

**(2006) 11 P&H CK 0153**

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

**Case No:** Civil Revision No. 362 of 2006

Surjan Singh

APPELLANT

Vs

Punjab Singh and another

RESPONDENT

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**Date of Decision:** Nov. 25, 2006

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 23, Order 41 Rule 25

**Citation:** AIR 2006 P&H 49

**Hon'ble Judges:** Passey, J

**Bench:** Single Bench

**Advocate:** Jagan Nath, for the Appellant; Anant Ram, for the Respondent

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### **Judgement**

Passey, J.

This defendant's revision is directed against the order of the District Judge, Fatehgarh Sahib remanding the suit after framing two fresh issues to the trial Court for decision de novo. One Sobha Singh son of Kalu of Bigga Khurd made a gift of the property in dispute to his sister's son Surjan Singh on 30-2-2003. Partap Singh, his brother Nathu's son, and Punjab Singh, who is described in the settlement pedigree table as his uncle Chabha's adopted son, brought the present suit on 26-3-2003 impugning the validity of the gift on the ground that the property alienated was ancestral and the donor had no unrestricted powers of adoption over it. The donee in his written statement urged inter alia that the subject of gift was not ancestral and that the alienation in his favour had been made in lieu of services which he had continuously rendered to the donor for a score of years. Five issues covering the points of variance arising out of the pleadings were drawn up and evidence was being led when Partap Singh entered into a composition with the donee and dropped out of the suit. He was, however, transposed as a defendant and the suit was eventually dismissed on 14-1-2003 as the plaintiff had failed to prove that he was a reversioner of the donor and had a locus standi to attack the gift. Punjab Singh in para. 1 of the plaint had stated that Sobha Singh was his brother which the

defendant controverted by saying that the averment was wrong. The trial Court, after an appraisal of the evidence led by the plaintiff in support of issue no. 1, found that he had failed to prove himself to be a collateral of Sobha Singh. The learned District Judge has not disturbed the findings of the Sub-Judge but has framed two fresh issues: (1) Whether the plaintiff is the son of Kalu and (2) Whether the gift in dispute in favour of Surjan Singh who is a stranger to the donor's family and a resident of alien territory is invalid and therefore, not binding on the plaintiff and remanded the case for a decision afresh. According to issue No. 1 drawn up by the lower Court, the plaintiff had to prove that he was a reversioner of Sobha Singh and the word "reversioner" obviously includes a brother. The first issue framed by the District Judge is thus redundant. The defendant had in his written statement advanced the plea that the gift to him being in lieu of services was valid according to custom and he was, therefore, called upon to establish his contention. The second issue struck by the lower appellate Court casts the burden on the plaintiff to prove that the gift is invalid. The validity of the gift has to be proved by the person in whose favour it was made and the plaintiffs cannot be asked to prove its invalidity. The new issue is not only unnecessary but makes a wrong allocation of onus. The order under revision also directs the trial Court to decide whether the plaintiff should be allowed to amend his plaint and convert the suit into one for possession. The donor had died during the trial of the suit but the plaintiff pursued his declaratory suit and appealed against its dismissal. The question of amendment could have very well been determined by the learned District Judge and should not have been left for decision by the trial Court. I am further of the view that even if the District Judge was of the opinion that it was necessary to frame fresh issues for the disposal of the appeal, the procedure laid down in R. 25 of O. 41, Civil P. C. should have been followed. In [Mansurali Sarkar Vs. Jamiran Bewa and Others](#), it was held by a Division Bench consisting of Cuming and D. B. Ghosh JJ., that where an appellate Court finds it necessary that a particular issue should be framed and tried, it should proceed under the provisions of O. 41, R. 25, to frame the issue and refer it for trial to the lower Court. It is not proper for the appellate Court to set aside the judgment of the trial Court and send back the case to that Court for deciding it by framing an issue which the appellate Court considers necessary for the decision of the case. It cannot be doubted that an appellate Court has inherent power to remand a case even where O. 41, sR. 23 or O. 41, R. 25 does not apply provided that the interests of justice require it, but Court should not discard the procedure prescribed by the Code of Civil Procedure, and adopt a different one unless it is necessary to do so. In the case before me, neither the two issues framed were necessary nor was a proper use of inherent powers made. I, therefore, accept the revision with costs and quash the order of remand. The appeal shall now be decided by the learned District Judge on its present merits. Surjan Singh petitioner and the respondent through his counsel have been directed to appear in his Court on 10-12-2006.