

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

**SAO No.1 of 2012 (O&M)
Date of Decision-24.12.2015**

Dyal Singh and another

Appellants

Versus

Jagjit Singh and others

Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. R.S. Chahal, Advocate
for the appellants.

Mr. Arihant Jain, Advocate
for respondents No.1 and 2.

Mr. Rakesh Chopra, Advocate
for respondent No.3.

RAJ MOHAN SINGH, J.

[1]. This is an appeal against the judgment dated 01.12.2011 passed by District Judge, Fatehgarh Sahib vide which case has been remanded back to the trial Court by setting aside the judgment and decree of the trial Court with a direction to decide the case afresh after returning the findings on additional issues No.1 to 3.

[2]. Plaintiffs-respondents filed suit for declaration to the effect that they are joint owners and in joint possession to the extent of 1/3rd share as coparceners in the suit property being ancestral coparcenary joint Hindu family property since the time of their birth. Sale deed dated 14.06.2001 executed by defendant No.1 in favour of defendant No.2 in respect of 15 kanals 7 marlas of land and sale deed dated 08.08.2001

executed by defendant No.1 in favour of defendant No.2 in respect of 5 kanals 7 marlas of land are claimed to be null and void. Similarly, gift deed dated 20.06.2001 executed by defendant No.1 in favour of defendant No.2 in respect of 33 kanals 7 marlas of land is also claimed to be null and void and not binding upon right of the plaintiffs along with mutations sanctioned in pursuance thereof. A relief of permanent injunction was also sought restraining defendant No.2 from alienating the suit property and seek joint possession to the extent of $1/3^{\text{rd}}$ share in respect of suit land. Plaintiffs alleged that they are grand sons of defendant No.1, sons of defendant No.3 and are nephews of defendant No.2. Parties being Hindu, constituted joint Hindu family, coparcenary and property is ancestral property of the plaintiffs. Plaintiffs are members of joint Hindu family and as such they have right in the property by birth. Fateh Singh great grand father of the plaintiffs died on 16.01.1973. The property was inherited by defendant No.1 grand father of the plaintiffs by way of natural succession. At the time of death of Fateh Singh father of defendants No.2 and 3, they were living as they had taken birth prior to the death of Fateh Singh. Great grand father of Fateh Singh was owner in possession of property in village Sihora District Ambala and also in village Brahman Majra. Fateh Singh sold his ancestral

property in village Sihora and with the sale proceeds of that ancestral property he purchased the suit land in the name of defendant No.1 i.e. grand father of the plaintiffs. Therefore, suit land is ancestral coparcenary and joint Hindu family property.

[3]. Plaintiff further alleged that defendant No.3 i.e. father of the plaintiffs was having bad habits and he was under the influence of defendants No.1 and 2 and defendants in collusion with each other and to grab the property of the plaintiffs executed the sale deed dated 14.06.2011 in favour of defendant No.2 in respect of 15 kanals 7 marlas of land and defendant No.1 also executed sale deed dated 08.08.2001 in favour of defendant No.2 in respect of 5 kanals 7 marlas of land without any right and authority. Sale deeds were without consideration and the same are null and void. A gift deed dated 20.06.2001 was also executed by defendant No.1 in favour of defendant No.2 in respect of 33 kanals 7 marlas of land which is also claimed to be illegal, null and void. Plaintiffs claimed 1/3rd share in the suit property being coparceners and also seek joint possession to the extent of 1/3rd share.

[4]. Defendants contested the suit. On merits, it has been admitted that plaintiffs are grand sons of defendant No.1, sons of defendant No.3 and nephews of defendant No.2. Parties are Saini Sikh and agriculturists. The property was self-acquired

property of defendant No.1. Defendant No.1 had purchased the property from its previous owner Atma Singh vide registered sale deed dated 01.03.1996. The suit property was purchased from his own funds. Father of the plaintiffs filed a Civil Suit No.30 dated 07.02.2001 against defendant No.1 as well as against defendant No.2. In the said civil suit, a compromise was effected between the parties before the Court and defendant No.1 agreed to give two acres of land to the father of the plaintiffs. Suit was ultimately dismissed as withdrawn. At the instance of father of the plaintiffs, Mohinder Kaur, Aunt of father of the plaintiffs also filed a Civil Suit No.351 dated 20.12.2000. In the said suit also a compromise was effected and suit was got dismissed as withdrawn by Mohinder Kaur. Defendant No.1 has already given his total share to the father of the plaintiffs out of the suit property vide gift deed dated 12.06.2001 which was registered on 14.06.2001. Father of the plaintiffs already got his share out of the suit property which was purchased by defendant No.1 by spending huge money from his own earnings and the property cannot be claimed to be ancestral and coparcenary property of the plaintiffs. It has been denied that the property has devolved upon defendant No.1 from his father Fateh Singh. It has also been denied that suit property was purchased from sale proceeds of the land of village Sihora

District Ambala. It has been claimed that the suit property was a self-acquired property of defendant No.1. Defendant also alleged that suit has been filed by the plaintiffs at the instance of defendant No.3. Father of plaintiffs also filed another suit before the Court, claiming the property of defendant No.1 by alleging that property situated at village Shambhu Khurd is an ancestral, coparcenary property. Defendant No.1 asserted that since the suit property is self-acquired property, therefore, he is competent to execute the sale deed and those are lawful transactions which are binding upon the plaintiffs and family members of the plaintiffs. It has been denied that the plaintiffs are joint owners and in joint possession of the property and gift deed is also claimed to be legal.

[5]. Defendant No.2 also contested the suit denying that plaintiffs are governed by Mitakshara School of Hindu Law. It has been denied that plaintiffs are members of joint Hindu family and they are living jointly. Suit property is not joint Hindu family and coparcenary property nor the plaintiffs are members of joint Hindu family or coparceners. The property is claimed to be self-acquired property of defendant No.1 and filing of the suit by the plaintiffs is claimed to be at the instance of defendant No.3. Defendant No.3 admitted the claim of the plaintiffs.

[6]. After filing replication, following issues were framed:-

“1. Whether the plaintiff is entitled to declaration as prayed for? OPP

2. Whether the plaintiff is entitled to permanent injunction as prayed for? OPP

3. Whether the plaintiff is entitled to joint possession as prayed for? OPP

4. Whether the suit is not maintainable in the present form? OPD

5. Whether defendant No.1 is entitled to compensatory costs of Rs.10,000/-? OPD

6. Whether the plaintiffs are estopped by their own act and conduct for filing the present suit? OPD

7. Relief.”

[7]. Parties led their respective evidence to prove their case. Trial Court held under issues No.1 and 3 that in order to prove property being ancestral property it has to be proved beyond issue that property was inherited from common ancestral. No evidence has been led to prove ancestral nature of the property. No excerpts have been brought on record and no revenue official has been examined to prove the nature of the property. Rather, evidence on record was discrepant to prove that property in the hand of Fateh Singh was coparcenary property. Link evidence viz-a-viz excerpt and revenue record have not been established. Trial Court held that plaintiffs have failed to prove the ancestral nature of the property, hence the

property in the hands of Dyal Singh was joint Hindu family, coparcenary or ancestral property. Under issue No.2, trial Court held that in view of findings under issue No.1, since the plaintiffs had failed to prove ancestral nature of the property, therefore, sale deeds and gift deed have been held to be valid. Defendant No.2 cannot be restrained from alienating the suit property. Accordingly issue No.2 was held in favour of defendants. Issues No.4 and 5 were decided against the defendants and in favour of plaintiffs. Under issue No.6, trial Court held that plaintiffs are estopped from their own act and conduct for filing present suit. Ultimately, trial Court dismissed the suit with costs vide judgment and decree dated 02.12.2009.

[8]. Plaintiffs filed appeal against the judgment and decree of the trial Court. During the pendency of the appeal, an application under Order 41 Rule 27 CPC for leading additional evidence was also filed by the appellants. Learned counsel for the appellants submitted that trial Court has committed error in holding that plaintiffs are estopped by their own act and conduct from filing the suit on the basis of compromise Ex.DW1/B to which plaintiffs were not even party. Plaintiffs No.2 and 3 were minors at the time of said compromise allegedly executed by their father who was an addict, therefore, plaintiffs claimed that compromise was not binding upon them. Plaintiffs further

alleged that in the revenue record, land held by Fateh Singh in village Sihora, District Ambala was ancestral property having been inherited from his own forefather and immediately after the sale of said land another piece of land was purchased in village Brahman Majra, District Fatehgarh Sahib, therefore the land purchased in village Brahman Majra was from sale proceeds of ancestral land sold in village Sihora, District Ambala and land assumed character of ancestral property. The application under Order 41 Rule 27 CPC for leading additional evidence was filed. Lower Appellate Court referred to paras No.5 and 6 of the plaint and observed that a specific issue was ought to have been framed in order to enable the parties to lead evidence in the context of proving land being ancestral in village Sihora and Fateh Singh had sold the same and purchased the land in village Brahman Majra out of the sale proceeds.

[9]. Learned counsel for the appellants pressed the application for additional evidence in the shape of producing sale deeds dated 19.01.1966 executed in respect of 13 bigha of land for sale consideration of Rs.10,000/- and also sale deed dated 01.03.1966 in respect of suit property purchased at village Brahman Majra in the name of Dyal Singh. According to learned counsel, both the transactions i.e. sale deed dated 19.01.1966 in respect of selling 13 bigha of land for

consideration of Rs.10,000/- in village Sihora, District Ambala and sale deed dated 01.03..1966 in respect of purchase of land in village Brahman Majra are claimed to be clinching evidence and are necessary for just decision of the case especially in view of the fact that plaintiffs-appellants No.1 and 2 were minors. Plaintiffs-appellants also seek permission to place *jambanadi* for the year 1943-44 and mutation No.1732 pertaining to village Sihora and also *jamabandi* for the year 1968-69. The application was contested by the defendants on the ground that if the additional evidence is allowed, the same will amount to fill up the lacuna at this stage of the case. Defendants alleged that land in village Brahman Majra was not purchased by Fateh Singh, it was purchased by Dyal Singh and as such it cannot be connected with the sale of land by Fateh Singh in village Sihora. The sale consideration of land in village Brahman Majra was much more than the share of Fateh Singh out of sale proceeds and therefore, the land purchased by Dyal Singh at Brahman Majra cannot be said to be ancestral property. The Lower Appellate Court held that additional evidence was necessary to be allowed for just decision of the case. Lower Appellate Court thought it appropriate that proper issues have to be framed for adducing additional evidence. Therefore, while accepting the appeal, Lower Appellate Court

set aside the judgment of the trial Court and remanded the case back to the trial Court after framing issues No.1, 2, 3 as additional issues in the following manner:-

“1. Whether the land held by Fateh Singh in village Sihora, District Ambala was ancestral land? OPP

2. Whether the land purchased at Brahman Majra, District Fatehgarh Sahib vide sale deed dated 01.03.1966 in the name of Dyal Singh had been purchased mainly or partly out of the sale proceeds of sale deed dated 19.01.1966 executed by Fateh Singh and others? OPP

3. Whether the suit property is ancestral coparcenary property of the parties? OPP”

That is how the present appeal came to be filed before this Court.

[10]. I have heard learned counsel for the parties and perused the record.

[11]. Order 41 Rule 23 CPC deals with remand of case by the Appellate Court, wherein Court from whose decree an appeal is preferred and disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may if it thinks fit by order remand the case to the trial Court and may further direct what issue or issues shall be tried by the trial Court and shall send a copy of its judgment and order to the trial

Court to readmit suit under its original number and proceed to decide the same after the remand.

[12]. Rule 23-A deals with remand in other cases where the trial Court has disposed of the case otherwise than a preliminary point and the decree is reversed by the Appellate Court and retrial is considered necessary. The Appellate Court shall have some powers in hand as in Rule 23. In case of remand under Rule 23, the Appellate Court has to return findings under all the issues and on reversal thereof the case was to be remanded back to the trial Court for fresh decision.

[13]. Rule 25 of Order 41 deals with the cases where the trial Court omitted to frame or try any issue or omitted to determine any question of fact which appears to be essential in the opinion of the Appellate Court then the Appellate Court may if necessary frame such issue or issues and record the same for trial to the Court from whose decree the appeal is preferred. In such case, the Appellate Court shall direct the trial Court to take additional evidence if required. The Appellate Court can proceed to take evidence of such issues so framed at appellate stage and can return the findings based on evidence or the Appellate Court can summon a report from the trial Court on the additional evidence so allowed by the Appellate Court or findings under additional issues so framed by it. When a case sought to be

decided by the Appellate Court on the basis of evidence or additional issues framed by it, there are two options before the Lower Appellate Court. The Appellate Court can ask a report from the trial Court under Order 41 Rule 25 CPC. Under Rule 25, remand as a whole is not warranted except that the reversal of findings on all issues and such remand would fall under the ambit on Order 41 Rule 23-A CPC.

[14]. The Appellate Court cannot remand the case with a liberty to produce evidence to fill lacuna in the evidence. A remand cannot be ordered in routine. The power of remand can be exercised by the Appellate Court in three eventualities i.e. under Order 41 Rule 23, Order 41 Rule 23-A and under Order 41 Rule 25 CPC.

[15]. Rule 23 of Order 41 CPC can be applied when suit is disposed of by the trial Court on preliminary issues. Rule 23-A of Order 41 CPC can be invoked when the suit is disposed of other than a preliminary point and when the decree is reversed in appeal and re-trial is found necessary by the Appellate Court. Rule 25 of Order 41 CPC can be exercised when additional evidence or additional issue is framed by the Appellate Court and to that extent a report can be asked from the trial Court on the specific point. Remand makes the party to wait for a final decision for a substantial period which is avoidable in nature,

therefore, case should be remanded rarely and not in a routine manner. The Appellate Court can exercise its discretion under Order 41 Rule 25 CPC and can record the evidence itself and decide the case on merits and if need so be it can summon a report thereto from the trial Court. Therefore, Appellate Court should remand the case rarely and not in a matter of routine.

[16]. The Appellant Court has the power to analyze the factual position and can decide the issue and additional issues of its own. The directory and mandatory nature of statute cannot be resolved by laying down any general rule of universal application. The word 'shall' in the statute, though generally taken to be mandatory in nature but does not unnecessarily mean that in every case it shall have the effect of mandatory nature. On the other hand, it is not always correct that the word 'may' has only directory impact and non-compliance of the statute will not render the proceedings invalid, therefore, the word 'may' and 'shall' appearing in the provision in terms of Order 41 Rule 25 CPC has its own application in view of the fact that legislature intended to make one part directory and other part mandatory and that by itself is not decisive. The power of the Court to find out whether provision is directory or mandatory remains unimpaired.

[17]. The re-trial by the trial Court can be considered

necessary only when the Court gives findings on all the issues and the same are set aside. Reference can be made to **1988(2) RCR 334, Kartar Singh Vs. Punjab and Sind Bank and others.**

[18]. Framing of additional issues on amended plaint and remanding the case without following the procedure is wholly unjustified. In **P. Purshotam Reddy Vs. M/s Partap Still Limited 2002 (2) RCR (Civil) 70**, the Hon'ble Apex Court while incorporating Order 41 Rule 23 and 25 CPC ruled that Rule 23 CPC applies only when trial Court disposed of the entire suit by recording its findings on a preliminary issue without deciding other issues. Rule 25 of Order 41CPC contemplates a limited remand to try only such issues as are referred to it for trial. When application for additional evidence is to be allowed by the Appellate Court, there will be two options before it, the Appellate Court may record evidence itself and it may direct the trial Court to do so. When the issue is only with regard to subject matter of additional evidence for which evidence is to be collected either by the Appellate Court or by the trial Court, the order of remand of the suit as a whole can only be made in terms of Order 41 Rule 23 and under Order 41 Rule 23-A CPC.

[19]. The jurisdiction of the Court to remand a case is discretionary. It is not to be exercised by the Appellate Court

only because it finds it difficult to deal with the entire matter. When the Appellate Court does not agree with the decision of the trial Court, it has to give proper findings of its own. The Appellate Court can shrink of his duty by passing an order of remand routinely. Remand can only be made on the threshold of Order 41 Rule 23, 23-A and 25 CPC.

[20]. Since the Lower Appellate Court has remanded back the case after framing the additional issues on the basis of acceptance of application for additional evidence, judgment of the trial Court appears to have been passed without setting aside the findings recorded under all the issues. The case has been remanded solely on the basis of framing of additional issues after acceptance of application for additional evidence. Learned counsel for the respondents has vehemently argued that the additional issues framed by the Lower Appellate Court were already covered under original issue No.1 framed by the trial Court.

[21]. The Lower Appellate Court has not adverted to the feasibility of treating original issues to be sufficient to answer the controversy in nature. Apparently, the findings recorded by the trial Court under issue No.6 have not been touched by the Lower Appellate Court even remotely. Necessary parameters of remand by the Lower Appellate Court have already been

discussed in the preceding paras, therefore, it would be just and expedient to allow the Lower Appellate Court to have fair assessment of original issues as well as additional issues framed by it and also to visualize whether it is necessary to set aside the findings recorded by the trial Court under all the issues and then to remand the case to the trial Court. The Lower Appellate Court is also obligated to record findings whether original issues are sufficient to answer the requirement of additional issues in any manner.

[22]. In any case, since remand cannot be ordered in routine and the same cannot be intended to fill lacuna of either side, therefore, it will be appropriate to ask the Lower Appellate Court to decide the appeal afresh after taking note of the parameters as discussed above. Resultantly, this appeal is allowed and the order dated 01.12.2011 passed by Lower Appellate Court stands set aside and the case is remanded back to the Lower Appellate Court to pass fresh decision in accordance with law. In entirety, in order to do substantial justice between the parties, Lower Appellate Court would be at liberty to decide the appeal on merits if the feasibility of additional issues is not considered and original issues are considered to be sufficient to answer the controversy.

[23]. Parties are directed to appear before the Lower

SAO No.1 of 2012 (O&M)

17

Appellate Court on 29.01.2016.

24.12.2015
prince

(RAJ MOHAN SINGH)
JUDGE