

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**1. SAO No. 21 of 2011 (O&M)
 Date of Decision: 21.12.2018**

Chaman Lal and othersAppellants

VERSUS

Suman Kumar and othersRespondents

2. SAO No. 22 of 2011 (O&M)

Chaman Lal and othersAppellants

VERSUS

Neha and othersRespondents

3. SAO No. 26 of 2011 (O&M)

Chaman Lal and othersAppellants

VERSUS

Krishan Kumar and othersRespondents

4. SAO No. 27 of 2011 (O&M)

Chaman Lal and othersAppellants

VERSUS

Krishan Kumar and othersRespondents

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Arun Jain, Sr. Advocate
 with Mr. Arnav Sood, Advocate
 for the appellants in all the appeals.

Mr. Anish Setia, Advocate
for respondent no. 4 in SAO Nos. 21 and 22 of 2011 and
for respondent no. 1 in SAO No. 26 and 27 of 2011.

Mr. H.K. Aurora, Advocate
for respondent no. 2 in SAO No. 21 of 2011,
for respondent no. 7 in SAO No. 26 of 2011 and
for respondent no.10 in SAO Nos. 22 and 27 of 2011

SURINDER GUPTA, J.

Above captioned appeals have been taken up together as the same pertains to property of one Gehna Mal. For the sake of convenience facts are being extracted from SAO No. 21 of 2011.

2. Plaintiffs-respondents no. 1 to 4 filed suit for declaration to the effect that they alongwith defendants no. 8, 9 and 10 are joint owners of land measuring 26 *kanals* situated in village Usmanpur, *Teshil* and District Jalandhar comprising in *khewat* no. 3, *khatauni* no. 5, Rect. No. 13, *hasra* no. 21/2 (5-2), 22 (8-0), 19 min (south 6-8), 20 min (south 6-10) as per entry in *jamabandi* for the year 1988-89. They also sought declaration that the alienation of above land by defendants no. 1 to 4 in favour of Sham Lal (defendant no. 11) vide registered sale deeds no. 6572 and 6573 dated 07.11.1994 is illegal, null and void and consequently, they sought possession of this land.

3. It is not disputed that the land in suit was originally owned by Gehna Mal, who died on 08.02.1974. Plaintiffs-respondents no. 1 to 4 propounded Will dated 04.07.1969 executed by Gehna Mal in favour of his grand children and alleged that he ignored his three sons, namely, Lekh Raj, Attar Sain and Chaman Lal from inheriting his property and Smt. Sham Devi his wife was given limited ownership right during her life time with no powers to alienate it. After her death on 22.07.1983 suit property devolved upon her grandsons in equal shares. Plaintiffs alleged that defendants no. 1 to 4 claimed title over the suit land on the basis of some forged Will of Gehna Mal dated 31.05.1973 and a suit was filed against them by defendants no. 5, 6 and 7 (defendant no. 5 transposed as plaintiff no. 4) in which a compromise took place and the suit was withdrawn on 04.09.1983.

Under the compromise, it was agreed that three sons of Gehna Mal and defendants no. 2 to 4 will not claim any share in the estate of Gehna Mal. As per Will dated 04.07.1969, plaintiffs, defendants no. 8, 9 and 10 and all the legal heirs of Attar Sain became owner of the suit land. Defendants no. 1 to 4 later on sold the disputed land to defendant no. 11 vide two sale deeds dated 07.11.1994, which as per plaintiffs are not binding on them.

4. In the written statement filed by defendants no. 1 to 4, claim of plaintiffs was contested with the plea that they have no right, title or interest in the suit property. Besides other objections, an objection was taken that suit is bad for misjoinder and non-joinder of necessary parties. They also propounded Will dated 31.05.1973 executed by Gehna Mal as per which his son Chaman Lal got 30 *kanals* out of his land and defendants no. 2 to 4 got 53 *kanals* in equal share. It was denied that after death of wife of Gehna Mal, plaintiffs have succeeded to the land in dispute. Defendants no. 1 to 4 have also denied any compromise in the civil suit filed by defendants no. 5 to 7. The suit filed by plaintiffs was decreed to the effect that alienation of 2/3rd share in the land in dispute in favour of defendant no. 11-Sham Lal vide sale deed dated 07.11.1994 was held as illegal, null and void. Plaintiffs, defendants no. 8, 9 and 10 and defendants no. 6 and 7 were held to be joint owner and entitled to joint possession of 2/3rd share of total land measuring 81 *kanals* and 19 *marlas* and consequently, defendant no. 11 was restrained from alienating the suit property in any manner.

5. Against judgment of the trial Court defendants no. 1 to 4 filed appeal before Additional District Judge, Jalandhar. Learned Ist Appellate Court remanded all the civil suits to the trial Court with direction that all the civil suits between the parties be entrusted to one Court, which will decide

the same in accordance with law. The reason for remand of suits which find mention in the order passed by learned Ist Appellate Court, which are enumerated as follows:-

- (i) Three different suits regarding the estate of Gehna Mal were filed. One suit was filed by Krishan Kumar and others, which was decided vide judgment dated 26.02.2009. In this civil suit learned trial Court dismissed the claim of plaintiffs based on the family settlement. The second suit was filed by Chaman Lal and others against Krishan Kumar and others (plaintiffs) seeking possession of 16 *kanals* of land on the basis of title, which was decreed. In the above suit, two Wills of Gehna Mal and family settlement were pleaded and decided. The third suit was filed by respondents no. 1 to 4 in this case, facts of which have been discussed above, where also two Wills of Gehna Mal and family settlement were pleaded.
- (ii) Ist Appellate Court observed that daughters of Lakh Raj and Attar Sain sons of Gehna Mal were not impleaded. Until and unless all the legal heirs are impleaded the matter cannot be adjudicated finally. Keeping in view these facts applications filed by plaintiffs-respondents under Order I Rule 10 CPC to implead them as party were allowed.

6. Learned counsel for appellants has argued that all the parties to the suit are relying on their claim based on Wills dated 04.07.1969 and

31.05.1973. In the event of either of the Wills being held as valid, daughters of Lekh Raj and Attar Sain sons of Gehna Mal will not get any share in the suit property. Even otherwise, appellants have taken the objections in their written statements at the initial stage of the suit that the same is bad for non-joinder of parties and issue no. 6 was also framed on this plea of appellants, which was decided with observation that suit was not bad for non-joinder of parties and contention of plaintiff-respondents that daughter of Lekh Raj and Attar Sain are not necessary parties to the suit was upheld. They have not preferred any appeal against finding of trial Court and are estopped from going against their pleadings. In order to delay the disposal of appeal and against their pleadings they moved application under Order I Rule 10 CPC before the Ist Appellate Court and taken the plea that daughters of Attar Sain and Lekh Raj are necessary parties to suit. Ist Appellate Court instead of reversing the findings recorded by the trial Court on issue no. 6 has remanded the case just by allowing the application.

7. Learned counsel for appellants-defendants no. 1 to 4 has argued that the dispute is regarding the inheritance of Gehna Mal, which will also effect the right of his grand daughters, as such, the matter cannot be decided finally without impleading them as party. Though, before the trial Court appellants-defendants no. 1 to 4 have opposed the plea of appellant in this regard but in appeal they have realized that daughters of Lekh Raj and Attar Sain are necessary parties and moved application under Order 1 Rule 10 CPC, which was allowed by the Ist Appellate Court. The matter can now be decided afresh after hearing the plea of newly added defendants with regard to the Will of Gehna Mal.

8. Admittedly, both the parties are claiming inheritance of Gehna

Mal on the basis of his Will. In the event of either of the Will of Gehna Mal being accepted, daughters of Lekh Raj and Attar Sain will have no right in the suit property. It is admitted that even in the family partition alleged by plaintiffs, daughters of Lekh Raj and Attar Sain have not been given any share. Plaintiffs-respondents in the civil suit have been contesting the plea raised by defendants-appellants that suit is bad for non-joinder of necessary parties. On the basis of pleadings and arguments raised before it, issue no. 6 to this effect was decided by the trial Court as follows:-

“16. Onus to prove this issue was on the defendants. Counsel for the defendants has contended that this suit is bad for misjoinder and non-joinder of the necessary parties as the three daughters of Lekh Raj and three daughters of Attar Sain have not been impleaded as a party and further they have sold 29 kanals 9 marlas of land to Sukhpal Singh, Gural Singh and Surinder Pal Singh son of Karnail Singh vide sale deeds dated 02.06.1992 and 06.05.1992 but they were not made the party to the said suit but the plaintiff have challenged the sale deeds executed by defendants no. 1 to 4 in favour of defendant no. 11. So, there was no need to make them party to the present suit. So this issue is decided against the defendants and in favour of the plaintiffs.”

9. Once the plaintiffs have resisted the plea of appellants-defendants no. 1 to 4 that the suit is barred for non-joinder of necessary party they were left with no *locus standi* to move application under Order 1 Rule 10 CPC in the first appeal to implead daughters of Lekh Raj and Attar

Sain sons of Gehna Mal as parties. Ist Appellate Court has also not looked into this fact on merit to find as to whether daughters of Lekh Raj and Attar Sain are necessary parties to this suit. Findings of trial Court on issue no. 6 have not been set aside so far. Even if the case has been remanded, the trial Court will remain bound by the findings recorded by it on issue no. 6 and cannot record a different finding even after impleading the daughters of Lekh Raj and Attar Sain. Ist Appellate Court appears to have failed to look into the design of plaintiffs-respondents no. 1 to 4 while allowing this application under Order 1 Rule 10 CPC. The purpose appears to be to delay decision of the appeal. Ordering retrial of a case is a very serious matter. It is only in exceptional circumstances where there was no real trial; complete and effective adjudication that remand of a case for fresh trial can be ordered. Before ordering the fresh trial and remanding the case, Ist Appellate Court has to examine the entire material on record; set aside the findings recorded by the trial Court. Reference in this regard can be made to observations in case of **Avtar Singh vs. Shinder Pal Kaur, 2003 (3) RCR (Civil) 564.**

10. Ist Appellate Court has not arrived at the conclusion that the finding of trial Court on issue no. 6 framed in this case are not sustainable. Even otherwise, these findings could not be set aside on plea of respondents no. 1 to 4 (plaintiffs) as they were not in appeal against findings of trial Court and were estopped from raising the plea to implead daughters of Lekh Raj and Attar Sain as parties to the suit. Mere allowing of application under Order 1 Rule 10 CPC is no ground to remand the case for retrial. Reference in this regard can be made to observations in case of **Shahab-Ud-Din vs.**

Radhey Shyam Bansal, 2000 (1) RCR (Civil) 231.

11. Court of appeals are expected to be vigilant while exercising jurisdiction of remand as envisaged under Order XLI Rule 23-A CPC, otherwise there would be no end to litigation. There was no bar for the Ist Appellate Court to first record its finding on issue no. 6, see consequences of non-joinder of necessary parties and then pass order either to decide the appeal on merit or if the need to arises to remand the case.

12. Hon'ble Apex Court **Municipal Corporation, Hyderabad vs Sunder Singh, 2008(4) RCR (Civil) 850**, while discussing the powers of Appellate Court to remand a case has observed in para 11 as follows:-

“It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order XLI Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial Court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties.”

13. In the present case suit was not decided upon a preliminary point and decree was reversed in appeal, making out a reason for remand as per provision of Order XLI Rule 23 CPC. Ist Appellate Court has not recorded finding on merits of any issue or reversed finding of trial Court while setting aside the decree passed by it while ordering remand and retrial of case as per provisions of Order XLI Rule 23-A CPC. Remand of case for fresh trial has also not been ordered as per provisions of Order XLI Rule 24 or 25.

14. Keeping in view above proposition of law, facts and circumstances of the case, I find that order dated 09.02.2011 passed by

Additional District Judge, Jalandhar is perverse and suffers from legal infirmity, as such, is liable to be set aside. Consequently, these appeals have merit and are accepted. Parties are directed to appear before District Judge, Jalandhar on 22.01.2019. He will take files of all the appeals i.e. RC Nos. 63, 64, 66 and 67 of 2010, decided on 09.02.2010 on board, list the same for final hearing or entrust the same to some other Court of competent jurisdiction for final disposal.

December 21, 2018

jk

**(SURINDER GUPTA)
JUDGE**

Whether speaking/reasoned Yes/No

Whether reportable Yes/No