

SAO-106-2018(O&M) &
SAO-107-2018(O&M)

-1-

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

(1) SAO-106-2018(O&M)

Dr.Surinder Mohan

...Appellant

Versus

Bharat Kumar

...Respondent

(1) SAO-107-2018(O&M)

Dr.Surinder Mohan

...Appellant

Versus

Bharat Kumar

...Respondent

Date of Decision:-21.12.2021

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Binderjit Singh, Advocate
for the appellant in both appeals.

Mr.Deepak Sharma, Advocate
for the respondent in both appeals.

H.S. MADAAN, J.

1. By this order, I shall dispose of two SAOs i.e. SAO-106-2018
& SAO-107-2018 filed on behalf of appellant – Dr.Surinder Mohan.

2. Briefly stated, facts of the case are that plaintiff Dr.Surinder

Mohan aged about 50 years son of Sh.Om Parkash, resident of Bathinda presently at Delhi, had brought a suit for possession by way of specific performance of agreement to sell dated 27.5.1999 against his brother Bharat Kumar. On getting notice defendant put in appearance and filed written statement contesting the suit. Issues on merits were framed and case was posted for evidence of the plaintiff. Since the plaintiff failed to conclude his evidence despite availing of several opportunities, the same was closed by order of the Court on 16.2.2006.

3. The plaintiff challenged the said order by filing a revision petition in the High Court, which was disposed of vide order dated 6.4.2006 granting one opportunity to the plaintiff to examine the expert witness at his own responsibility, subject to payment of Rs.2,000/- as cost. However, on the date fixed in the trial Court as 11.5.2006, the plaintiff submitted affidavit of PW Harbax Singh Mander, Forensic Science Consultant as well as his own affidavit. After a few dates, both these witnesses were subjected to cross-examination. The evidence produced by the defendant was also recorded. Then the trial Court of Additional Civil Judge (Sr.Divn.), Bathinda vide judgment dated 7.9.2009 decreed the suit filed by the plaintiff partly regarding specific performance directing the defendant to execute the sale deed regarding shop No.34 bearing MC No.293-A measuring 17 ' x 80' situated at grain market, Bathinda within two months, whereas relief of specific performance of agreement to sell regarding property comprised in Khasra No.2480 min was declined. The relief in the form of decree for recovery of Rs.2,69,000/-, which has been received by defendant pertaining to that property was passed in favour of

plaintiff against the defendant with interest and cost. The plaintiff was further granted decree for permanent injunction restraining the defendant from alienating the property bearing shop No.34 bearing MC No.293-A situated in Grain Market, Bathinda.

4. Feeling aggrieved by the said judgment and decree, the plaintiff and the defendant had preferred separate appeals before District Judge, Bathinda. The same were assigned to Additional District Judge, Bathinda. The said appeals were finally heard and disposed of by a common judgment dated 25.10.2018 observing that the evidence of plaintiff was recorded beyond the order of the High Court and the trial Court could not have given further opportunity to the plaintiff to examine any other evidence except the expert witness allowed by the High Court, while disposing of the revision petition filed by the plaintiff and that the plaintiff was not entitled to examine any other additional evidence. The operative part of the judgment passed by learned Additional District Judge, Bathinda is reproduced as under:

The learned counsel for the appellant/respondent/plaintiff argued that whatever fault was there, was on the part of the court itself and for this the contempt proceedings were the answer. The evidence taken on record cannot be discarded. However, I find no force in this contention because there is no doubt about the fact that the learned lower court cannot go beyond the order of Hon`ble High Court and if it does so, it invites contempt proceedings, but it is also true that proceedings carried out beyond order of Hon`ble High Court are not admissible and cannot be taken into

consideration for deciding the lis. Admittedly the learned lower court had acted beyond the order, while granting opportunity after opportunity and also by allowing the examination of the plaintiff while clear orders were as to expert witness. Clearly this evidence cannot be taken into consideration while passing the judgment but learned lower court while passing the judgment has relied upon this evidence, taking into consideration the oral testimony as well as documents produced by PW10 Surinder Mohan, beyond orders of Hon`ble High Court. As such, the judgment itself cannot sustain in the eyes of law and was liable to be set aside. Therefore, the impugned judgment and decree passed by the court below are set aside, and the matter is remanded back to the learned lower court to decide the matter afresh by taking into consideration the observations vis a vis evidence of the plaintiff beyond the orders of Hon`ble High Court. As such, both the appeals stand disposed of as remanded. The parties are directed to appear before the learned lower court on 12.11.2018.

5. The Additional District Judge, Bathinda while setting aside the judgment and decree passed by the trial Court had remanded the case to the trial Court to decide the matter afresh taking into consideration the observations vis a vis evidence of the plaintiff beyond orders of the High Court. Such judgment left the plaintiff aggrieved and he has approached this Court by way of filing separate appeals, which are being resisted on behalf of the respondent/defendant.

6. I have heard learned counsel for the parties besides going through the record and I find that the appeals are absolutely without any merit.

7. When the evidence of the plaintiff was closed by order of trial Court and he had challenged that order by way of filing revision petition, admittedly he had been allowed to examine expert witness only, subject to payment of costs. In the garb of that order, the plaintiff not only examined expert witness Sh.Harbax Singh Mander but also got his own statement recorded, which was beyond purview of the order passed by the High Court. The trial Court was certainly not careful and cautious in the matter since it had allowed statement of plaintiff to be recorded without the same being permitted by the High Court to be so done. The plaintiff had rather tried to play fraud with the Court clearly knowing that he had been permitted to examine the expert witness only but then submitted his own affidavit as examination-in-chief and subsequently he was cross-examined also. It is not only an act of negligence on the part of the trial Court but indicates towards cleverness and *mala fide* intention on the part of plaintiff, the involvement of counsel for the plaintiff in the whole process also seems to be there since it cannot be expected that he had got statement of plaintiff recorded ignorant of the order passed by this Court allowing the revision petition.

8. Here it may be noted that counsel for the defendant was also negligent inasmuch as he had cross-examined the plaintiff without bothering to go through the order passed by this Court in the revision petition moved by the plaintiff. The trial Court again fell into error in

considering the statement of the plaintiff recorded in the case when the statement could not be taken into consideration having not been allowed to be recorded by the trial Court.

9. The argument advanced by learned counsel for the appellant that since counsel for the defendant had cross-examined the witness, as such defendant is estopped from raising this point now and rather the defendant had waived of his right, is totally without merit. The plaintiff himself being guilty of playing fraud with the Court, he cannot certainly take plea of estoppel on the part of defendant and defendant having waived of any right. There is nothing on record to show that defendant had given his consent for recording statement of the plaintiff after evidence of the plaintiff had been closed by order and in the revision petition filed by the plaintiff, the High Court had allowed the examination of expert witness only that too on payment of cost. Under the circumstances, there is no question of the defendant having waived of any right or being estopped by his act and conduct in the matter, rather it seems that the cross-examination of the plaintiff was conducted on behalf of the defendant just out of ignorance and under some wrong impression.

10. The judgment referred to by learned counsel for the appellant **State of Punjab & Ors Versus Dhanjit Singh Sandhu, 2014(3) Civil Court Cases 269** wherein it was observed that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground, does not find application to the case in hand due to different facts and circumstances and the context in which such observations had been made. As already

observed above, the defendant is not shown to have given his consent for recording of statement of the plaintiff after evidence of the plaintiff was closed by order and High Court had also not allowed recording statement of plaintiff and cross-examination of the plaintiff seems to have been conducted under some misconception or by way of negligence. The defendant has not derived any benefit out of such situation. Therefore, estoppel as provided under Section 115 of the Evidence Act does not come into play against the defendant.

11. For similar reasons, the judgment *M/s Sonell Clocks and Gifts Ltd. Versus New India Assurance Co. Ltd., 2018(4)RCR(Civil)203*

by the Apex Court wherein the waiver of right was interpreted and explained does not come to rescue of the appellant. In this judgment, it was observed that waiver is intentional relinquishment of right; it must involve conscious abandonment of existing legal right, advantage, benefit, claim or privilege, which except for such waiver, party could have enjoyed; it is agreement not to assert right; to invoke principle of waiver, person who is said to have waived must be fully informed as to his rights and with full knowledge about same, he intentionally abandons them. There must be specific plea of waiver, much less of abandonment of right by opposite party. In this case no waiver on the part of the defendant comes out to be there.

12. The judgment passed by the Additional District Judge, Bathinda remanding the case is perfectly legal and valid and does not suffer from any illegality or infirmity. The plaintiff is feeling unnecessarily aggrieved by the same. The appeals filed by the

SAO-106-2018(O&M) &
SAO-107-2018(O&M)

-8-

appellant/plaintiff are devoid of any element of merit and are dismissed accordingly.

21.12.2021
Brij

(H.S.MADAAN)
JUDGE

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

Whether reportable : **Yes/No**