

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

**SAO-21-2022 (O&M)
Date of decision : 06.07.2022**

Lakhmir Singh (since deceased) through LR's and Others ... Appellant(s)

Versus

Kuldeep Singh (since deceased) through LR's and Others ... Respondent(s)

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Gurcharan Dass, Advocate for the appellants.

ALKA SARIN, J. (ORAL)

The challenge in the present appeal is to the order dated 26.05.2022 passed by the lower Appellate Court whereby the matter has been remanded to the Trial Court for deciding afresh on the question of maintainability.

The brief facts relevant to the present *lis* are that the plaintiff-respondent No.1 filed a suit for declaration to the effect that he (plaintiff-respondent No.1) and defendant Nos.11 to 13 (respondent Nos.8 to 10 herein) are joint owners in possession to the extent of 1/3rd share in the suit land fully described in the head-note of the plaint. It was averred in the plaint that the plaintiff-respondent No.1 is the son of late Harchand Singh son of Amar Singh and defendant Nos.11 to 13 (respondent Nos.8 to 10 herein) are the widow and daughters of the brother of the plaintiff. The defendant-appellants herein filed their written statement raising the

preliminary objection that the suit itself was not maintainable being barred by the principles of *res judicata* and under Order 2 Rule 2 of the Code of Civil Procedure, 1908 (CPC) amongst others. It is pertinent to note that earlier an application under Order 7 Rule 11 CPC was filed by the defendant-appellants which came to be dismissed. Against the dismissal of the said application Civil Revision No.7854 of 2013 was preferred. Vide order dated 03.07.2018, though the revision petition was dismissed, it was directed that the issue regarding maintainability be decided in the first instance. Accordingly, issue No.2 qua maintainability was taken up at the first instance by the Trial Court. The onus of issue No.2 qua maintainability was on the defendant-appellants. The defendant-appellants led their evidence, however, none appeared on behalf of the plaintiff-respondent No.1 to rebut the evidence of the defendant-appellants. Vide judgment and decree dated 29.08.2018 the suit of the plaintiff-respondent No.1 was dismissed on merits as being not maintainable. Aggrieved by the said judgment and decree the plaintiff-respondent No.1 preferred an appeal and vide order dated 26.05.2022 the case was remanded back to the Trial Court by passing the following order :

“18. In view of above discussion, the instant appeal is accepted. Impugned judgment and decree are set aside.

However, as the matter pertains to the year 2005, both the parties very fairly conceded to the advice of this Court and made the following statements :

“Learned counsel for appellant has suffered statement to the effect that he will cross-examine DW Kashmira

Singh and Sohan Singh on the question of maintainability in one effective opportunity and will not seek the adjournment for the purpose of their cross-examination. He further stated that the plaintiff would lead the evidence on issue no.2 regarding maintainability within two effective opportunities and will not seek further adjournment for leading the evidence as the matter is old one. Learned counsel for respondent nos. 3 and 4 (iii) also suffered statement to the effect that the respondents/defendants will produce Kashmira Singh and Sohan Singh for their cross-examination by plaintiff/appellant in the month of July. Except for their cross-examination and for tendering of documents, no other evidence is required to be led on issue no.2.”

Accordingly, the respondents/defendants are directed to produce DW Kashmira Singh and DW Sohan Singh during the month of July, 2022 for their cross-examination and tendering of documents and no other evidence shall also be led by them on their behalf and the appellant/plaintiff is also made bound down to cross-examine the above said witnesses on the question of maintainability of the suit, in one effective opportunity and will not seek any adjournment. The appellant/plaintiff shall lead his evidence on issue no.2

regarding maintainability of the suit in two effective opportunities and not to seek further adjournment for leading evidence.

With these observations, the matter is remanded back for deciding the same afresh on the question of maintainability”

The Lower Appellate Court held that as per the provisions of Order 9 Rule 8 CPC, the suit could have been dismissed for non-prosecution, however, the same could not have been decided on merits in the absence of the plaintiff-respondent No.1.

Learned counsel for the defendant-appellants would contend that the appellants have been litigating for a number of years and the plaintiff-respondent No.1 chose not to appear to lead his evidence and now is in fact taking advantage of his own wrong.

Heard.

The Trial Court could not have decided the suit on merits in the absence of the plaintiff. Order 9 Rule 8 CPC reads as under :

“8. Procedure where defendant only appears - Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part

only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.”

The wordings of the above reproduced provision are mandatory in nature and in case the plaintiff does not appear the Court can dismiss the suit for non-prosecution and the same cannot be decided on merits. Dealing with a situation arising from a decision in an appeal, it was held by the Hon’ble Supreme Court in the case of **“Harbans Pershad Jaiswal vs. Urmila Devi Jaiswal [(2014) 5 SCC 723] :**

“11. It is clear from the above that whereas an appeal can be heard on merits if the respondent does not appear, in case the appellant fails to appear it is to be dismissed in default. The Explanation makes it clear that the court is not empowered to dismiss the appeal on the merits of the case. As different consequences are provided, in case the appellant does not appear, in contradistinction to a situation where the respondent fails to appear, as a fortiori, Rule 19 and Rule 21 are also differently worded. Rule 19 deals with readmission of appeal “dismissed for default”, where the appellant does not appear at the time of hearing, Rule 21 talks of “rehearing of the appeal” when the matter is heard in the absence of the respondent and ex parte decree made. In Abdur Rahman case [(1996) 6 SCC 62] , this Court made it clear that because of non-appearance of the

appellants before the High Court, the High Court could not have gone into the merits of the case in view of specific course of action that could be chartered (viz. dismissal of the appeal in default above) continued in the Explanation to Order 41 Rule 17 CPC and by deciding the appeal of the appellants on merits, in his absence. It was held that the High Court had transgressed its limits in taking into account all the relevant aspects of the matter and dismissing the said appeal on merits, holding that there was no ground to interfere with the decision of the trial court.”

Similarly, a suit also cannot be decided on merits if the plaintiff or his counsel is not present before the Trial Court. Thus, in the absence of the plaintiff the suit can only be dismissed by the Trial Court for non-prosecution and cannot be decided on merits.

In view of the above, I do not find any illegality and infirmity in the order passed by the Lower Appellate Court and, hence, the present appeal is accordingly dismissed. Pending applications, if any, also stand disposed off.

06.07.2022
Yogesh Sharma

(ALKA SARIN)
JUDGE

NOTE : Whether speaking/non-speaking : Speaking
Whether reportable : YES/NO