

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO No.4 of 2013(O&M)
Date of Decision:12.9.2017

Ginder Singh and anotherAppellants
Vs
Diwan Singh and othersRespondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Sandeep Bansal, Advocate
for the appellants.

Mr. Sanjay Gupta, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. This appeal has been preferred by the appellants against the judgment dated 21.11.2012 passed by Additional District Judge, Hoshiarpur, vide which the case was remanded to the trial Court after accepting the application for additional evidence.

[2]. Plaintiffs/appellants filed a suit for declaration against the defendants to the effect that they were owners in possession of 2 kanals, 7 marlas of land as detailed in the plaint. Permanent injunction was also sought to restrain the defendants from interfering in the peaceful possession of the plaintiffs over the suit property.

[3]. Plaintiffs claimed that the land in question was in lawful

possession of the plaintiffs as owners, having purchased the same from defendant No.1 vide registered sale deed dated 19.03.1981 for consideration and also vide another sale deed dated 12.12.1989 for consideration. Plaintiffs had already raised construction over the suit property by incurring heavy expenses. Earlier a civil suit was filed by Swarn Singh (defendant No.1) titled Swarn Singh Vs. Ginder Singh. Another suit was filed by Gian Kaur (plaintiff No.2) titled Gian Kaur Vs. Dharam Singh etc. Both the suits were decided vide judgment and decree dated 19.03.1999, wherein plaintiffs were held to be owners in lawful possession of the suit property.

[4]. After due contest, the trial Court decreed the suit of the plaintiffs and they were declared to be owners in possession of the suit property as detailed in the plaint. Defendants were restrained from interfering in the peaceful possession of the plaintiffs over the suit property vide judgment and decree dated 27.01.2010.

[5]. An appeal was preferred by defendant No.9/appellant against the judgment and decree dated 27.01.2010. Lower Appellate Court vide judgment dated 21.11.2012 remanded the case to the trial Court. Application under Order 41 Rule 27 read with Section 151 CPC and another application to place on record letter No.172 dated 14.05.2012 issued by Tehsildar, Mukerian filed by defendant No.9/appellant were also decided

by the Lower Appellate Court. Both the applications were allowed by the Lower Appellate Court subject to cost of Rs.10,000/-. Lower Appellate Court also observed that the plaintiffs were trying to get the mutation sanctioned twice on the basis of single sale deed. In the sale deeds Exs.P1 and P2, there was no reference of khasra No.39R/3/1/2. In the absence of aforesaid khasra number in the sale deeds, the plaintiffs could not drive any benefit out of the sale deeds in respect of title over khasra No.39R/3/1/2. In the suit titled Gian Kaur Vs. Dharam Singh and others, defendants were not the parties and the said judgment was not related to khasra No.39R/3/1/2. Only order of partition dated 3.11.1992 passed by the Revenue Officer was challenged. Defendants were not parties to the said proceedings. Both the aforesaid judgments were not related to the issue involved in the present case. In the case titled Swaran Singh Vs. Ginder singh, a Local Commissioner was appointed. Trial Court passed the judgment on the basis of order passed by the Settlement Officer dated 22.10.1969. Defendants were not the parties to the said proceedings.

[6]. Lower Appellate Court further observed that the order Ex.P6 dated 22.10.1969 passed by the Settlement Officer, Consolidation of Holdings, Amritsar was never implemented in the revenue record. Defendants filed an application for additional evidence at the appellate stage for bringing on record

jamabandis, copies of mutation in favour of those persons whose names were mentioned in the order dated 22.10.1969. Jamabandis for the year 1973-74, 1984-85, 1989-90, 1994-95, 1999-2000, 2004-05 along with certified copies of mutation were sought to be adduced in the additional evidence. The said application was allowed by the Lower Appellate Court on the ground that the trial Court had not given any specific findings regarding ownership of defendants No.8 and 9 and the plaintiffs were trying to get the mutation sanctioned twice. No appeal was preferred against the order of the Settlement Officer. Mutations on the basis of both the sale deeds were sanctioned in favour of the plaintiffs about 20 years back and the plaintiffs had become owner of the property. Pointed objection was raised that the plaintiffs cannot file second suit as the mutation had already been sanctioned. The title in respect of khasra No.39R/3/1/2 was also required to be decided by the trial Court in terms of entitlement of the plaintiffs viz-a-viz the aforesaid khasra number.

[7]. In view of acceptance of the application for additional evidence, issues No.1 and 2 were reversed by the Lower Appellate Court and the case was remanded to the trial Court with a direction to decide the case afresh after giving two opportunities to both the parties to prove their case and also to give findings whether the plaintiffs had tried to get the mutation

sanctioned twice on the basis of one sale deed and whether the plaintiffs are still trying to encroach upon two properties on the basis of one sale deed.

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

[9]. Trial Court had framed necessary issues on 13.12.2000. Issues No.1, 2 and 4 were jointly decided and all the aforesaid issues were decided in favour of the plaintiffs. No evidence was led by the defendants in respect of issue No.3, therefore, issue No.3 was decided against the defendants. Issues No.4-A, 4-B, 4-C, 4-E and 4-F were taken together. Defendants did not lead any evidence in respect of these issues, nor the aforesaid issues were pressed by the defendants at the time of arguments before the trial Court, therefore, the aforesaid issues were decided in favour of the plaintiffs and against the defendants. In respect of issue No.4-D, trial Court held that since the plaintiffs had already become owners in possession of the suit property vide judgment dated 19.03.1999 (Ex.P7), therefore, filing of the suit in the year 2000 was within limitation. Defendants could not adduce any material to show that the suit was barred by limitation. Issue No.4-D was decided in favour of the plaintiffs and against the defendants. In view of findings recorded under different issues, the suit of the plaintiffs was decreed by the trial Court vide judgment and decree dated 27.01.2010. Lower Appellate Court while

accepting the application for additional evidence has not set aside the findings recorded under all the issues while remanding the case to the trial Court after accepting the application for additional evidence.

[10]. In order to test the legality and propriety of the order of remand, it is necessary to have a glance on necessary provisions in terms of Order 41 Rules 23, 23-A and 25 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 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 ***Kartar Singh Vs. Punjab and Sind Bank and others, 1988(2) RCR 334.***

[18]. 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]. Under Order 41 Rule 28 CPC, the Lower Appellate Court was required to adhere to the mode of taking additional evidence. Wherever additional evidence is allowed to be produced by the Lower Appellate Court, then the Lower Appellate Court may either take such evidence itself or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and send the same to the Lower Appellate Court for ultimate decision on merits.

[21]. In view of above, I deem it appropriate to set aside the judgment dated 21.11.2012 passed by the Additional District Judge, Hoshiarpur with a direction to the Lower Appellate Court to decide the mode of taking additional evidence in terms of Order 41 Rule 28 CPC and decide the appeal in accordance with law.

[22]. The present appeal stands disposed of accordingly.

September 12, 2017.

Prince

Whether speaking/reasoned

Whether reportable

**(RAJ MOHAN SINGH)
JUDGE**

Yes/No

Yes/No