



SAO-11-2020(O&M)

**110 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

SAO-11-2020(O&M)

Date of decision:05.04.2025

Shashi Sharma and another

..Appellants

Versus

Kuldeep Sharma and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sanjiv Gupta, Advocate for the appellants

ANIL KSHETARPAL, J. (Oral)

1. The plaintiffs assail the correctness of the First Appellate Court's order remitting the matter back to the trial court for a fresh decision while reversing the judgment and decree passed by the trial court.

2. The dispute in the present case is with regard to succession of the property left behind by Sh.Mangal Dass. He was blessed with six children; two sons and four daughters. The plaintiffs namely; Shashi Sharma, Ramesh Sharma and Madhu Sharma, three daughters of Sh.Mangal Dass, filed a suit for partition claiming decree for possession to the extent of 1/6th share each. Defendant no.1 and 2 (two sons) filed the written statement claiming that Sh.Mangal Dass bequeathed the property in their favour by virtue of the Will dated 17.02.1988.

3. Replication was filed. The trial court settled the following issues:-



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“1. Whether the plaintiffs are entitled to a decree for partition, as prayed for ? OPP.

2. Whether the suit is not maintainable in the present form? OPD

3. Relief.”

4. The parties were permitted to lead evidence. The defendants examined DW2-Ganga Ram attesting witness of the Will. The trial court found that the Will is surrounded by suspicious circumstances. Hence, the suit was decreed. Defendants no.1 and 2 filed the first appeal. The First Appellate Court found that proper issues have not been framed and in fact, a specific and distinct issue on the question of validity of the Will has not been culled out. The court further observed that no attesting witness of the Will has been examined. Thereafter, the court proceeded to remit the matter back to the trial court for a fresh decision.

5. Heard the learned counsel representing the appellants at length and with his able assistance perused the paperbook.

6. Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908 (hereinafter referred to as ‘CPC’) relates to the appellate court’s power to remit the matter back to the lower court for fresh decision. Order XLI Rule 25 CPC enables the appellate court to frame new/additional issues and refer them to trial to the court against whose decree the appeal has been filed. The appellate court can also permit the parties to lead evidence on such additional issue.

7. In this case, the First Appellate Court has erred in framing issue by placing negative onus on the plaintiff. The additional issue framed by the First Appellate Court reads as under:-

“Whether Mangal Dass never executed any Will dated 17.02.1988 in favour of defendants no.1 & 2



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and the same is false, fabricated and fictitious document, as alleged? OPP.”

8. The onus to prove the Will is always on the propounder. In this case, defendant no.1 and 2 propounded the Will dated 17.02.1988. Hence, the issue should have been as under:-

“whether Mangal Dass executed a valid Will on 17.02.1988 bequeathing his property in favour of defendant no.1 and 2? OPD (defendant no.1 and 2)?”

9. The First Appellate Court has also erred in observing that no attesting witness of the Will has been examined. In fact, DW2 Ganga Ram was examined by the defendants. Before the judgment and decree passed by the court is set aside by the appellate court, it is mandatory to analyse the reasons recorded by the lower court and set aside the same after its critical appraisal. The appellate court is also required to form an opinion that re-trial of the case is necessary. Unless these two mandatory requirements are fulfilled, the appellate court is not expected to remit the matter back to the lower court. Order XLI Rule 25 CPC does enable the appellate court to seek report from the trial court after framing additional issue.

10. The appellate court also has power to call upon the parties to lead evidence after framing additional issues. However, the judgment of the lower court cannot be set aside only on this aspect of the matter.

11. Keeping in view the aforesaid facts and observation, this Court is left with no choice but to set aside the First Appellate Court's order. Hence, the appeal is allowed. The judgment of the First Appellate Court is set aside while restoring the appeal to its original number. The appellants,



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through their learned counsel, are directed to appear before the First Appellate Court on 08.05.2025.

12. All the pending miscellaneous applications, if any, are also disposed of.

(ANIL KSHETARPAL)
JUDGE

05.04.2025

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Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No