211 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO-31-2008 (O&M)
Date of decision: 13.07.2023

Shammi Monga and another

..Appellants

Versus

Mahabir Singh and others

.Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Som Nath Saini, Advocate for the appellants

Mr. B.S.Bhatia, Advocate for respondent no.1 to 5 & 7

ANIL KSHETARPAL, J (Oral)

1. This Second Appeal against an order has been filed by the defendants to challenge the correctness of the order of remand passed by the First Appellate Court. A civil suit for grant of decree of declaration to the effect that the plaintiffs are the owners and in possession free from from any encumbrances of the land situated in Village Tandwal, Revenue Estate no.216, Tehsil Barara, District Ambala. The suit land was under mortgage in possession with certain Muslims. The suit was dismissed by the trial court under Order XVII Rule 3 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') as the plaintiffs failed to produce the evidence.

2. In appeal, the First Appellate Court, after the threadbare discussion of the various developments, which took place during the pendency of the trial, recorded the following findings:-

Rekha Sihag
2023.07.21 13:29
I attest to the accuracy and
integrity of this document
Chandigarh

"7. According to appellants-plaintiffs, they could not lead evidence due to death of their counsel Shri Jai Ram Advocate. To find out truth, let us examine the case history. In this case, issues were framed on 14.3.1997 and matter was adjourned to 7.1.98 for PWs. But no PW was produced before the court. Then, case adjourned to 9.9.98. On 9.9.98, case was transferred from that court. Then, it was adjourned to 24.10.1998. On 24.10.1998 and subsequently on 19.1.1999, evidence was not let and case was adjourned for 21.5.99 for PWs.

8. On 10.4.1999, an application for summoning the witnesses as well another application under order 11 rule 14 CPC was filed. Then, case was adjourned to 21.5.99 for PWs. On 21.5.99, no evidence was present and case was adjourned for 18.9.99 for PWs. On 18.9.99, case adjourned to 7.1.2000 for PWs. On 7.1.2000, reply to application under Order 11 Rule 14 CPC was not filed and matter was adjourned to 24.1.2000 and then to 23.2.2000; 7.4.2000; 15.5.2000; 19.7.2000 and 2.9.2000 for filing reply to the application. On 2.9.2000, reply to the application was filed and case was adjourned to 4.10.2000 for consideration on this application. Then, case was adjourned for 9.11.2000; 20.12.2000; 9.2.2001 and 22.3.2001. finally, on 22.3.2001 that application was disposed of. Thus, it is clear from the record all these opportunities were not effective ones. Because an application under Order 14 rules 11 CPC remained pending.

9. Then, again matter was adjourned to 18.7.01, on which date, court was on leave and matter was adjourned to 19.10.2001 for PWs. On 19.10.2001, case was transferred and matter was fixed for 19.4.02

Rekha Sihag
2023.07.21 13:29
I attest to the accuracy and
integrity of this document
Chandigarh

> *& 8.10.2002 for PWs. Then matter was adjourned to 21.4.200. But before that date, file was taken up and matter was adjourned to 21.9.2003 for notice on application for Lrs and amendment to plaint. Then, matter remained pending on that application till 29.8.2005. Meanwhile, affidavit of PW Jagdish Singh was filed. Counsel of plaintiffs Shri Jai Ram Advocate expired and four opportunities were granted to the plaintiff, but it is not to be ignored that on all these dates, their counsel Shri Jai Ram Advocate was actually died though marked present in order sheet in a routine manner. It is also to be kept in mind that during the period application under order 7 rule 11 CPC remained pending for consideration what was decided on 12.12.2007. So, again effective opportunities were not granted."*

3. The First Appellate Court remanded the case back to the trial court for granting two effective opportunities to the appellants of 10 days each subject to the payment of Rs.10,000/- as costs. The appeal is pending before this Court for the last 15 years.

4. Heard the learned counsel representing the parties at length and with their able assistance perused the paperbook. Learned counsel representing the appellants submits that the plaintiffs failed to lead any evidence though the suit remained pending for 11 years. He further draws the attention of the court to an interim order dated 22.03.2001 wherein the plaintiffs were directed to conclude their evidence preferably on the next date of hearing i.e 11.07.2001. He further relies upon the judgments passed in **Naresh Chand Gupta vs. Braham Prakash and Smt. Dayawati 2007 SCC (Online Delhi) 1000** and **M/s**

Rekha Sihag
2023.07.21 13:29
I attest to the accuracy and
integrity of this document
Chandigarh

Shiv Cotex vs. Tirgun Auto Plast P. Ltd. and others (2011) 9 SCC 678.

5. This Court has considered the submissions of the learned counsel representing the parties and perused the paperbook. The First Appellate Court as a matter of fact has found that the presence of Sh.Jai Ram, Advocate was being marked in a routine manner though he had already died. It has further been noticed that various applications filed by the parties remained pending. The court has recorded a positive finding that though many opportunities were given to the plaintiffs to lead evidence, yet, these opportunities were not effective one. In these circumstances, the First Appellate Court in exercise of its discretion, has opted to grant two more opportunities to the plaintiff to lead their evidence. The dispute is with regard to immovable property. The suit is for declaration qua ownership of the property. Ultimately, Order XVII Rule 3 CPC is a procedural provision. Such provision has been incorporated to ensure the speedy disposal of the cases. Once a positive finding has been arrived at by the First Appellate Court that the various opportunities granted to the plaintiffs were not effective opportunities, this Court in exercise of its appellate jurisdiction is not expected to interfere in the absence of any material irregularity or perversity. Undoutedly, on 22.03.2001 the plaintiff was directed to conclude his evidence, preferably on the next date of the hearing. However, thereafter, the suit was transferred to another court and the case was adjourned in a routine manner. The correctness of the factual finding recorded by the First Appellate Court is not disputed. The judgments

Rekha Sihag
2023.07.21 13:29
I attest to the accuracy and
integrity of this document
Chandigarh

relied upon by the learned counsel representing the appellant are in the peculiar facts of the case.

6. Keeping in view the aforesaid facts, no ground to interfere is made out.

7. Hence, dismissed.

8. All the pending miscellaneous applications, if any, are also disposed of.

13.07.2023 **(ANIL KSHETARPAL)**
rekha **JUDGE**
Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No

Rekha Sihag
2023.07.21 13:29
I attest to the accuracy and
integrity of this document
Chandigarh