

**In the High Court of Punjab and Haryana, at Chandigarh****S.A.O. No. 13 of 2018 (O&M)****Date of Decision: 04.07.2023**

Vishwa Mitter

... Appellant(s)

Versus

Pushpa Devi and Others

... Respondent(s)

**CORAM: Hon'ble Mr. Justice Anil Kshetarpal.**Present: Mr. R.Kartikeya, Advocate  
for the appellant(s).Mr. Sushant Kareer, Advocate  
for the respondent No.1 to 4.**Anil Kshetarpal, J.**

1. The present appeal has been preferred by the plaintiff by challenging the order dated 03.10.2017 passed by the First Appellate Court which remanded the case back to the trial Court.

2. Though, the detailed facts are not required to be noticed, however, in order to complete the narration, the relevant facts are being noticed. The plaintiff-Vishwa Mitter filed a suit against his mother and siblings claiming that the suit property is ancestral and coparcenary, whereas the defendant No.1-Pushpa Devi while contesting the suit claimed that she has inherited the property in dispute on the basis of a Will executed by late Sh. Ram Rakha. Both the plaintiff and the defendant No.1 are the children of late Sh. Ram Rakha. The trial Court, though, found that the plaintiff has failed to prove the suit property to be ancestral or coparcenary, however, it

partly decreed the suit on the basis of the natural succession. In the first

**S.A.O. No. 13 of 2018 (O&M)**

appeal, the defendant No.1 filed an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the CPC”) for permission to prove the registered Will. The First Appellate Court, while exercising its discretion, has allowed the application framing the additional issue on the Will by placing onus on the defendants to prove the Will. The First Appellate Court has set aside the judgment passed by the trial Court only on the ground that a new issue has been framed and the evidence is required to be led.

3. Heard the learned counsel representing the parties at length and with their able assistance, perused the paper-book.

4. The learned counsel representing the appellant contends that the First Appellate Court has erred in allowing the application under XLI Rule 27 of the CPC for permission to lead the additional evidence particularly when the defendant No.1 has failed to prove the Will in accordance with law before the trial Court despite granting an ample opportunity. He further contends that the First Appellate Court should not have remanded the case back to the trial Court only on this count because a decree passed in favour of the appellant has been set aside.

5. On the other hand, the learned counsel representing the respondent No.1 to 4 contends that the Will executed in favour of the defendant No.1 is a registered Will and the First Appellate Court has given the cogent reasons to permit her to prove the Will. He submits that the evidence is required to be led, therefore, the order passed by the First Appellate Court should be upheld.

6. This Court has considered the submissions of the learned

**S.A.O. No. 13 of 2018 (O&M)**

counsel representing the parties. The First Appellate Court, while exercising its discretion, has allowed the application under Order XLI Rule 27 of the CPC for permission to lead the additional evidence. It has been noticed that the trial Court has committed an error in omitting to frame a distinct issue with regard to the testamentary disposition. The First Appellate Court has found that the defendant No.1, being misled by the non-framing of the issue, has failed to lead any evidence to prove the Will.

7. Once a discretion has been exercised by the First Appellate Court in the absence of any perversity or material irregularity which goes to the root of the matter, this Court does not find it appropriate to interfere in the discretion exercised by the First Appellate Court while allowing the application under Order XLI Rule 27 of the CPC for permission to lead the additional evidence. However, the First Appellate Court was not justified in setting aside the judgment of the trial Court only on this count. As per the Order XLI of the CPC, the Appellate Court has a power to remand the case back to the trial Court only in the exigencies provided under Order XLI Rules 23 and 23A of the CPC. It is well settled that the power of remand by the Appellate Court should not be exercised if the matter can be adjudicated otherwise. The power of remand should be exercised only in the rare cases when a re-trial of the case is considered necessary. In this case, the First Appellate Court ought to have either permitted the parties to lead the evidence in the Court or directed the trial Court to furnish a report after recording the evidence. A decree passed in favour of the appellant should not have been set aside in this manner particularly when the First Appellate Court did not find any other error in the judgment of the trial Court.

**S.A.O. No. 13 of 2018 (O&M)**

8. Keeping in view the aforesaid discussion, the order passed by the First Appellate Court on 03.10.2017 is set aside to the limited extent whereby the case was remitted back to the trial Court. The hearing of the first appeal will be kept in abeyance. The trial Court is directed to permit the parties to lead evidence and send a report within a period of six month to the First Appellate Court. The First Appellate Court, on receipt of the report, will proceed to decide the appeal. The parties through their learned counsel are directed to appear before the trial Court on 24.07.2023 at 10.00 A.M.

9. With the observations made above, the present appeal is disposed of.

10. The miscellaneous application(s) pending, if any, shall also stand disposed of.

**(Anil Kshetarpal)**  
**Judge**

**July 04, 2023**  
**“DK”**

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No