

(2014) 07 P&H CK 0044

High Court Of Punjab And Haryana At Chandigarh

Case No: S.A.O. Nos. 13 and 14 of 2009

Suresh Kumar

APPELLANT

Vs

Sahab Singh

RESPONDENT

Date of Decision: July 14, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 3, Order 41 Rule 20, Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 31

Hon'ble Judges: Mahesh Grover, J

Bench: Single Bench

Advocate: Arvind Singh and Pritam Saini, Advocate for the Appellant; Akshay Jindal, Advocate for the Respondent

Final Decision: Disposed Off

Judgement

Mahesh Grover, J.

By this order I dispose of S.A.O. Nos. 13 and 14 of 2009.

2. These two appeals are directed against the order of the learned Appellate Court dated 18.11.2008 vide which it remanded the matter back to the learned trial Court for a decision afresh on an application moved by the present respondents. The facts would be relevant and are, therefore, noticed in brief.

3. Respondent No. 2 Joginder Singh son of Chamela initiated a suit (Civil Suit No. 343 of 1995) against Sahab Singh, Prem Singh, Charta and Babu laying a claim to the estate of one Raji widow of Telu, the real aunt of Joginder Singh by pleading that she was issueless and he being her adopted son, was entitled to her estate. The adoption deed dated 13.7.1959 was set up in support of his claim. Two of the defendants namely Sahab Singh and Prem Singh admitted the claim of the plaintiff/respondent No. 2 while Charta and Babu sons of Harmela contested the suit to say that Raji was issueless, but denied the adoption in favour of the plaintiff/respondent No. 2. They set up the plea of natural succession in their

defence. Another cross-suit (Civil Suit No. 342 of 1995) was filed by Charta and Babu against Sahab Singh, Joginder Singh, Narinder Kumar, Sukhinder Kumar, Vipin, Salma and Sahab Devi laying a claim to the estate of Raji on the plea of natural succession.

4. Both the suits were consolidated vide order dated 8.5.2004 and were decided through a common judgment.

5. The learned trial Court on the basis of the pleadings of the parties, framed the following issues in Civil Suit No. 343 of 1995:-

(1) Whether the plaintiff is sole owner in possession of the suit land, detailed in prayer clause of the plaint ? OPP.

(2) Whether mutation No. 627 dated 16.11.1968 of Village Kalal-Majra and mutation No. 538 dated 18.2.1969 of Village Morthala and subsequent entries in the revenue record on the basis of said mutations are wrong, illegal, null and void ? OPP.

(3) Whether there is any valid adoption-deed dated 13.7.1950 in favour of the plaintiff ? OPP.

(4) Whether the suit is not properly valued for the purposes of court fees and jurisdiction ? OPD.

(5) Whether the suit of the plaintiff is time barred ? OPD.

(6) Whether the plaintiff has no locus standi to file the present suit ? OPD.

(7) Whether the suit is not maintainable since defendants No. 3 and 4 are joint owners in possession of the suit land ? OPD.

(8) Whether the present suit is liable to be stayed u/s 10 of C.P.C. ? OPD.

(9) Whether the suit is false, frivolous and misconceived ? OPD.

(10) Whether the defendants are entitled for special costs u/s 35A C.P.C. ? OPD.

(11) Relief.

6. And the following issues were framed in Civil Suit No. 342 of 1995:-

(1) Whether the suit property is the ancestral property in the hands of the plaintiffs ? OPP.

(2) Whether mutation No. 627 and mutation No. 538 are illegal, null and void ? OPP.

(3) Whether plaintiffs are entitled to possession ? OPP.

(4) Whether plaintiffs have no locus standi to file the present suit? OPD.

(5) Whether suit is not maintainable in the present form ? OPD.

(6) Whether plaintiffs have no cause of action ? OPD.

(7) Whether the plaintiffs are estopped from filing the present suit by their own act and conduct ? OPD.

(8) Whether suit is time barred ? OPD.

(9) Whether plaintiffs have waived their rights ? OPD.

(10) Whether mere suit for declaration is not maintainable? OPD.

(11) Whether suit is not properly valued for the purposes of court fee and jurisdiction ? OPD.

(12) Relief.

7. The learned trial Court then went on to decide the suits on the crucial issues of adoption and also of limitation which resulted in the filing of the appeals.

8. During the hearing of the appeals, an application was moved by the present respondents No. 9 and 10 namely Mam Raj and Bachni claiming a share in the estate of Smt. Raji by making a plea that they are her maternal grand-children. Joginder Singh who was the plaintiff in Civil Suit No. 343 of 1995, was also arrayed as a respondent, but he has chosen not to contest the present proceedings. The Appellate Court remanded the matter back to the learned trial Court for de-novo trial by virtue of the impugned order which is now the cause of grievance to the appellants.

9. The argument of the learned counsel for the appellants centres around the non-compliance of the provisions of Order 41 Rule 23 C.P.C. and the learned counsel for the respondents, on the other hand, has centered his argument around the provisions of Order 41 Rule 23A and Section 107 of the C.P.C. Therefore, it would be necessary to advert to these provisions of law which are extracted here below:-

107. Powers of appellate Court.- (1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power-

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein.

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Order 41, Rule- 23. Remand of case by Appellate Court.-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 direction 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 all just exceptions, be evidence during the trial after remand.

23-A. Remand in other cases.- 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

10. Evidently, the learned trial Court having commented upon the adjudication of all the issues, has not dealt with the suits on a preliminary point and, therefore, it would be the procedure contained in Order 41 Rule 23A C.P.C. which would be relevant for the adjudication of the present controversy. Order 41 Rule 23A contemplates that the Appellate Court can reverse a decree in appeal to order re-trial if it considers it to be necessary. Inherent in the language of the said provision of law is the requirement that the Appellate Court would comment and discuss all the issues which have been challenged before it as this is the only course available to it if it has to reverse the findings of the trial Court questioned before it. It cannot embark upon any other course to order re-trial. The Hon"ble Supreme Court in [Sri P. Purushotham Reddy and Another Vs. Pratap Steels Limited](#), has observed as follows:-

7. 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 CPC by CPC Amendment Act, 1976, there were only two provision contemplating remanded 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 inasmuch 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 therefor 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 u/s 151 of the C.P.C. 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 41 of the C.P.C. In cases where additional evidence is required to be taken in the event of any one of the Clauses 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 Manilal Nanavati Vs. Sushila Mahendra Nanavati](#), 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 41 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. The instant cases were thus not of a kind where the Appellate Court could have shrugged all the findings recorded by the trial Court merely on an application moved by persons other than the plaintiffs to say that they were necessary parties that too on the basis of their random identification by villagers. Even the inherent powers conferred upon by virtue of Section 151 C.P.C. could not have been extended to the applicants in the wake of the peculiar facts of the case. More importantly, it has to be noticed that the civil suit had also been dismissed on the issue of limitation. It was for the Appellate Court to have commented upon these issues when an application is moved by certain persons putting forward their claim to succession which claim could also similarly have been barred by limitation as had been noticed by the trial Court.

12. Therefore, the learned Appellate Court was clearly in error in accepting the application under Order 41 Rule 20 and Section 107 C.P.C. to remand the matter back for de-novo trial.

13. The impugned order is therefore, set aside and the matter is remanded back to the Appellate Court to decide the matter afresh in the light of what has been stated

above and in the light of the provisions of law.

14. Disposed of.