

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

**Date of Decision-24.12.2015**

**1.           SAO No.10 of 2012 (O&M)**

Jarnail Singh

.... Appellant

Versus

Ajaidar Hussain and ors.

... Respondents

**2.           SAO No.11 of 2012 (O&M)**

Jarnail Singh

... Appellant

Versus

Ajaidar Hussain and ors.

... Respondents

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

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

Mr. Yogesh Chaudhary, Advocate  
for respondent No.1.

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**RAJ MOHAN SINGH, J.**

[1].       These appeals have been directed against the judgment dated 08.11.2011 passed by Additional District Judge, Karnala vide which judgment and decree dated 16.05.2009 passed by Civil Judge (Junior Division), Karnala has been set aside and the case has been remanded back to the trial Court for fresh decision after framing additional issue.

[2].       Vide this common judgment **SAO No.10 of 2012** titled

No.11 of 2012 titled as Jarnail Singh and Ajaidar Hussain and ors are being disposed of. Common facts are being recorded from both the appeals.

[3]. Plaintiff Ajaidar Hussain filed a suit for declaration with consequential relief of permanent injunction to the effect that entries in the revenue record i.e. *jamabandi* for the year 1975-76, 1980-81, 1985-86, 1990-91 and 1995-96 as well as *khasra girdawari* are null and void and are liable to be corrected by declaring the plaintiff to be owner in possession of the property as detailed in the plaint. A consequential relief of permanent injunction has also been sought restraining the defendants from dispossessing the plaintiff from the suit land.

[4]. Plaintiff alleged that as per *jamabandi* for the year 1975-76, he is owner in possession of agricultural land. The land is subject matter of river cause of action and merged into Yamuna river and after its recovery, the land has been mentioned as *shamlat deh* in the revenue record. According to letter No.136 dated 28.01.1984, the land which merged into Yamuna river and recovered later on will be the *Makbuja Malkan* and *shamlat deh*. Since the plaintiff was owner of the land before this merger in the Yamuna river, therefore on recovery plaintiff has to be treated as owner in possession of

the land. The Revenue Officer had wrongly recorded land to be *shamlat deh* inspite of *Makbuja Malkan* in the column of ownership. Plaintiff further alleged that defendant No.1 Joginder Singh neither remained as a Bisweddar in the village nor he was having land at the time of merging of the land in Yamuna river, rather, defendant No.1 along with other defendants have resided in village Jabti Chhapra and are SIKLIGAR by profession and were not farmer. Therefore, question of defendants being *Makbuja* in the suit land does not arise.

[5]. Defendant No.1 contested the suit on all counts. Defendant No.1 denied plaintiff to be owner in possession of the land, rather, claimed himself in cultivating possession of the suit land. Defendant claimed that land has never merged in Yamuna river and since consolidation, defendant No.1 is in cultivating possession of the same. Defendant No.7 also contested the suit. It has been pleaded that consolidation took place in the year 1972-73 and defendant No.1 has been shown in cultivating possession as *gair marusi bah vaja bill's lagan kabja no taur* in the *jamabandi* for the year 1972-73.

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

*"1. Whether the plaintiff is owner in possession of the suit property and the entries in the jamabandi for the year 1975-76, 80-81, 85-86, 90-91 and 95-96 are wrong, illegal, null and*

2. *If issue No.1 is proved whether the plaintiff is entitled for permanent injunction restraining the defendants from interfering in his possession in the suit land in any manner whatsoever? OPD*

3. *Whether suit is not maintainable? OPD*

4. *Whether suit is bad for mis-joinder of parties and non-joinder of necessary parties? OPD*

5. *Whether suit of the plaintiff is liable to be stayed under Section 10 of CPC? OPD*

6. *Relief."*

[7]. Trial Court while discussing revenue record held under issues No.1 and 2 that land being *shamlat deh*, question of title cannot be adjudicated. Defendant is proved to be in possession of the suit land in continuity. In the connected **Civil Suit No.254 of 2007** titled as **Joga @ Joginder Singh Vs. Ajaidar Hussain,** the Court has held that plaintiff is not in possession of the suit land. Therefore, issues have been decided in favour of defendants and against the plaintiffs. In this way, findings of issues No.1 and 2 have been recorded in favour of defendants. Defendant No.1 is the plaintiff in Civil Suit No.254 of 2007, therefore, it has to be taken that the findings of like nature have

to be considered in favour of plaintiffs in Civil Suit No.254 of 2007. In the aforesaid connected suit, issues No.1 and 2 were jointly taken by the trial Court and it has been held that plaintiff is in exclusive possession of the suit property and the entries in the revenue record are null and void and plaintiff was held entitled for injunction as well being in exclusive possession. So issues No.1 and 2 as well as issues No.1 to 3 in the connected suit have been decided in favour of defendant herein i.e. plaintiff Joginder Singh in the connected suit. Trial Court decided issue No.3 in favour of defendant that the Civil Court has got no jurisdiction to adjudicate the matter in question in respect of land being *shamlat deh* or not? After returning the findings under issues No.4 and 5 in favour of plaintiffs, trial Court dismissed the suit. The connected civil Suit No.254 of 2007 was decreed by the trial Court in favour of defendant No.1, plaintiff in the said suit.

[8]. Plaintiff filed appeal before the Lower Appellate Court against the judgment and decree dated 16.05.2009 passed by Civil Judge, Junior Judge, Karnal. The Lower Appellate Court discussed the issue that under Section 13 of Punjab Village Common Lands (Regulations) Act, 1961, Civil Court has got no jurisdiction to entertain any question whether the land is *shamlat deh* and vests in the Gram Panchayat or not? Plaintiff was not proved to be in possession of the suit land. The Lower Appellate

Court adverted to the revenue record in terms of *Shariat Wajid-ul-Arj* wherein land has been recorded as *Gair Mumkin-or Sailab*. By referring to Section 2(g) of Punjab Village Common Lands (Regulations) Act, 1961 in the context of subject matter of river action, the Lower Appellate Court held that since river action land is not capable of vesting in Panchayat as *shamlat deh*, therefore, trial Court is not justified in holding that Civil Court has got no jurisdiction to entertain the suit in question in terms of bar created under Section 13 of Punjab Village Common Lands (Regulations) Act, 1961. The Lower Appellate Court has also opined that without impleading the Gram Panchayat such a finding could not have been recorded and also without framing necessary issue in the following context. In the connected suit, issue No.4 was also framed in respect of maintainability of the suit but said issue was not pressed by the defendants. The Lower Appellate Court accepted the appeal by setting aside the judgment of the trial Court and remanded the case back to the trial Court for fresh decision after framing additional issue:- “Whether the Civil Court has got jurisdiction to entertain and try the present suit?” That is why these appeals came to be filed before this Court.

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

[10]. Issue No.3 in the present suit as well as issue No.4 in

the connected suit though framed on the maintainability of the suit but still the issue regarding bar created under Section 13 of Punjab Village Common Lands (Regulations) Act, 1961 in the context of jurisdiction of the Civil Court has not been framed by the trial Court. The Lower Appellate Court has not adverted to the effect that whether framing of additional issue in the absence of Gram Panchayat would suffice to serve purpose or not? The Lower Appellate Court has also not reversed the findings under all the issues decided by the trial Court. In the absence of any such finding not reversed by the Lower Appellate Court whether remand satisfy the ingredients of Order 41 Rule 23-A CPC or not would be a question that has to be answered in negative. Since the findings of all the issues of the trial Court have not been set aside by the Lower Appellate Court, therefore, such a remand order does not satisfy the ingredients of Order 41 Rule 23-A CPC.

[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 decrees 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 re-admit suit under its original number and proceed to

[12]. Rule 23-A of Order 41 CPC deals with remand in other cases where the trial Court has disposed of the case otherwise then on a preliminary point and the decree is reversed by the Appellate Court and re-trial 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 the findings under all the issues and on reversal thereof the case shall be remanded back to the trial Court for fresh decision.

[13]. Rule 25 of Order 41 CPC 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 of 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 exercised when suit is disposed of by the trial Court on preliminary issues. Rule 23-A 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 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 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)**

**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 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 shrunk 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 decision of both the suits is overlapping in nature, it would be just and appropriate to remand these appeals to the Lower Appellate Court with a liberty to Lower Appellate Court to record findings on merits of the case whether it would be desirable to set aside the findings under all the issues decided by the trial Court. The Lower Appellate Court may decide the appeals on merits and in case it comes out with an opinion that the case requires remand then Lower Appellate Court should identify the category of remand and thereafter, proceed to decide the case on merits in accordance with parameters of Order 41 Rule 23, 23-A and 25 CPC.

[21]. With aforesaid observations, these appeals are remanded back to the Lower Appellate Court for passing fresh judgment in accordance with law.

[22]. Parties are directed to appear before the Lower Appellate Court on 29.01.2016.

**24.12.2015**  
prince

**(RAJ MOHAN SINGH)**  
**JUDGE**