

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

**SAO No.86 of 2017 (O&M)
Date of Decision: April 09, 2019.**

Nazar Singh

.....APPELLANT(s).

VERSUS

Amrik Singh through his LRs and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Sonia G. Singh, Advocate
for the appellant (s).

Mr. Jaideep Verma, Advocate
for respondent No.1 (a) to (d).

SURINDER GUPTA, J.

Plaintiff Amarjit Singh (since deceased, now represented
through his legal representatives) filed suit seeking relief as follows:-

“Suit for a decree of declaration to the effect that the land measuring 118K 10M, Khewat no.31/25, Khatauni no.31, Rect. no.107, Killa no.11, 12, 19, 20, 21, 22, Rect. No. 164, Killa no.2/2, 3, 8, 9min, 12, 13, 19, 20/1, 21/3, 22, Khasra no.430, 656, Khewat no.31, Khatauni no.32, Rect. No.163, Killa no.6/1, 15/3, Rect. No.164, Killa no.9min, 10, 11/2, as mentioned in the Jamabandi for the year 2000-01 situated in village Hathur-III, H.B. No.124, Tehsil Jagraon, District Ludhiana, recorded in the name of Karnail Sing-defendant no.1 is the ancestral Joint Hindu Family Coparcenary Property in the hands of Karnail Singh-defendant no.1, who is bound to maintain

and manage the property both for the plaintiff and defendant no.2; after setting aside the sale deed dated 10.05.2005, concerning land measuring 71K 13M bearing Khata no.31/31-32, Rect. no. 107, Killa no.11(8-0), 12(8-0), 19(8-0), 22(8-0), 19(8-0), 22(8-0), 20(5-1), Rect. no.164, Killa no.3, (7-2), 8(8-0), 12(7-18), 13(3-8), 2/2(3-11), 9(4-0) Khasra no.430 (0-10), 656 (0-3) as mentioned in the Jamabandi for the year 2000-01, situated in village Hathur-III, Tehsil Jagraon, District Ludhiana executed by defendant no.1 in favour of defendant no.2 being illegal, null and void.”

Suit was dismissed by learned Additional Civil Judge (Senior Division), Jagraon with the observations that plaintiff has failed to establish on record that suit property was joint Hindu family coparcenary property. Relevant observations of learned Additional Civil Judge as contained in para 14 of the judgment are reproduced as follows:-

“Plaintiff also examined Major Singh, Special Kanungo, who proved on record Intkhab and his summary report prepared by him qua status of the suit property as Ex.P-1 and P-2, which does not reflect the factum of Joint Hindu Family Coparcenary Ancestral Property, because said witness has not brought on record the material pertaining to mutations no.849 and 2062, which were necessary to be brought on record to resolve the controversy qua nature of suit property. There is nothing on record as to how Sham Singh inherited the property from his father Sobha Singh nor there is anything on record by which mode, suit property inherited by Sham Singh from Sobha Singh and then by Karnail Singh from Sham Singh, rather, property measuring 32B 12B 19B reported to have been divided equally by Sham Singh in between his son namely Karnail Singh and Jarnail Singh and

mutation no.2062 to this effect was sanctioned which has not been brought on record, whereas, it was incumbent upon the plaintiff to bring on record the fact that suit property was coming to Karta (Karnail Singh) from four male lineal descendants by way of survivorship. But he did not bring the material to establish this fact. Further, plaintiff has brought on record only the Missal Hakiat and has not brought on record the other three material documents namely Naksha Haqdarwar, Khatauni Pemaish and Khatauni Istemal to prove the fact that pre-consolidated khasra numbers of suit property and post-consolidation khasra numbers are of the same property.”

In appeal, plaintiff moved application under Order 41 Rule 27 CPC for permission to lead additional evidence. While allowing the application, learned first Appellate Court took note of the fact that while preparing the excerpt, Kanungo has failed to look into certain documents which are part on the record. The excerpt lacked documents pertaining to mutation Nos.849 and 2062, *Missal Haqiat*, *Naksha Haqdarwar*, *Khatauni Pemaish and Khatauni Istemal*. Permission was allowed to the plaintiff to lead additional evidence and judgment of the trial Court was set aside.

Two questions arise for consideration in this appeal; firstly, as to whether the order of the first Appellate Court allowing permission to lead additional evidence is legal and valid and; secondly, on allowing additional evidence, order of the first Appellate court remanding the case is justified?

Firstly, I look into the legality and validity of the order of first Appellate court allowing the permission to the plaintiff to lead additional evidence. The dispute in between the parties is regarding the nature of the suit property. Plaintiff is claiming it to be joint Hindu family coparcenary

property. In order to prove his contention, he examined Kanungo, who prepared the excerpt Ex.P1, who failed to take on record the existing mutation Nos. 849 and 2062 or made the same as part of excerpt along with *Missal Haqiat, Naksha Haqdarwar, Khatauni Pemaish and Khatauni Istemal*. Plaintiff-respondent No.1 sought assistance of District Kanungo to prepare the excerpt of the land and it was incumbent upon him to look into all the relevant mutations and documents, which he failed to make part of his report. These are the documents, which cannot be created or fabricated in favour of either of the party and are most relevant and material to decide the controversy in the suit, as such, order of the first Appellate Court allowing the permission to the plaintiff to lead additional evidence is legal and justified and call for no interference in this appeal.

While allowing the permission to the plaintiff to lead additional evidence, learned first Appellate Court, on setting aside the judgment of the trial Court, remanded the case for fresh decision. Hon'ble Apex Court in case ***H.V. Vedavyasachar Vs. Shivashankara & Anr 2009(8) SCC 231***, has observed that when an application for adducing additional evidence is allowed, the Appellate Court has two options; firstly, it may record the evidence on its own and; secondly, it may direct the trial Court to do so. However, it does not have the power to remand the case on this score as per provisions of Order 41 Rule 23, 23A or 25 CPC. In that case, Hon'ble Apex Court, while discussing the above issues has observed as follows:-

“However, so far as the second contention raised by the learned counsel for the appellant is concerned, in our opinion, the same has substance. When an application for adducing additional evidence is allowed the appellate

court has two options open to it. It may record the evidence itself or it may direct the trial court to do so.

Order XLI Rule 28 of the CPC reads as under:-

“28. Mode of taking additional evidence – Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.”

For the aforementioned purpose, in our considered opinion, the High Court could not have directed the trial court to dispose of the suit after taking evidence. Such an order of remand could be only in terms of Order XLI Rule 23, Order XLI Rule 23A or Order XLI Rule 25 of the Code. None of the said provisions have any application in the instant case.”

In case of ***Manjinder Singh Vs. Jatinder Singh 2016 (2) Law***

Herald 1441, a Co-ordinate Bench of this Court has observed as follows:-

“4. The Court that hears the appeal along with the application under Order 41 Rule 27 CPC could have the following options. One, it can dismiss the application for additional evidence if it did not find any of the justifications under Order 41 Rule 27 CPC for reception of additional evidence and proceed to dispose of the appeal. Two, if the appeal itself is not disposed of and the Court was also finding a justification for reception of additional evidence, it can take the additional evidence itself and dispose of the appeal or if it is of the view that the additional evidence would require to be collected by taking evidence through a subordinate court, it will have an option to do so. The mode of taking additional evidence is set out under Order 41 Rule 28 CPC which is as under:-

“28. Mode of taking additional evidence.

Wherever additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.”

5. This Section will make it clear that the Appellate Court may itself take such evidence or it can direct the Court from whose decree, the appeal is preferred to take such evidence and send it to the Appellate Court. This is another way of saying that the Appellate Court while examining the appeal along with the application may instead of disposing of the appeal may take the additional evidence by directing the subordinate court to collect such evidence and send it to the appellate court. This procedure mentioned under Order 41 Rule 28 CPC makes implicit that whenever the Appellate Court is calling for evidence from the subordinate court, it need not dispose of the appeal. It is bound to keep the appeal pending till such time as the report is brought to itself. That is precisely what has happened in this case.”

In view of the above mentioned settled proposition of law, the order of the first Appellate Court remanding the case for trial is not sustainable and is set aside.

As a sequel of my above discussion, this appeal is partly allowed. Order of the first Appellate Court allowing the additional evidence and sending the case to the trial Court for recording the additional evidence/rebuttal evidence is sustained. However, the order of the first Appellate court remanding the case to the trial Court for fresh decision is set aside. The first Appellate Court is directed to call for report of the trial Court on additional evidence and then proceed to decide the appeal on

merits. Parties are directed to appear before the first Appellate Court on 07.05.2019 on which date, the first Appellate Court will take the appeal file on board and proceed further in accordance with the observations above.

April 09, 2019.
Sachin M.

(SURINDER GUPTA)
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes/No</i>
<i>Whether Reportable:</i>	<i>Yes/No</i>