

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

SAO 17 of 2011

Date of Decision: April 29, 2015

Phulwati

.....Petitioner

Vs.

Jagbir

.....Respondent

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.

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Present:- Mr.M.S. Khaira, Sr. Advocate with
Mr. D.S. Randhawa, Advocate
for the appellant.

Mr. K.P. Singh, Advocate
for the respondent.

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M.M.S. BEDI, J. (ORAL)

This order will dispose of second appeal against order dated January 29, 2011 setting aside the judgment and decree passed against the appellant by trial Court on January 29, 2010 and remanding back the case to the trial Court with a direction to decide the suit afresh after complying with provisions of Order 16 Rule 10 CPC regarding examination of attesting witness of the Will i.e. Mann Singh.

Brief facts which are relevant for the decision of the present case are that the plaintiff- petitioner had filed a suit for declaration and permanent injunction claiming that she was in cultivating possession as co-sharer in the suit land mentioned in the heading of the plaint and that the Will dated June 3, 1993 allegedly executed by her father-in-law Mahinder Singh in favour of defendant-respondent, her brother-in-law and mutation on the basis of said Will were illegal, null and void and liable to be cancelled. She has also sought injunction against the defendant-respondent. Husband of the plaintiff- appellant pre-deceased, her father-in-law Mahinder Singh in whose estate she claimed a legal right. The trial Court examined the validity of the Will dated June 3, 1993 Ex.DW1/A. The defendant had examined DW3 Rakesh Kumar, son of the scribe Sodan Singh to show that an entry had been made in the register maintained by his father regarding the Will. Another witness DW4 Ashok Kumar, son of attesting witness Lal Chand, Lambardar was examined who identified the signatures of his father on the Will. The second attesting witness to the Will, namely, Mann Singh son of Desh Raj though alive was not examined by the defendant- respondent. Several opportunities were granted to the defendant to produce his evidence but the said attesting witness was not produced as such the evidence of the respondent was closed vide order dated August 29, 2009. The trial Court observed that Section 68 of the Evidence Act, for short 'the Act', requires that a Will is required to be proved with the testimony of at least one attesting witness, however, Section 69 of the Act provides that in cases

where no attesting witness can be found, then it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person. The trial Court relied on Section 47 of the Act, observing that when the Court has to form an opinion as to the person by whom document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, would be a relevant fact. Relying upon the testimony of DW3 Rakesh Kumar, son of scribe, the Will Ex.DW1/A was held to be proved and the suit of the plaintiff was dismissed.

The plaintiff aggrieved by the dismissal of her suit filed an appeal challenging the finding of the trial Court on issue No.1 which pertains to the controversy for declaration regarding the Will.

The lower Appellate Court has set aside the judgment and decree dismissing the suit of the plaintiff- appellant by observing as follows:-

“19. In case titled Babu Singh and others Versus Ram Sahai @ Ram Singh 2008 (3) LJR 451, one of the attesting witness died and second witness could not be served despite summons were issued. Process under Order 16 Rule 10 CPC was not followed and no step was taken to compel presence of second witness. In these circumstances Hon’ble Apex Court held that provision of

section 69 of Evidence Act 1872 cannot be invoked to prove the Will and Will was held not to be proved.

20. In the present case Man Singh son of Beghraj second attesting witness of Will Ex.,DW1/A is alive but could not be examined and process under Order 16 Rule 10 of Civil Procedure Code was also not followed by the learned lower Court and provisions of Section 69 of Evidence Act have been invoked by learned lower Court without following the procedure laid down in Order 16 Rule 10 of CPC.

21. In view of the aforementioned proposition of law discussed above impugned judgment and decree are set aside and case is remanded back to learned trial court with the direction to decide the suit afresh after making compliance of Order 16 Rule 10 of Civil Procedure Code regarding examination of attesting witness i.e. Man Singh son of Beghraj.”

The plaintiff has approached this Court against the order of remand claiming that the defendant had been given sufficient opportunities to produce his evidence. After giving him fair opportunity, the trial Court had closed the evidence of the defendant. The defendant had not challenged the order closing the evidence by filing a cross-appeal as such the defendant was not entitled to any further opportunity of hearing. The validity of the

order closing the evidence of the defendant was not questioned in the cross-appeal under Order 43 Rule 1 A CPC by filing an appeal under Order 41 CPC.

Counsel for the plaintiff-appellant has referred to various interim orders to show that number of opportunities had been granted to the defendant- respondent before closing of his evidence. Various interim orders passed by the trial Court reads as follows:-

“No DW is present. Adjournment requested by counsel for defendant heard. Now to come upon 30.9.2008 for recording of DWs at Own responsibility.

Sd/-Amarjit Singh,

CJJD 11.8.08

Present: As above.

One DW present and examined. No other DW is present date is sought. Heard now to come up on 21.10.08 for DWs at own responsibility.

Sd/- CJJD/Palwal

30.9.09

Present: As above.

One DW present and examined. No other DW is present date is sought heard now to come up on 16.12.2008 for DWs at own responsibility. Last opportunity granted.

Sd/- CJJD/Palwal

21.10.08

Present: As above.

One DW is present. No other DW is present date is sought heard in the interest of justice case is adjourned to 7.3.09 for DWs at his own responsibility. Last opportunity stand.

Sd/- CJJD/Palwal

7.3.2009

Present: Ld Counsel for parties.

One DW is present and recorded defendant has sought one more opportunity for DWs statement recorded heard. Now case is adjourned to 30.5.09 for DWs at own responsibility. Last opportunity stands.

Sd/-CJJD/ Palwal

12.5.09

Present: Ld Counsel for parties.

No DW is present. Ld. Counsel for defendant has closed oral evidence and seeks time for tendering documents be tendered on 7.7.09

Sd/-CJJD/ Palwal, 30.5.09.

Present: Parties in person.

Documents not tendered date sought, heard and allowed. Now case is adjourned to 29.8.09 for tendering of documents by defendants.

Sd/-Sudhir Parmar,

CJJD 27.7.09.

Present: Sh. S.N. Tewatia, Advocate for plaintiff.

Sh R.P. Bainsla Advocate for defendants.

Ld. Counsel for defendants after tendering certain documents closed the defendants evidence. Now case is adjourned to 26.9.09 for rebuttal evidence if any and for arguments.

Sd/-Amit Sehrawat,

CJJD 29.8.09.

Present: None

Case taken up today.

On leave on 26.9.09.

Case is adjourned to 29.9.09 for parties informed.

Sd/- CJJD.25.9.09

Present: Sh S.N. Tewatia Advocate

Sh R.P. Bainsla Advocate.

No rebuttal evidence is present adjournment is requested, heard and allowed. Now case is adjourned to 14.11.09 for rebuttal evidence if any and for arguments.

Sd/-CJJD/ Palwal

29.9.09.”

It has been argued by Mr. M.S. Khaira, Senior Advocate that the burden to prove execution of the Will in the present case lay on the propounder of the Will i.e. the defendant but the lower Appellate Court has, in the light of Section 69 of the Act wrongly observed that the defendant had successfully discharged the burden to prove the execution of the Will by wrongly invoking the provisions of Section 69 of the Act as one of the attesting witness is still alive. It was argued that the ratio of the rules in **Babu Singh and others Vs. Ram Singh @ Ram Sahai**, 2008 (3) LJR 451 (SC) has been wrongly applied by lower Appellate Court while remanding the case.

On the other hand, learned counsel for the respondent has submitted that the remand order is fair and just order.

I have heard learned counsel for the appellant as well as counsel for the respondent and carefully gone through the facts and circumstances of the case in context to the relevant provisions of law. The power to remand the case by an Appellate Authority is enshrined in Order 41 Rule 23, Order 41 Rule 23 (A), Order 41 Rule 24, and Order 41 Rule 25 CPC. The Apex Court in **P. Purushottam Reddy and another Vs. Partap Steels Limited**

AIR 2002 SC 771 considering the provisions of remand had observed that Order 41 Rule 23 CPC applies only where the trial Court disposes of the entire suit by recording its finding on a preliminary issue without deciding other issues. Order 41 Rule 25 CPC contemplates a limited remand to try only such issues as are referred to it for trial. An Appellate Court could have recourse to its inherent powers to make a remand where express provisions are available dealing with a situation. It was held that where the material is available on record, the Appellate Court should take up the matter itself and proceed to record its own findings instead of remand for fresh recording of the findings on the left out issues. It was specifically observed that an unwarranted order of remand gives a litigant undeserved lease of life, and therefore, must be avoided. In the present case, the lower Appellate Court has remanded the case to enable the defendant- respondent to adduce additional evidence despite the fact that defendant- appellant had not questioned the legality of the order closing his evidence by filing an appeal which was even maintainable under Order 43 Rule 1 (a) CPC or by filing an appeal under Order 41 CPC. It is pertinent to mention that Order 41 Rule 27 CPC permits the production of additional evidence before the Appellate Court but for that purpose, a party seeking to produce additional evidence has to move an application for additional evidence before the Appellate Court by establishing that the party seeking to produce additional evidence despite exercise of due diligence, could not produce such evidence or that such evidence was not within his knowledge. Order 41 Rule 28 CPC

prescribes that whenever additional evidence is allowed to be produced, the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred or any other subordinate Court to take such evidence and to send it when taken to the Appellate Court.

In the present case, the Appellate Court has exercised the power under Order 41 Rule 27 CPC when there being not any challenge to the order of closing of evidence or without any prayer for additional evidence presuming that it is the requirement of the Court. It is settled principle of law that the Appellate Court can allow additional evidence if it is required by it to enable it to pronounce judgment or for any other substantial causes. In the present case, the remand of the case for adducing additional evidence is not warranted. The Appellate Court appears to have wrongly applied the ratio of the ruling in **Babu Singh Vs. Ram Sahai**, AIR 2008 SC 2485. In the said case, taking into consideration the provisions of Sections 68 and 69 of the Evidence Act wherein in a case of proof of the due execution of the Will one attesting witness had already died and other had been won over, it was held that the Will had wrongly been held to be proved under Section 69 of the Evidence Act. Section 69 of the Evidence Act deals with proof when no attesting witness is found. Section 68 of the Evidence Act deals with mode/manner in which execution of the Will is to be proved. The lower Appellate Court placed wrong reliance on **Babu Singh's** case (supra) to remand the matter.

Since the Appellate Court has not arrived at a conclusion that in the exercise of powers under Order 41 Rule 27 (1) (b) CPC, it requires the witness to be examined to enable it to pronounce the judgment. For any other cause, the remand of the case is not legal. In the exercise of powers under Order 41 Rule 28 CPC, the Appellate Court had exercised the power without there being any application by the defendant or without a cross-appeal/ cross-objection by the defendant- respondent. In **Hawa Singh Vs. Lal Singh**, 1998 (1) RCR (Civil) 165, a Single Bench of this Court has held that remand of a case is not a matter of course. The remand is not appropriate unless and until the Appellate Court arrives at a conclusion that findings on the issues are not sustainable and the matter requires re-trial. The case cannot be remanded without reversing the findings of the trial Court. It was observed in the said judgment that mere fact that the Appellate Court has allowed an application for additional evidence in appeal or necessary parties were not allowed to be impleaded, is no ground in itself for remanding the case for re-trial. Order of remand passed by the Appellate Court was set aside with a direction to decide the appeal, in accordance with law.

The circumstances of the present case do not warrant the exercise of extraordinary powers of Appellate Court under Order 41 Rule 33 CPC to pass any order in favour of any of the parties, even if any of the parties may not have filed appeal or objections. No such circumstances have been mentioned by the lower Appellate Court.

In view of the above discussion, this Court is of the opinion that vide the impugned order dated January 29, 2011 the lower Appellate Court by wrong application of judgment of **Babu Singh's** case (supra) has wrongly remanded the case to the trial Court for enabling the defendant, the propounder of the Will, to produce additional evidence by directing the trial Court to exercise powers under Order 16 Rule 10 CPC. The petition is allowed. The order dated January 29, 2011 is hereby set aside. It is directed that the lower Appellate Court will itself take up the adjudication of the first appeal on merits on the basis of the material available and decide the same expeditiously by giving fair opportunity to both the parties. Parties are directed to appear before the lower Appellate Court on May 28, 2015 for adjudication of the appeal on merits.

April 29, 2015
sanjay

(M.M.S.BEDI)
JUDGE