
(1980) 09 P&H CK 0026
In the Punjab And Haryana At Chandigarh
Case No : S.A.O. No. 41 of 1980

The Punjab and Sind Bank Ltd. and Others	APPELLANT
Vs	
Punjab Wakf Board	RESPONDENT

Date of Decision : 29-09-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23A

Citation : (1981) 3 ILR (P&H) 26

Hon'ble Judges : J.V. Gupta, J

Bench : Single Bench

Advocate : H.L. Sarin, for the Appellant; A.N. Aggarwal, for the Respondent

Final Decision : Allowed

Judgement

J.V. Gupta, J.—The Defendants Appellants have filed this appeal against the order of the Additional District Judge. Sonapat, dated 17th of May, 1980, whereby the judgment and decree of the trial Court has been set aside and the case has been remanded to the trial Court for fresh decision.

2. The Punjab Wakf Board. Ambala Plaintiff-Respondent, filed a suit for possession of the land measuring 363 square yards forming khasra No. 4031 on the allegations that it was Darghe Sayyad Imman Nasar-Uddin and thus acquired the character of Wakf property by user, dedication and occupation The Defendants without any permission, illegally and forcibly occupied the said property and they told to vacate the same in spite of repeated efforts The suit was contested on behalf of the Defendants. It was contended that the suit property is neither wakf property and nor formed part of khasra No. 4031. On the pleadings of the parties, the trial Court framed as many as 9 issues but dismissed the Plaintiff's suit on the finding of issues Nos. 1, 2 and 3. On appeal, the learned Additional District Judge has reversed the finding of the trial Court on issue No. 2 it has been held that the plaint was instituted by a duly authorised person. On the finding of issues Nos. 1 and 3 of the trial Court, the lower appellate Court took the view that the case, in fact, requires further evidence

and therefore, the finding of the trial Court on these issues could not be sustained. It has been further held that the Plaintiff moved an application that a Local Commissioner be appointed and measurements be taken in respect of land in dispute but this application was wrongly dismissed by the trial Court. According to the learned Additional District Judge, the facts and circumstances of the case require appointment of a suitable Local Commissioner and only then appropriate findings on these issues shall be possible. Consequently, the judgment and decree of trial Court has been set aside and the case has been remanded to the trial Court for deciding the matter afresh on these issues after recording further evidence including the appointment of the Local Commissioner. Feeling aggrieved against this order, the Defendants have come up in appeal in this Court.

3. Learned Counsel for the Appellants contended that under the circumstances of the case, there was no occasion for the lower appellate Court to set aside the decree of the trial Court and then remand the case for fresh decision after further evidence. In support of his contention, he referred to *Smt. Dhapan v. Vijay Singh and Ors.* 1980 PLR 211 and *Sheo Daiti v. Mst. Sarbati and Ors.* 1970 PLR 702.

4. On the other hand, the learned Counsel for the Plaintiff-Respondent submitted that under Order 41, Rule 23-A, of the Code of Civil Procedure, the appellate Court has the powers to send the case back for retrial.

5. I have heard the parties at a great length. Order 41, Rule 23-A, Code of Civil Procedure, reads as under:

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.

This rule pre-supposes that where the decree is reversed in appeal and then retrial is considered necessary, only then the appellate Court shall have the same powers as it has under Rule 23. It does not mean that the decree be reversed because, according to the appellate Court, a retrial is considered necessary. Reversing of the decree is a condition precedent and after reversing the decree, if the appellate Court considers the retrial necessary, it will have the same powers as it has under Order 41, Rule 23, Code of Civil Procedure. In the present case, the findings of the trial Court on issues Nos. 1 and 3 could not be reversed on the basis of the evidence on the record nor the same have been, as a matter of fact, been reversed by the lower appellate Court. What has been observed is that the findings of the learned trial Court on issues Nos. 1 and 3 cannot be sustained. If in the opinion of the learned Additional District Judge, the appointment of a Local Commissioner was necessary in order to do justice between the parties, the same could be appointed by the Court itself or the trial Court could be directed to send a report after appointing a Local Commissioner. For that purpose alone, the findings of the trial Court on these issues could not

be reversed in appeal.

6. Consequently, this appeal succeeds, the order of remand passed by the lower appellate Court is set aside and it is directed that the appeal be registered on its original number and be disposed of in accordance with law keeping in view the observations made above. The parties are directed through their counsel to appear in the Court of the Additional District Judge, Sonapat, on 17th of October, 1980.