

SAO-7-2022(O&M)

2024 PHHC 008011



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210 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO-7-2022(O&M)
Date of decision : 15.05.2024

Hardev Singh (Since deceased)
through his Lrs and another

...Appellants

Vs.

State of Punjab and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Maninder Singh Saini, Advocate
for the appellants.

Mr. Kanav Singla, AAG, Punjab, Advocate
for respondents No.1, 2 and 5.

Ms. Gagandeep Kaur, Advocate
for respondent No.3.

ANIL KSHETARPAL, J. (Oral)

CM-14840-CII-2022

This application has been filed under Order 22 Rule 4 of the Code of Civil Procedure (hereinafter referred to as the 'CPC 1908') for bringing on record legal representative of respondent No.3-Jasbir Singh.

For the reasons mentioned in the application, which is supported by an affidavit of Mrs. Veerjit Kaur, W/o Late Jasbir Singh, the same is allowed subject to all just exceptions and the legal representative of respondent No. 3 are ordered to be taken on record.

Amended memo of parties is taken on record.

The application stands allowed.



Main case

1. In this second appeal, the plaintiff assails the correctness of First Appellate Court's order remanding the case back to the trial Court for fresh decision.
2. Heard the learned counsel representing the parties at length and with their able assistance perused the paper-book.
3. In order to comprehend the issues involved in the present case, some relevant facts, in brief, are required to be noticed.
4. The plaintiff (appellant) filed a suit for the grant of decree of declaration that he is the owner of the property and the defendants have no right to dispossess him, pursuant to the order dated 04.02.1986, passed by the Commissioner, which is illegal, null and void and without jurisdiction. He also prayed for decree of permanent injunction restraining the defendants from interfering in his possession. In substance, the plaintiff claims that his Highness Maharaja Nabha gifted the property vide registered gift deed dated 29.03.1938 in favour of Sh. Sajjan Singh, father of plaintiff No.3. It is also claimed that the suit property was personal property of Maharaja Nabha, hence, he was competent to gift the same. The defendants while contesting the suit claimed that as per the revenue record, the property belongs to provincial Government and Maharaja Nabha had no right, title or interest in the property.
5. Upon appreciation of the pleadings, the trial Court settled the following issues for determination:-

- “1. Whether the civil court has no jurisdiction to try the present suit? OPD
2. Whether the matter has already been finally decided by the Collector Nabha as alleged in the plaint? OPP



3. *If issue No.2 is proved, whether the ejectment proceedings against the plaintiff are barred by principle of resjudicate? OPP*
4. *Whether the orders of the Commissioner Patiala dt. 4.2.1986 is illegal, null and void, abinitio and without jurisdiction and the same does not effect the right of the plaintiff? OPP*
5. *Whether the notice U/s 80 CPC was served upon the defendant? If so its effect? OPD*
4. *After the amendment of plaint, the following addition issues were framed on 10.9.1988:-*
 - 5-A *Whether the plaintiffs are owner in possession of the suit land by virtue of gift deed dt. 29.3.1936?OPP*
 - 5-B *Whether the plaintiffs have become owner by way of adverse possession? OPP*
6. *Relief.”*

6. The trial Court decreed plaintiff's suit. The State of Punjab filed the first appeal. During its pendency, an application under Order XLI Rule 27 of the CPC, 1908, was filed, which was allowed. The Court remanded the case back to the trial Court on the following three grounds :-

1. An application for additional evidence has been allowed, which would require elaborate evidence.
2. A certified copy of the gift deed has been produced, however, no application for secondary evidence has been filed.
3. The department of Horticulture has not been impleaded as a party.

7. This Court has considered the submissions made by the learned counsel for the parties.

8. Order XLI Rule 27 of the CPC, 1908 does not envisage that the Appellate Court would remand the case back to the trial Court while allowing the application for additional evidence. Remitting the case back to the trial



Court is regulated by Order XLI of Rules 23 and 23-A of the CPC, 1908.

9. Order XLI of Rule 23 of the CPC, 1908 enables the Appellate Court to remand the case back to the trial Court if the trial Court decided the suit on a preliminary point, which was reversed in appeal. In this case the decision is not on a preliminary point.

10. The second ground on which the case remitted back to the lower Court is under Rule 23-A of the CPC, 1908, which provides that if the decree is reversed in an appeal and re-trial is considered necessary. These two requirements have been interpreted and explained by the Hon'ble Supreme Court in '**P.Purushottam Reddy and Another v. Pratap Steels Ltd**'. (2002) 2 SCC 686, laid down as under:-

"10. 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 Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand 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 in as much 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 therefore of 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 CPC 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 11 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause 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 SC 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 11 Rule 31 of the CPC 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.”

11. In this case, the First Appellate Court could have permitted the respondent-State to lead additional evidence or directed the trial Court to record evidence and sent report.

12. The second reason assigned by the First Appellate Court is equally erroneous. There is no provision for filing an application for permission to lead secondary evidence. In fact, for quite some time a wrong practice has continued, which is not supported by law.

13. In fact, after examining the provisions of Indian Evidence Act, 1872, the CPC, 1908 and the High Court Rules and Orders, in **“Madan Lal Vs. Shankar and others”**, RSA-327-1989, decided on 01.11.2018, this Court came to the conclusion that there is no provision for filing an application for permission to lead secondary evidence.

14. In Civil Revision application No. 82 of 2016, decided on

10.11.2017, the Bombay High Court also held that such applications are being filed under misconception, which has now turned into epidemic. Even, the Hon’ble Supreme Court in ‘Dhanpat Vs. Sheoram (Deceased) through LRs and others’, 2020 SCC online SC 606, has held that there is no requirement of filing the application for permission to lead secondary evidence.

15. With respect to the next ground, it would be noted that as per the provisions of CPC, 1908, the suit against the State is required to be filed through its Secretary or the District Collector. In this case, both the Secretary as well as the District Collector are defendants No.1 and 2. Different departments of the State are not independent entities. This is only on account of administrative set up created by the State.

16. Keeping in view the aforesaid discussions, the impugned order dated 18.11.2021, passed by the First Appellate Court is set aside. The matter is remitted back to the First Appellate Court to proceed in accordance with law. The parties through their counsel are directed to appear before the First Appellate Court on 31.05.2024.

17. The appeal stands disposed of.

	(ANIL KSHETARPAL)	
	JUDGE	
15.05.2024		
neeraj	Whether speaking/reasoned :	Yes No
	Whether Reportable :	Yes No