

221

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

**SAO No.46 of 2015 (O&M)
Date of Decision: 25.07.2017**

SUBHASH

.....Appellant

Vs

RAM NIWAS

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Madan Pal, Advocate
for the appellant.

Mr. Pankaj Mehta, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. This appeal has been preferred by the appellant against the judgment dated 11.05.2015 passed by Addl. District Judge, Hisar whereby judgment and decree dated 13.04.2015 passed by Civil Judge (Jr. Divn.) Hisar was set aside and the case was remanded to the trial Court for fresh decision on merits after framing fresh issues. The application for demarcation of the property was also sent to the trial Court for passing fresh order for demarcation of the land in dispute by a competent revenue officer.

[2]. Brief facts are that respondent filed a suit for

possession and permanent injunction after demolishing the constructed house by the defendant in *Khasra* No.1524/3(3-0) situated in *Khewat* No.826 *Khatoni* No.1060 as per *jamabandi* for the year 2006-07. The property was shown with definite dimensions in the plaint. Plaintiff/respondent claimed himself to be the owner of the land in question and the defendant had forcibly occupied the same to the extent of 64.93 sq. yards in the first week of January 2011. Thereafter defendant constructed the house on this area. Plaintiff staked his claim on the basis of demarcation report which was got conducted through a computer machine under the instructions of *Halqa Patwari and Kanungo* on 11.06.2014.

[3]. Defendant contested the suit on all counts.

[4]. The trial Court after recording findings under different issues, decreed the suit of the plaintiff with costs. Plaintiff was held entitled for possession in respect of *gair mumkin* plot bearing *Khasra* No.1524/3, total measuring 64.93 sq. yards as shown in headnote of the plaint after demolishing the construction existing thereupon. Plaintiff was held owner of the suit land. Defendant was restrained from raising further construction over the land in question.

[5]. The defendant feeling aggrieved against the judgment and decree of the trial Court dated 13.04.2015 filed an appeal

before the lower Appellate Court. Lower Appellate Court after discussing the statement of PW-1 Ram Singh Kanungo, PW-2 Hawa Singh, Halqa Patwari came to the conclusion that no separate notice was given to the defendant at the time of demarcation. PW-1 Ram Singh Kanungo could not state as regards the concerned person to whom the notices were given. The perusal of the revenue record as alleged was not depicted in the map which was prepared at the time of demarcation report. The witness had admitted in his cross-examination that he had not given any notice to the defendant, rather stated that he had called the defendant through the *Chowkidar*. The witness could not produce anything to prove that the *Chowkidar* was authorised to call the parties without there being any material in writing or instructions.

[6]. Lower Appellate Court also discussed the statement of PW-2 Hawa Singh Halqa Patwari, who also admitted in his cross-examination that no notice was given to the defendant. Even the Sarpanch of the Gram Panchayat namely Dharampal (PW-4) could not say anything about the notices having been issued to the defendant. He even projected a separate story of *munadi* that the same was done two days prior to the demarcation. He again submitted that the *munadi* was got effected by *Chowkidar*, who ultimately could not demonstrate

the plot for which the alleged demarcation had to be conducted.

[7]. After noticing the aforesaid discrepancies, the lower Appellate Court proceeded to remand the case to the trial Court for fresh decision on merits. Lower Appellate Court also directed the trial Court to frame fresh issues and also pass fresh order for demarcation of the property in dispute by a competent revenue officer as per the Punjab Land Revenue Act. Both the parties were held liable to pay the expenses for demarcation in equal proportion.

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

[9]. Apparently, the lower Appellate Court has remanded the case to the trial Court without discussing the findings recorded by the trial Court under different issues and even without setting aside the findings recorded by the trial Court under all the issues. Though issue Nos.2 to 4 were not pressed by the defendant and the same were decided against the defendant, but while remanding the case, it appears that the findings recorded under issue No.1 by the trial Court was taken into consideration with reference to the discrepancies in the demarcation and wholesome order of remand was passed.

[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

then 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]. 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]. The lower Appellate Court has remanded the case to the trial Court with a direction to frame fresh issues. No issues have been pointed out by the lower Appellate Court as to how the issues earlier framed were lacking in covering the controversy in question. The judgment and decree passed by the lower Appellate Court appears to have been passed without setting aside the findings recorded by the trial Court under different issues. Lower Appellate Court has not adverted to the feasibility of treating the original issues to be sufficient to answer the controversy. The findings recorded under different issues

have not been commented upon by the lower Appellate Court.

[21]. In view of aforesaid, I am of the view that the lower Appellate Court can be obliged to revisit the judgment dated 11.05.2015. Resultantly, the appeal is allowed and the impugned order dated 11.05.2015 is set aside. The case is remanded to the lower Appellate Court to pass afresh decision in accordance with law. Both the parties are directed to appear before the Lower Appellate Court on 08.08.2017.

[22]. Disposed of.

July 25, 2017

Atik

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No