

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

**SAO NO.58 of 2013 (O&M)
Date of Decision-24.12.2015**

Pawan Kumar

... Appellant

Versus

Bhola Singh and others

... Respondents

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

Present: Mr. Kanwaljit Singh, Senior Advocate with

Mr. Rajinder Singh, Advocate for the appellant.

Mr. Akshay Jain, Advocate
for respondent No.3.

Mr. N.K. Banka, Advocate
for respondent No.4.

RAJ MOHAN SINGH, J.

[1]. Pawan Kumar- plaintiff filed suit for declaration and permanent injunction against Bhola Singh, Surjit Singh, General Public, Gram Panchayat (Nagar Panchayat) and SHO, Police Station Bhikhi, District Mansa.

[2]. Plaintiff alleged that he is owner in possession of 15 kanals of land known as Lala Daulat Ram Di Chhapri (means pond) on the basis of Will executed by Lala Daulat Ram. Plaintiff further alleged that he is using the same and has raised boundary wall and has also filled earth therein. Defendants have no concern with the property in dispute and plaintiff is entitled to be declared as owner of the above 15 kanals of land. Plaintiff

also sought permanent injunction for restraining the defendants from taking forcible possession of the suit property and also for raising any construction and interfering in the possession of the plaintiff. Plaintiff also alleged that in case he is not proved to be the owner of suit property on the basis of Will then he will become owner of the suit property by way of adverse possession being in possession for more than 12 years. The possession of the plaintiff is claimed to be open, hostile and to the very knowledge of the general public.

[3]. Defendants contested the suit. Defendant No.4 took a stand that the plaintiff has no locus standi or cause of action to file the suit and has not joined the necessary party. The suit is not maintainable in the present form. Plaintiff intentionally did not mention khasra number of the suit property which is being maintained by the defendants and earth work has been done by defendant No.4. A park is to be constructed by defendant No.4 for the general public. The suit has been filed on wrong facts and plaintiff has not served upon defendant No.4 any notice as required under Section 49 of Punjab Municipal Act. The property vests in Gram Panchayat and it bears khasra No.341. Daulat Ram has no concern with the property in question nor plaintiff has any connection whatsoever. Defendant No.4 is in possession of the suit property and no such Will was ever

executed by Daulat Ram. The alleged Will is forged and fabricated. Plaintiff has not become owner of the suit property by way of adverse possession. Defendants No.1, 2 and 3 were proceeded against ex parte. Defendant No.5 did not file any written statement and made a statement that he will not interfere in the suit property.

[4]. After filing replication, trial Court framed the following issues:-

“1) Whether the plaintiff is owner in possession of the suit property by virtue of the execution of the legal and valid Will of Sudhi 10 samat 2005 in his favour? OPP

2) If issue No.1 is proved, whether the plaintiff is entitled for declaration and grant of permanent injunction? OPP

3) Whether the Will dated Sudhi 10 Samat 2005 is forged and fabricated document and the land in dispute vests in Nagar Panchayat? OPD

4) Whether this Court has no jurisdiction to entertain and dispose of present suit? OPD

5) Whether the suit is not maintainable? OPD

6) Relief.”

[5]. Both the parties led their respective evidence to prove their case and trial Court decreed the suit for declaration and permanent injunction as prayed by the plaintiff.

[6]. Gram Panchayat filed appeal before the Lower Appellate Court. The Lower Appellate Court observed in its judgment that the original issues No.1 and 2 framed by the trial Court were in the context of execution of Will and entitlement of the plaintiff for declaration and grant of injunction in the event of success under issue No.1. Issue No.3 was also in respect of Will in the context of its being forged or otherwise and the property whether capable of vesting in Panchayat as *Shamlat Deh*. Issue No.4 was in respect of jurisdiction of the Court to entertain the suit and issue No.5 was in respect of maintainability of the suit. The Lower Appellate Court found that plaintiff gave up claim regarding declaration on the basis of adverse possession as such claim cannot be taken to be a weapon of evidence.

[7]. The Lower Appellate Court after considering the contentions of both the sides found that the suit property bears khasra No.341 whereas the same has not been shown by the plaintiff, rather the same has been shown by the boundaries as per site plan Ex.P1. The trial Court without deciding whether suit land is part of khasra No.341 held the suit land to be owned by the plaintiff. If the suit land bears khasra number, without mentioning the same in the plaint no decree could have been passed. The trial Court decided the issue No.4 in favour of the

plaintiff to hold that suit land being part of *abadi* does not vest in Gram Panchayat as *shamlet deh* in terms of Section 2(g) (4) of Punjab Village Common Lands (Regulations), Act 1961. Apparently, land is described as Chhapri which means pond. No findings have been recorded by the trial Court whether land in question is being used as pond for common purposes or not? Without giving such findings the pond cannot be brought out from the ambit of being vested in Gram Panchayat as *shamlat deh*. The trial Court did not frame proper issues. The Lower Appellate Court found the judgment of the trial Court not sustainable and allowed the appeal after setting aside the judgment and decree dated 05.05.2012 passed by the trial Court and remanded the case back to the trial Court to decide the case afresh in accordance with law after giving proper opportunities to the parties to lead their evidence. That is why present appeal came to be filed.

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

[9]. Following additional issues were framed by the Lower Appellate Court for complete adjudication of controversy between the parties:-

“A. Whether Lala Daulat Ram was owner in possession of the suit property? OPP

B. Whether Lala Daulat Ram was only in possession of the suit property? OPP

C. Whether plaintiff is in possession of the suit property continuously for the last 60 years? OPP

E. Whether suit property is abadi deh of village Bhikhi? OPD

F. Whether suit property was being used as pond and is being used as pond? OPD

G. Whether notice under Section 49 of the Punjab Municipal Act, 1911 was served upon defendant No.4 before filing of the suit? OPP”

[10]. The Lower Appellate Court found that issue No.4 has been wrongly framed and the same was amended accordingly:-

“Whether the Civil Court has jurisdiction to try the suit”? OPP”

On recasting all issues total 15 issues have been framed by the Lower Appellate Court which covers the entire controversy in the light of rival claims claimed by the parties to the litigation.

[11]. The land in question is found to be *abadi deh* (pond) which is being used for common purposes by the village community. The Gram Panchayat-defendant No.4 argued that the suit land is a *shamlat deh* as per Section 2(g) (4) of Punjab Village Common Lands (Regulations) Act, 1961 and notice under Section 49 of the Punjab Municipal Act has been served

upon the defendants before filing the suit. The suit property bears khasra No.341. In the *jamabandi* Ex.D22, the land is shown to be abadi deh. In the column of cultivation "*Makbooja Bashindgan Deh*" has been recorded. The Will could not be proved beyond suspicious circumstances. Moreover, it being an unregistered document became highly suspicious in view of the fact that when Lala Daulat Ram was owner of 99 acres of land then why he has executed a Will in respect of suit property which is only 15 kanals. The Lower Appellate Court recorded findings that the issues No.1, 2, 3 and 5 have been wrongly decided and such findings are required to be reversed. The contention of the plaintiff that the land is *abadi Deh* and is explicitly excluded from the ambit of Section 2(g) of Punjab Village Common Lands (Regulations) Act, 1961. The word Chhapri denotes Ponds. The pond even if existing in *abadi deh*, user of such pond is the village community and the same is taken to be used for common purposes of the village community. Even this type of land is capable of vesting in Punjab village as shamlat deh.

[12]. 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.

[13]. Rule 23-A of Order 41 CPC 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.

[14]. 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.

[15]. 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.

[16]. Rule 23 of Order 41 CPC can be applied 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 to be necessary by the Appellate Court. Rule 25 can be applied 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, 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.

[17]. The Appellate 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.

[18]. 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.**

[19]. 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.

[20]. 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.

[21]. Since the Lower Appellate Court has set aside the findings of all the issues and reframed necessary issues by bifurcating the joint issues so as to facilitate the Court to record correct findings under the relief issue. Question of Will as well as vesting of property shown by word 'chhapri' have to be decided with reference to proper issues and findings recorded therein on the basis of evidence. The question of vesting of such land in Gram Panchayat would also have an issue which has to be deliberated on the basis of evidence on record.

[22]. Keeping in view the judgment passed by the Lower Appellate Court, I am of the considered view that the case squarely falls under the ambit of Order 41 Rule 23-A CPC and issues already framed by the trial Court are not sufficient to

answer the controversy in an effective manner. Consequently, I find that impugned judgment has been passed by exercising lawful jurisdiction and requirement of remand in terms of Order 41 Rule 23-A CPC is squarely fortified. In view of aforesaid, this appeal is dismissed.

24.12.2015
Prince

(RAJ MOHAN SINGH)
JUDGE