



IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO No.74 of 2015
Reserved on: - 01.08.2024
Pronounced on: - 06.08.2024

BALWINDER SINGH

... APPELLANT

Vs.

SIMAR KAUR ALIAS SIMARJIT KAUR AND ORS

... RESPONDENTS

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. Ranjit Saini, Advocate, for the appellant.

Mr. G.S. Saini, Advocate, for respondents No.2 & 3.

DEEPAK GUPTA, J.

Plaintiff of Civil Suit No.36 of 2011 titled '*Balwinder Singh Vs. Simar Kaur and others*' decided on 24.04.2014 by the Court of Ld. Additional Civil Judge (Sr. Division) Gulha, is before this Court. He is aggrieved by the order dated 02.09.2015 passed by Id. District Judge, Kaithal in Civil Appeal N: 78 of 2014 titled, '*Balwinder Singh Vs. Simar Kaur and others*', whereby after setting aside the judgment and decree passed by the trial Court, the matter has been remanded to the trial Court for fresh decision on the additional issues as framed by the Appellate Court.

2. Facts in brief, relevant for the purpose of present Second Appeal against Order, are as under: -

2.1 Plaintiff-Balwinder Singh (*appellant herein*) claimed 1/5th share in the suit property on the basis of natural inheritance from her mother Smt. Inder Kaur, who expired on 05.01.2008. He challenged the legality and validity of mutation No.1809 in favour of defendant No.1-Simar Kaur alone, entered and sanctioned on the basis of a Will dated 09.09.1996, which the plaintiff alleged to be a fraud document. As per plaintiff, he had challenged the mutation No.1809 sanctioned on 21.04.2008 before the Collector and the same was accepted on 16.01.2009. Thereafter, the appeal of the defendants before the Commissioner Ambala was dismissed, against which they filed petition under Section 16 of the Punjab Land

Revenue Act and the Financial Commissioner, Haryana accepted the same vide an order dated 30.03.2010. Plaintiff then filed a Civil Revision under Article 226 of the Constitution of India before this Court, but the same was dismissed on 28.10.2010 as withdrawn with liberty to file Civil Suit.

2.2 Plaintiff alleged that the impugned Will dated 09.09.1996 in favour of defendant No.1 and the consequent mutation No.1809 are illegal and void and a result of collusion, misrepresentation and fraud played by the defendants and so, the same did not have any binding effect upon the rights of the plaintiff and the same were liable to be set aside. He even alleged that some imposter lady had been produced by the defendants in place of Smt. Inder Kaur before the Sub Registrar, Gulha for registration of the Will. He also referred about the numerous suspicious circumstances surrounding the Will.

2.3 Defendants in the written statement, apart from taking various preliminary objections, defended the impugned Will dated 09.09.1996 to be legal and to have been validly executed by Smt. Inder Kaur and that their revision had been accepted by the Financial Commissioner, Haryana in respect of the mutation on the basis of Will.

2.4 Following issues were framed by the trial Court:-

1. Whether the plaintiff is entitled for the relief of declaration to the effect that impugned Will allegedly executed by Smt. Inder Kaur wife of late Kartar Singh resident of village Ladana Chakku in favour of defendant No.1 and subsequent mutation No.1809 in favour of defendant No.1 are totally illegal, null and void and forged, fabricated, ineffective, nonest, rest of collusion, misrepresentation, impersonation and fraud played by the defendants in collusion with each other and not binding over the rights of the plaintiff and mutation No.1809 is liable to be sanctioned in favour of the plaintiff and defendants in equal shares in respect of the suit land? OPP
2. Whether the plaintiff is entitled for the relief of permanent injunction restraining the defendants from interfering into the peaceful and lawful possession of the plaintiff over the suit land to the extent of his 1/5th share and from alienating the suit land mentioned in para No.1 of the plaint by way of sale, lease, mortgage, release deed, and gift deed etc. and from creating any charge over the suit land of the plaint? OPP
3. Whether the suit is not maintainable? OPD

4. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD
5. Whether the plaintiff has suppressed true and material facts from the Court? OPD
6. Whether suit is hopelessly time barred? OPD
7. Relief.”

2.5 After taking evidence produced by the parties, the trial Court dismissed the Civil Suit on 24.4.2014 by holding that plaintiff had failed to prove that Will was not validly executed or that it was forged document or that there were suspicious circumstances surrounding the Will.

2.6 Plaintiff appealed against the judgment of the trial Court before the District Court, Kaithal. Ld. District Judge Kaithal, made the following observations: -

“20. The learned lower Court, non suited the plaintiff by holding that plaintiff failed to prove as to how the Will is surrounded by suspicious circumstances. Learned lower Court held that plaintiff failed to discharge the initial burden of proving suspicious circumstances surrounding the Will.

21. As evident, from the foregoing para of the judgment, whereby this Court has reproduced the issues casted by the learned lower Court, it makes it amply clear that learned lower court did not caste any positive issue as to the due execution of the Will. The defendants, as evident, from their pleadings have specifically raised the plea that Inder Kaur has executed a valid Will No.35/3 dated 09.09.1996 in favour of defendant No.1. However, this material issue was not framed by the learned trial Court, that led to miscarriage of justice between the parties.

22. There is no gain saying over settled proposition of law that it is propounder of Will who is to establish the due execution of the Will and initial onus of same is upon the propounder and further, he is under legal duty to dispel the suspicious circumstances, if any, surrounding the Will. Since material and basic issue left to be casted by learned lower Court and onus was also wrongly placed upon the plaintiff to dispel the circumstances vide issue No.1, resulted in miscarriage of justice. Since issue on Will was not framed, the defendants did not lead evidence on the due execution Will, as required under Section 68 of the Evidence Act. The defendants were thus deprived of proving the Will.

23. There is no dispute over settled proposition of law that Court is under bounded duty of frame proper issues, arising out of the contest of the pleadings of the parties and then asked them to lead the evidence thereon. In this regard,

reference can be placed to order XIV of CPC. The plaintiff also took specific pleading that suit land is ancestral-coparcenery/JHF property and he has pre-existing rights in it being son. This issue was also not framed by the learned trial Court, which also had bearing on the merits of the case. However, this has not happened in the present case, as discussed above. The issue No.1 has also not been framed properly and needs to be re-casted.”

2.7 Ld. District Judge then referred to Order 41 Rule 23A CPC so as to hold that retrial was necessary, as the trial Court had omitted to frame a very material and essential issue, upon which the right decision of the suit vested and as such, remanded the case for fresh decision of the case after its retrial on the issues already framed and by casting additional issue. Ld. District Judge re-casted some of the issues and framed some additional issues, which are as under: -

“1-A. Whether suit property is ancestral/coparcenery/JHF property of the parties and plaintiff has pre-existing rights in its as alleged? OPP

1-B Whether Inder Kaur executed a valid Will No.35/3 dated 09.09.1996 in favour of defendant No.1? OPD

Issue No.1 framed by learned lower Court on 01.11.2012 is re-casted as under: -

1-C Whether the plaintiff is entitled for declaration to the respect that mutation No.1809 sanctioned in favour of defendant No.1 along on the basis of invalid Will is illegal, nonest and not binding upon his rights as alleged? OPP

1-D Whether plaintiff is entitled to declaration to the respect that mutation No.1809 is liable to be sanctioned in favour of the parties in equal shares in respect of the suit land? OPP”

2.8 Thereafter, Id. District Judge vide her impugned order dated 02.09.2015 set aside the judgment and decree of the trial Court by setting aside all the findings and remanded the matter to the trial Court with direction to readmit the case at its original number and proceed to determine the suit afresh. Further direction was given to provide reasonable opportunity to the parties to lead evidence both in affirmative and rebuttal on their respective issues and decide all the issues afresh.

3. Assailing the aforesaid order of the District Judge, Kaithal, plaintiff of the case is before this Court in the present Second Appeal against Order.

4.1 The contention raised by Id. counsel is that while remanding the case, Id. District Judge wrongly relied upon under Order 41 Rule 23A CPC without considering Order 41 Rule 25 CPC, as per which the Appellate Court is empowered to frame issues and refer the same for trial, but as per the proviso, such Court shall proceed to try such issues and shall return the findings to the Appellate Court together with its findings and reasons thereof.

4.2 Id. counsel contends further that even if the Appellate Court found that proper issues were not framed, in the light of Order 41 Rule 25 CPC, remanding the matter to the trial Court with direction to re-admit it at its original number and proceed to determine the suit fresh was not warranted, as appellate Court was only empowered to send the case to the trial Court with the direction to send the record after recoding evidence.

4.3 Id. counsel has referred to ***Smt. Bachahan Devi and another Vs. Nagar Nigam, Gorakhpur and another, 2008(2) RCR (Civil) 367 (SC)*** besides ***Harikishan Vs. Smt. Anandi, 2007(1) PLR 469*** and ***Savitri Devi (died) through Lrs Vs. M/s Jiya Lal Baldev Krishan Cheema and others, 2006(3) PLR 538.***

4.4 With these submissions, Id. counsel prayed for setting aside the order passed by the Appellate Court/District Judge and to direct the said court to decree the suit of the plaintiff by setting aside the judgment and decree of the trial Court.

5. Refuting the aforesaid contentions, Id. counsel for the respondents-defendants has defended the impugned order passed by the District Judge. Id. counsel submits that since the Will had been propounded by the defendants, therefore, the proper opportunity should have been provided to the defendants to prove said Will. They could not produce the evidence to prove the Will, as the onus was not placed upon them. With these submissions, prayer is made for dismissal of this Second Appeal against Order.

6. I have considered submissions of both the sides and have appraised the record carefully.

7. After considering submissions, although this Court finds merit in the point raised by the Id. counsel for the appellant to the extent that matter should have been considered in the light of Order 41 Rule 25 CPC instead of Order 41 Rule 23A CPC, but this Court is not agreeable to the prayer made by the appellant. The

following are the reasons for this opinion by this Court:

8. Although, the appellate court has the power to remand the case, but only in such circumstances, which are covered under Order 41 Rule 23, 23-A or 25 CPC. These rules may be tabulated as under:

Order XXXVI Code of Civil Procedure		
Rule 23	Remand of case by Appellate Court — <i>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 what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand</i>	Pre-requisites: • The court, whose decree is under appeal, has disposed of the suit <u>upon a preliminary point</u>. • The appellate court has reversed the decree. Options open for appellate court: • It may remand the case • may direct what issue or issues shall be tried in the case so remanded What is to be done by the appellate court: • To send a copy of its judgment and order to the concerned court Directions to be sent by the appellate court: • To readmit the suit at original number in relevant register • To proceed to determine the suit The consequence: • the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.
Rule 23A	Remand in other cases — <i>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 retrial is considered necessary, the Appellate Court shall have the same powers as it has under</i>	Pre-requisites: • The court, whose decree is under appeal, has disposed of the suit <u>otherwise than a preliminary point</u>. • The appellate court has reversed the decree. • Retrial is considered necessary Options open for appellate court: [Same as under Rule 23]

	rule 23.	
Rule 25	Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from— 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; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court or extended by it from time to time.”	Pre-requisites: • The court, whose decree is under appeal, <u>has disposed of the suit has</u> ○ <u>omitted to frame any issue or</u> ○ <u>omitted to try any issue, or</u> ○ <u>to determine any question of fact</u> • The appellate court considers it essential for the right decision of the suit upon the merits Options open for appellate court: • May frame issues, and • refers the same for trial to the concerned court • To direct such court to take the additional evidence required What the trial court has to do: • To proceed to try such issues, and • To return the evidence to the Appellate Court together with its findings thereon and the reasons therefor • within such time as may be fixed by the Appellate Court or extended by it from time to time

9. Thus, under Rule 23, the Appellate Court can remand, when the matter was disposed of by the trial Court upon a preliminary issue and the decree is reversed in appeal. Necessary direction can be given by the Appellate Court as to what issues are to be tried on the matter being remanded. Under Rule 23-A, when the trial Court has disposed of the case, otherwise than on a preliminary issue and the decree is reversed in appeal and re-trial is considered necessary, then the Appellate Court has the same powers as are under Rule 23. Under Rule 25, order for remand can be made by the Appellate Court, when the trial Court has omitted to frame or try any issue or

determine any question of fact and Appellate Court considers it to be essential for the right decision of the suit on merits.

10. In the case of **Smt. Bachahan Devi (supra)**, after referring to Order 41 Rule 25 CPC, Hon'ble Supreme Court held as under: -

"8. There is no scope for any doubt that in a suit as well as the first appeal all disputed facts are open for decision. A point of fact is not to be decided in second appeal where only a substantial question of law is to be looked into. There is some amount of controversy as to whether the provisions are mandatory, notwithstanding the fact that the word 'may' has been used. The First Appellate Court is the last Court of facts.

9 Under Order XLI Rule 25, if it appears to the Appellate Court that any fact essential for the decision in the suit was to be determined, it could frame an issue on the point 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 additional evidence required. The order of remand should not be passed as a matter of routine. The First Appellate Court which has the power to analyse the factual position can decide the issue and the additional issues. In the instant case the First Appellate Court, inter alia, observed as follows:

"As such, it would not be proper for the first Appellate Court in such matter to itself record the evidence and to give its findings in regard to newly created issues. The Hon'ble High Court has also held that in the present matter under the provision of Order 41 Rule 25 of Civil Procedure Code, becomes mandatory (shall) though in this provision, the word 'may' has been used. No doubt in the present matter also the Appellate Court has framed 6 additional issues which are legal in nature and also factual, with the result if the Appellate Court gives its findings relating to said legal and factual issues after itself recording (receiving) evidence then the aggrieved party would be prevented from his right of filing first appeal. Accordingly, the aforesaid ratio laid down by the Hon'ble High Court is fully applicable in the present matter."

10. A bare reading of the provision makes it clear that the same comes into operation when the Court, from whose decree the appeal is preferred, has omitted to frame or try and issue, or to determine any question of fact which appears to the appellate court essential for the right decision of the suit upon the merits. In order to bring in application of Order XLI Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate Court to

do so. This is clear from the use of the expression 'may'. But the further question that arises is whether in such a case the appellate court is bound to direct the trial court to take additional evidence required. This is a mandatory requirement as is evident from the provision itself because it provides that the lower court shall proceed to try such case and shall return the evidence to the appellate court together with findings therein and the reasons therefor. As noted above, the provision becomes operative when the appellate court comes to the conclusion about the omission on the part of the lower court to frame or try any issue. Once the appellate court directs the lower court to do so, it is incumbent upon the trial court to take additional evidence required. As has been rightly contended by learned counsel for the appellant, there may be cases where additional evidence may not be required. But where the additional evidence is required, then the lower court has to return the evidence so recorded to the appellate court together with the findings thereon and the reasons therefor. Requirement for recording the finding of facts and the reasons disclosed from the facts is because the appellate court at the first instance has come to the conclusion that the lower court has omitted to frame or try any issue or to determine any question of fact material for the right decision of the suit on merits. It has to be noted that where a finding is called for on the basis of certain issues framed by the appellate court, the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of the first instance. This position was highlighted in **Gogula Gurumurthy and Others v. Kurimeti Ayyappa (1975(4) SCC 458)**, where it was *inter-alia* observed in para 5 as follows:

"We consider that when a finding is called for on the basis of certain issues framed by the appellate Court the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of first instance. We find the same view taken in **Gopi Nath Shukul v. Sat Narain Shukul (AIR 1923 All 384)**."

11. Thus, from the legal position as explained above by the Hon'ble Supreme Court as above, it is clear that when the Appellate Court finds that some issues are to be re-framed or re-casted and some additional evidence is required, it may refer the same for trial to the court from whose decree the appeal is preferred (*trial court in this case*) and then then the trial Court has to return the evidence so recorded to the Appellate Court together with the findings thereon and the reasons therefor. As has been made clear by Hon'ble Supreme Court that when the finding is

called for on the basis of certain issues framed by the Appellate Court, the appeal is not disposed of either in whole or in part and therefore, the parties cannot be barred from arguing the whole appeal after the findings are received from the Court of first instance. Thus, after framing additional issues or casting issues, though the appellate Court under Order 41 Rule 25 CPC can remand the matter to the trial Court with the direction to record evidence and return findings on those issues, but the trial Court could not be directed to re-decide the issues on all the points.

12. As far as Order 41 Rule 23A CPC is concerned, it is not applicable to the facts of the present case because though the trial Court had disposed of the suit otherwise than on a preliminary point by giving finding of all the issues in the present case, the appellate Court has framed additional issues and has re-casted some issues and therefore, it is Rule 25 of Order 41, which CPC will be applicable.

13. Consequently, it is concluded that the reasons recorded by the First Appellate Court, re-framing and re-casting some is quite correct, as it has been rightly noticed that when a Will is set up, it is propounder of the Will, who has to prove due execution thereof and has to satisfy the conscious of the Court regarding the suspicious circumstance, if any surrounding the same. The person, who challenged the legality and validity of the Will, onus cannot be placed upon him to disprove the legality of the Will.

14. As such, the present Second Appeal against Order is hereby disposed of by remanding the matter to the Appellate Court with the direction to ask trial Court to return the evidence recorded on additional/re-casted issues as framed by the Appellate Court to the said Appellate Court together with the findings thereon and the reasons therefor and then appellate Court has to decide the matter/appeal afresh after receipt of evidence/findings of the trial court on additional/re-casted issues as framed by the Appellate Court.

06.08.2024
Vivek

(DEEPAK GUPTA)
JUDGE

Whether speaking/reasoned?	Yes
Whether reportable?	No