

**(2006) 05 P&H CK 0077**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Second Appeal from Order No. 12 of 1999

Savitri Devi (died) through L.Rs.

APPELLANT

Vs

Jia Lal Baldev Krishan Cheema  
and Others

RESPONDENT

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**Date of Decision:** May 9, 2006

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 25

**Citation:** (2006) 4 CivCC 456 : (2006) 144 PLR 538 : (2006) 3 RCR(Civil) 782

**Hon'ble Judges:** Nirmal Yadav, J

**Bench:** Single Bench

**Advocate:** Arun Palli, for the Appellant; Amarjit Markan, for the Respondent

**Final Decision:** Allowed

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**Judgement**

Nirmal Yadav, J.

The present appeal is directed against the judgment and order dated 30.1.1999 passed by Additional District Judge, Sangrur vide which the judgment and decree passed by Sub-Judge, 1st Class, Sunam, dated 126.1.1988 has been set aside and suit is remanded to the trial Court for fresh decision within 3 months from the date of receipt of the record.

2. The brief facts of the case are that appellant-plaintiff filed a suit for rendition of accounts in respect and liabilities of the firm in the name and style of M/s Jia Lal Baldev Krishan Cheema for the period commencing from 1.4.1982 till the date of filing of the suit. The plaintiff and defendants No. 2 and 3 were the partners of defendant No. 1-firm. The firm was dealing in food grains and Bardana as Commission Agent. The defendants-respondents were running the business of the firm and also operating the bank account. The firm stopped working after 31.3.1983, but even then the accounts were not rendered in spite of several requests made by the plaintiff. Accordingly, the suit was filed.

3. The suit was contested by the defendants stating that no firm was constituted with the plaintiff as partner. The appellant-plaintiff never invested any amount in their partnership. Jai Lai, defendant, conducted the business of the firm as sole proprietor, therefore, the plaintiff has no cause of action. It was pleaded that the suit is collusive between Jamail Singh and husband of the plaintiff. Defendant No. 3-Baldev Krishan filed separate written statement admitting the factual position being correct. The trial Court after taking into consideration the facts and evidence on record passed a preliminary decree for rendition of accounts with respect to assets, liabilities and other accounts of the firms with effect from 1.1.1982 till the date of institution of suit i.e. 9.5.1986.

4. Defendant No. 1 firm and Jia Lal, defendant No. 2 challenged the decree mainly on the ground that plaintiff had got the plaint amended seeking dissolution of partnership firm. However, neither any issue in this respect was settled nor any evidence was recorded, therefore, it was pleaded that evidence be recorded by the 1st Appellate Court. The 1st Appellate Court while allowing amendment, observed that in case evidence is recorded at the appellate stage, the losing party would be deprived of right of first appeal, therefore, it is a fit case where suit be remanded for fresh decision after framing proper issues. Accordingly, the judgment under appeal was set aside.

5. The grievance of the appellant is that 1st Appellate Court was required to decide all the issues by itself after settling the issues and taking the evidence or if necessary, by calling for the report from the trial Court. The 1st Appellate Court could not set aside the findings of the trial Court on all other issues without giving any finding and to remand the matter for fresh decision. It is argued that provisions of Order 41, Rule 25 of the CPC are applicable in the present case wherein, after framing any additional issue, if required, the appellate Court should have referred the same to the trial Court for taking additional evidence and thereafter to submit report to the Appellate court together with its findings or take the evidence itself. In support, the learned Counsel referred to the decision of the Apex Court in *A.P. State Wakf Board Hyderabad v. All India Shia Conference Branch A.P. and Ors.* 2000 (2) R.C.R. 487 and the decisions of this Court in [Hasham and Others Vs. Jhangli Ram](#), and *Tarlok Chand v. State of Punjab* 2002 (4) R.C.R. 278.

6. On the other hand, learned Counsel for the respondent-defendants argued that once additional evidence was allowed, it became necessary that the case should be re-tried after granting adequate opportunity to both the parties to lead evidence in support of their respective cases. It is pointed out that in order to prove the resolution of the firm, evidence is to be produced by both the parties.

7. On careful consideration of the rival submissions of the learned Counsel for the parties, I am of the view that it was not incumbent upon the 1st Appellate court to set aside the judgment and decree of the trial court and remand the case for fresh decision by setting aside the findings of the trial court on all the issues. In fact, only

two courses were open to the 1st Appellate Court i.e. either to reverse the findings on all issues and remand the case to trial court or to seek report of the trial Court after recording the evidence with regard to the amendment sought by the plaintiff. The 1st Appellate Court has not given any reason for setting aside the judgment and decree of the trial Court as also the findings of the trial Court on all the issues. The order passed by the 1st Appellate Court is, in a way, contrary to the provisions of Order XLI Rule 25 C.P.C. The provisions of Order XLI Rule 25 of the Code of Civil Procedure, read as under:

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 therefore within such time as may be fixed by the Appellate Court or extended by it from time to time.

8. In view of the above provisions, it is evident 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 law/fact, which appears to the Appellate Court essential for the right decision of the suit, the Appellate Court may, if necessary, frame issues(s), and refer the same for trial to the trial Court directing it to take additional evidence, if so required. The trial Court shall proceed to try the such issues(s) and shall return the evidence to the Appellate Court together with its findings within such time as may be fixed by the Appellate Court. The Apex Court in All India Shia Conference's case (supra), has interpreted the above provisions holding that wherever additional evidence is required to be taken on record and Appellate Court, if feels difficulty in deciding the issues, it can direct the trial court or subordinate Court to record the evidence and send the same to the Appellate Court. It would not be necessary to remand the matter for that purpose.

9. In view of the legal position discussed above, the appeal is allowed and the impugned order of the 1st Appellate Court dated 30.1.1999 is set aside. It is directed that the matter shall be decided by the 1st appellate Court in accordance with the provisions of law as referred above. The parties are directed to appear before the learned District Judge, Sangrur on 18.7.2006, who shall either decide the case himself or assign it to the appropriate Court.