

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

Date of Decision-24.12.2015

1. SAO No.44 of 2013 (O&M)

Yashpal Sharma

... Appellant

Versus

Rekha Sharma and ors.

... Respondents

2. SAO No.45 of 2013 (O&M)

Yashpal Sharma

... Appellant

Versus

Rekha Sharma and ors.

... Respondents

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

Present:Mr. R.K. Chhibbar, Sr. Advocate with
Ms. Riya Bansal, Advocate
for the appellants.

Mr. Gaurav Gaur, Advocate for
Mr. S.M. Sharma, Advocate
for respondent No.1.

Mr. Sanjay Jain, Advocate
for respondents No.2 to 6.

RAJ MOHAN SINGH, J.

[1]. Vide this common judgment, aforesaid two appeals i.e
SAO No.44 of 2013 titled as Yashpal Sharma Vs. Rekha
Sharma and others and SAO No.45 of 2014 titled as Yashpal

Sharma Vs. Rekha Sharma and others are being decided. The facts are being taken from SAO No.44 of 2013.

[2]. Initially, the plaintiffs filed civil revision under Article 227 of Constitution of India. Vide order dated 21.08.2013, this Court ordered that the revisions be re-numbered as appeal with required nomenclature and place before the Court. In this way, present appeals have been re-numbered. Plaintiff-Rekha Sharma and others filed suit for declaration to the effect that judgment and decree dated 11.12.1987 passed by Sub Judge in Civil Suit No.596/89 suffered by Smt. Krishna widow of Charan Dass in favour of Charan Dass son of Rulla Ram is null and void, without consideration and fraudulent. Further Will dated 26.11.1991 executed by Charan Dass in favour of defendants No.2 and 3 and husband of plaintiff No.1 is illegal and null and void, without consideration and is the result of fraud and has no effect on the rights of the plaintiff. Plaintiff alleged that they are owners in possession of some portion of house No.100-B & C, Preet Nagar, Ambala in equal share with a consequential relief of permanent injunction restraining the defendants from alienating the suit property.

[3]. Pritpal Krishan Sharma purchased house No.100-B and 100-C situated in Ambala for a consideration of Rs.18,000/- from Ram Gopal vide registered sale deed dated 11.05.1970.

Pritpal Krishan Sharma executed GPA in favour of mother Krishna Sharma. Pritpal Krishan Sharma was husband of Rekha Sharma-plaintiff No.1 who died on 31.12.1998 at Pune. After the death of husband of plaintiff No.1, his family shifted from Allahabad to Ambala. Defendant No.1 Krishna and defendant No.2 Yashpal Sharma son of Charan Dass started quarreling with the plaintiff No.1 and her children. Defendant No.3 was helping plaintiffs. Defendant No.2 filed suit for permanent injunction against the plaintiffs and defendant No.3 and openly proclaimed that he has got all the documents changed as per Will in their favour. The decree suffered by defendant No.1 in favour of her husband is sought to be illegal, null and void. Similarly, Will dated 26.11.1991 executed by Charan Dass in favour of defendants No.2 and 3 and husband of plaintiff No.1 and father of remaining defendants is also sought to be null and void. Krishna widow of Charan Dass had no right title or interest to execute any decree in favour of her husband to defeat the rights of plaintiff No.1 and her husband.

[4]. Suit was contested by the defendants. Trial Court held that the plaintiffs have miserably failed to prove that the judgment and decree dated 11.12.1987 passed in Civil Suit No.596/89 is null and void. Plaintiffs could not establish the factum of fraud and misrepresentation, therefore, failed to prove

that Will dated 26.11.1991 is also null and void. In the absence of any such evidence on record, plea of fraud could not be proved, the suit was ultimately dismissed by the Civil Judge, Junior Division, Ambala vide judgment and decree dated 25.09.2010.

[5]. Plaintiffs-appellants filed appeal before Lower Appellate Court. Lower Appellate Court found that initially the suit was filed by plaintiff-Rekha Sharma widow of Pritpal Kirshan Sharma, Deep Sharma son of Pritpal Krishan Sharma, Vineeta Sharma daughter of Pritpal Krishan Sharma, Sandeep Dutt Sharma son of Pritpal Krishan Sharma, Hardeep Sharma son of Pritpal Krishan Sharma and Gautam Sharma son of Pritpal Kirshan Sharma. Gautam Sharma, Hardeep Sharma and Sandeep Dutt Sharma minor sons of Pritpal Krishan Sharma who were impleaded through their mother Rekha Sharma filed an application under Order 22 Rule 7 CPC before the trial Court on 31.05.2010 to prosecute the suit in their own capacity as they have attained majority. The applicants were impleaded as minor and on attaining the majority they wanted to prosecute the suit in their own personal capacity. The endorsement was made on the application by the defendants that they had no objection if the application is allowed subject to filing of amended title. Since the defendants had no objection and the applicants have

attained the age of majority, therefore, application was allowed and plaintiffs were directed to file amended title. Thereafter, application was filed by plaintiff No.5-Hardeep Singh on 17.07.2010 for granting permission to the applicant to file additional plaint as per their requirement or in the alternative granting permission to withdraw the suit with a liberty to file fresh one because applicants were earlier minors and now on attaining majority they have right to file the suit in their own capacity. This application was dismissed on 02.08.2010. Plaintiff No.5 was minor at the time of filing of suit and he attained majority during pendency of the suit. Since no permission was granted to the minor to contest his case, serious prejudice has been cast to his right. Reference was made to Order 32 Rule 2 CPC when a suit is instituted by or on behalf of a minor without a next friend, defendant may apply to have the plaint taken off. Order 32 (14) provides that a minor on attaining majority may apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper. If the minor on attaining majority desires to repudiate the suit he shall apply to have his name struck out as co-plaintiff and the Court if find that he is not a necessary party, shall dismiss the suit on such terms and conditions. Plaintiff No.5 though minor at the time of filing of the suit has a right in his own way to file

amended plaint but he was deprived of his legal right. Therefore, the Lower Appellate Court set aside the judgment and decree dated 25.09.2010 and remanded the case back to the trial Court for fresh decision. That is why these appeals came to be filed before this Court.

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

[7]. It is a settled principle that minor on attaining majority is entitled to question the suit on his behalf during his minority by his guardian by filing a separate suit. There is no illegality to file separate proceedings by the minor on attaining majority in terms of Order 32 Rule 12 CPC. The minor on attaining majority sought to decide the authority of his guardian and sought leave to contest the suit in his independent capacity, the Court can direct the plaintiff to amend the plaint. The decree passed against a minor not properly represented must be regarded as a decree passed against a person not a party to the suit and is without jurisdiction. On attaining majority minor can, a dominus litus and he is competent to choose his own way.

[8]. Lower Appellate Court found that trial Court has committed illegality in ignoring the proposition of law, therefore, judgment of the trial Court was set aside while passing the judgment dated 31.10.12012. The Appellate Court has not

reversed the findings recorded under all the issues.

[9].A. 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.

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 decrees 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.

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 of Order 41 Rule 23-A CPC.

B. 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.

Rule 23 could 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.

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.

C. 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.**

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 disposes 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.

D. 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.

[10]. Trial Court framed as many as 8 issues. Issues No.1 to 6 were decided jointly whereas findings were recorded under issue No.7 separately. Issue No.8 related to relief clause and suit was dismissed. While setting aside the judgment of the trial Court, Lower Appellate Court has not adverted any reversal of findings recorded by the trial Court under a different issue and simply on the basis of minority of plaintiff No.5 reversed the entire judgment and decree of the trial Court, which in considered opinion of this Court does not satisfy ingredients of

Order 41 Rule 23-A CPC.

[11]. The Lower Appellate Court while remanding the case back has not adverted to any provision in terms of Order 41 Rule 23 CPC, 23-A and 25 CPC to classify the remand as to what category the same is being ordered, therefore, this Court feels that this case can be remanded back to the Lower Appellate Court to give specific findings as to under what category remand falls. Lower Appellate Court would be well within its jurisdiction to decide the controversy within the parameters of Order 41 Rule 23, 23-A and 25 CPC after adverting to evidence on record.

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

24.12.2015
Prince

(RAJ MOHAN SINGH)
JUDGE