suit considering it to be a suit regarding the ownership of plaintiff over the disputed shop. Though, learned trial Court has discussed this fact in the judgment but it has also discussed the relief as claimed by plaintiff. Learned Ist Appellate Court has also committed error while observing that issues were wrongly and improperly framed beyond pleadings.

5. Issue no. 2 framed by learned trial Court covers the relief as claimed by plaintiff. Even if there is an issue regarding the ownership of the shop in question and findings have been recorded on this issue, this cannot be a reason to remand the case as Ist Appellate Court was all competent to rectify any mistake or illegality committed by trial Court.

6. Learned counsel for the respondents submits that learned trial Court has treated the suit seeking the relief of permanent injunction filed by plaintiff as suit seeking title over the suit property, which is not in dispute, as such, judgment and decree passed by learned trial Court has been rightly set aside in appeal.

7. From pleadings of parties, following issues were framed by learned trial Court:-

“(1) Whether the plaintiff is owner in possession of the shop in question fully detailed and described in para no. 1 of the plaint? OPP

(2) Whether the plaintiff is entitled to the decree of permanent injunction on the grounds as alleged in the plaint? OPP

- (3) Whether the present suit is not maintainable in the present form? OPD
- (4) Whether the plaintiff has no cause of action to file the present suit? OPD
- (5) Whether the plaintiff has not come to the court with clean hands and not entitled to the discretionary relief of injunction? OPD
- (6) Relief.

8. Though, the relief claimed by plaintiff-respondent pertained to wall shown as 'DAB' with red colour in the site plan and to restrain defendants from digging earth adjoining her wall 'AB' for construction of basement, there was no controversy regarding the title of the shop of plaintiff qua which issue no. (1) was framed. However, the parties were well aware of the dispute and led evidence to prove their case. Learned trial Court has also looked into the controversy concerning the wall and digging of earth while dismissing the suit, as such, it cannot be said that trial Court was not aware of the controversy. Even if it be believed that issue no. (1) was not required to be framed or discussed in detail, still as per provisions of Order XLI Rule 25 CPC, learned Ist Appellate Court was all competent to re-frame the issue and then proceed further to decide the appeal. Order XLI Rule 25 CPC 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.”

10. While remanding the case, learned Ist Appellate Court has nowhere opined that fresh evidence is required in this case. It has also not framed any additional issue for decision of the suit. Remanding of the case with mere observation that learned trial Court has not framed proper issues without discussing in detail as to which proper issue has not been framed, renders the order passed by learned Ist Appellate Court not legally sustainable. In case learned Ist Appellate Court forms the opinion that any issue has not been framed, it is all competent to frame the issue and take evidence, if so, required as per provisions of Order XLI Rule 25 CPC. It appears that learned Ist Appellate Court instead of following procedure as laid down under Order XLI Rule 25 CPC and Rules 23 and 23A CPC, has adopted a short-cut method to dispose of the appeal. Order of learned Ist Appellate Court dated 02.08.2014 being perverse and unsustainable in the eyes of law is set aside.

11. Parties are directed to appear before Ist Appellate

Court/successor Court on 30.05.2019, on which date file of Civil Appeal No. 41 of 2012 decided on 02.08.2014 shall be taken on board and proceeded further to decide the same in accordance with law.

Appeal is allowed in above terms.

May 14, 2019

jk

**(SURINDER GUPTA)
JUDGE**

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No