

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

RSA-964-2014

Date of Decision: 11.01.2019

Charan Kaur

...Appellant

Versus

Santokh Singh and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. Sarju Puri, Advocate,
for the appellant.

Mr. Malkeet Singh, Advocate,
for respondent No.1.

None for respondent Nos. 4 to 6, 19, 20 & 23.

Service upon respondents No. 2, 3, 7, 8, 10 12 to 16, 22, 25 &
26 and the legal representatives of respondent Nos. 9, 11, 17,
18 and 24 stand dispensed with vide order dated 02.02.2016.

JAISHREE THAKUR, J.

1. The present appeal is directed against the impugned judgment and decree dated 03.01.2014 passed by Addl. District Judge, SBS Nagar by which judgment and decree dated 30.04.2011 passed by the trial Court, has been set aside and the case stands remanded to the trial Court.

2. Learned counsel for the appellant herein contends that a suit was filed by the plaintiff Piara Singh (subsequently represented through his legal heirs) seeking a declaration to the effect that plaintiff Piara Singh and

defendant Nos. 3 to 10 are the joint owners in possession of the suit property as fully detailed in the head note of the plaint and as a consequential relief, a decree of permanent injunction was sought restraining defendant Nos. 1 & 2 from alienating any portion of suit property and further restraining them from interfering in the undisturbed possession of the suit land held by the plaintiff.

3. In brief, the case of the plaintiff-appellant ('the appellant' for short) is that Karam Singh was the original owner in possession of the suit property and the plaintiff Piara Singh, defendant Nos. 3, 4 and Charan Kaur were children out of wed lock with Inder Devi. Inder Devi predeceased him. Defendant – respondents Nos. 1 & 2 claimed to succeed the estate of Karam Singh claiming to be children born out of the wedlock of Bachni who was purported to have married Karam Singh. Defendant Nos. 1 & 2 claimed that Karam Singh had executed a Will dated 17.06.1974 in their favour and on its basis they were to succeed to the estate of Karam Singh. Notice of the suit was served upon the defendants and it is only defendant Nos. 1 & 2 (sons born out of the alleged marriage between Karam Singh and Bachni) who contested the claim of the plaintiff and took the preliminary objection that the plaintiff -appellant is not in possession of the suit land. It was also alleged that plaintiff has not approached the Court with clean hands since the plaintiff had himself got mutation sanctioned regarding the land of Karam Singh in favour of the defendants on the basis of the registered Will dated 17.06.1974.

4. No replication was filed to the written statement and from the

pleadings of the parties, the following issues were framed on 05.02.2003, however, additional issue No. 6-A was framed on 06.10.2009 :-

- “1. *Whether the plaintiff is entitled to the declaration as prayed for? OPP*
2. *Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?OPP*
3. *Whether in the alternative, the plaintiff is entitled to the relief for joint possession of the suit property? OPP*
4. *Whether suit of the plaintiff is within time?OPP*
5. *Whether the plaintiff has no locus standi to file the present suit?OPD*
6. *Whether the suit of the plaintiff is barred under Order 2 Rule 2 CPC?OPD*
- 6-A *Whether deceased Karam Singh executed last legal and valid Will dated 17.06.1974 registered on 18.06.1974 in favour of his sons Piara Singh plaintiff, Santokh Singh and Tarlok Singh defendants? OPP*
7. *Relief.”*

5. The trial Court, on appreciation of the evidence, came to uphold the existence of the Will dated 17.06.1974 in which the defendants were given a share in the property by which share of Piara Singh comes to 31K-09Ms, share of Tarlok Singh comes to 31K-09Ms whereas the share of defendant Santokh Singh comes to 23K-09Ms. It was held that the mutation that had been sanctioned in accordance with the Will was incorrect. While disposing of the said suit the claim of the plaintiff was allowed partly holding that the plaintiff Piara Singh and defendant Tarlok Singh to be owners to the extent of 31Ks-09Ms each whereas defendant Santokh Singh was owner to the extent of 23Ks-09Ms. As far as the property mentioned in the head note of the plaint as B and C, all plaintiff, defendant Nos. 1 & 2 were held to be equal owners. It was further ordered that the mutation is to be sanctioned strictly in accordance with the Will. A decree sheet was

prepared accordingly which came to be challenged by the defendant Santokh Singh before the Addl. District Judge, SBS Nagar. The Addl. District Judge while deciding the said appeal, came to note that issue No.4 had been framed regarding the period of limitation, however, no finding had been given on the said issue. By placing reliance upon the judgments rendered in *Smt. Sulochana Devi Bubna v. Gobinda Chandra Nag and others*, AIR 1986 Calcutta, 430, *Om Prakash and others v. State of Himachal Pradesh and others*, AIR 2001 Himachal Pradesh, 18 and *State Bank of India and another vs. M/s Emmsons International Ltd. and another*, 2011(4) RCR (Civil) 662 wherein it was held that the Court has to give findings on each and every issue, the impugned judgment was held to be improper and the appeal of the appellant was accepted and the matter was remanded back to the trial Court with the directions to give findings on each issue after hearing counsel for the parties. Aggrieved against the said order, the instant second appeal has been filed.

6. Learned counsel for the appellant herein contends that the impugned judgment and decree suffers from a basic flaw as the Addl. District Judge, could not have set aside all the issues decided by the trial Court without giving a finding as to the affirmity on the said finding. It is argued that at best in case any issue had not been decided, the matter ought to have been remanded back for decision on the said issue or since the record was available with the Appellate Court, the issue could have been decided by the said Court itself. Learned counsel for the appellant has placed reliance upon the judgment rendered in *K. Gopalan Nair vs. K.*

Balakrishnan Nair & Ors. 2005(12) SCC 351 to contend that once trial had been concluded, there was no question of giving second opportunity to respondent/defendants to prove their case before the trial Court and that the matter should have been decided on the basis of the material available on the record. He further places reliance upon the judgment rendered in **M/s Rath TMT Sariya Pvt. Ltd. vs. JSL Limited, 2015(8) R.C.R. (Civil) 691** to contend that remand cannot be ordered in routine under Order 41, Rule 23 C.P.C. merely because a reasoning of the trial Court is considered to be wrong and when material was available before the Appellate Court, the Court should have decided the case on merits.

7. Per contra, learned counsel appearing on behalf of respondent No.1 by relying upon the judgment rendered in **Om Prakash and others v. State of Himachal Pradesh and others, AIR 2001 Himachal Pradesh, 18** argues that all the issues have necessarily to be decided before the judgment can be pronounced. It is argued that the issue pertaining to limitation goes to the very root of the case since mutation already stands sanctioned as far back as 1974 and on the basis of the said mutation, the parties are already in possession. It is argued that the suit has been filed only in 2011 and by the impugned judgment the possession has been disturbed.

8. I have heard learned counsel for the parties and perused the records of the case.

9. There is no dispute with the proposition that once the issues have been framed, the Court has to pronounce judgment on all the issues and failure of the Court to give an appropriate decision on all issues, the

judgment is improper. However, the question that would arise is whether the Addl. District Judge could have decided the issue himself since the material was available with him or he was correct in setting aside the entire judgment on the ground that issue No.4 had not been decided.

10. Order 41 Rule 23 C.P.C. provides that where the Court from whose decree an appeal is preferred has 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 and may further direct which of the issues are to be decided again. The evidence recorded during the original trial, subject to all just exception, would be evidence after remand. Rule 23-A provides that where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23. Rule 24 C.P.C. provides that when the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds. Rule 25 provides that where the Court from whose decree the appeal is preferred has omitted to frame or try any issue or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues and refer the same for

trial to the court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required.

11. In the instant case the evidence has been led and it is only issue no 4, a legal issue pertaining to the question whether the suit is barred by the period of limitation, which remains undecided. The evidence of both the parties was available on the record and the issue which requires consideration according to the First Appellate Court should have been decided itself on the basis of the evidence available on the record.

12. In the judgment rendered in ***P. Purushottam Reddy And Anr vs Pratap Steels (2002) 2 Supreme Court Cases 686*** the Supreme Court held as follows :-

"7. The next question to be examined is the legality and propriety of the order of remand made by the High Court, Prior to the insertion of Rule 23A in Order 41 of the Civil Procedure Code by Civil Procedure Code Amendment Act 1976, there were only two provision contemplating remanded by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand inasmuch as the subordinate court can try only such issues as are referred to it for trial and having done so, the evidence

*recorded, together with findings and reasons therefor the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the Civil Procedure Code to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 41 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clauses of sub-rule (1) of Rule 27 being attracted, such additional evidence, oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in **Mahendra v. Sushila, AIR 1965 Supreme Court 365 at p. 399**, it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now*

exercise the power of remand de hors the Rules 23 and 23A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 of the Civil Procedure Code and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.”

13. In view of the pronouncement of the Supreme Court the impugned order passed by the Appellate Court cannot be sustained and accordingly this appeal is accepted and the impugned judgment and decree is set aside. The Appellate Court is directed to decide the issue of limitation itself, being the First Appellate Court, as the evidence has already been led. The First Appeal shall stand restored on the record of the Appellate Court and shall be decided after affording an opportunity to both parties.

14. Parties to the suit are directed to appear on 01.03.2019 before the Appellate court who shall in turn make an endeavour to decide the case preferably within a period of three months.

15. Appeal stands allowed.

11.01.2019
Satyawar

(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes.
No.