IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No. 305 of 2011
Reserved on: 19.10.2023
Date of Decision: 16.11.2023

Bidhi Chand and others ...Appellants.

Versus

Hardial Singh and others ...Respondents.

Coram

Hon'ble Mr. Justice Rakesh Kainthla, Judge.

Whether approved for reporting?[1] Yes.

For the Appellants : Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh Thakur, Advocate.

For the Respondents : Ms. Devyani Sharma, Senior Advocate with Mr. Basant Pal Thakur, Advocate for respondent No.1 to 5.

Mr. Ajay Sharma, Senior Advocate with Mr. Atharv Sharma, Advocate for respondent No.6.

Rakesh Kainthla, Judge

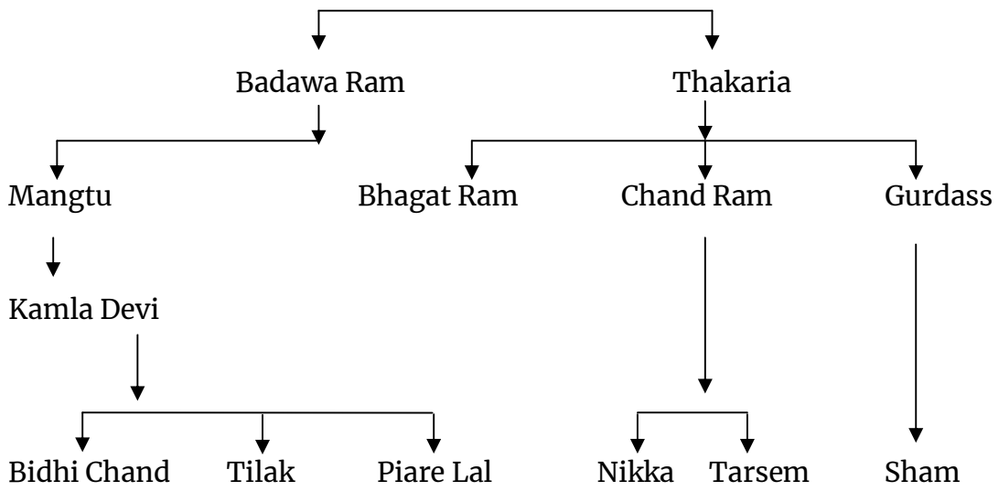
The present appeal is directed against the judgment dated 20.6.2011, passed by the learned Additional District Judge, Una, vide which the appeal filed by respondents no. 1 to 5

[1] Whether reporters of Local Papers may be allowed to see the judgment? Yes.

(defendants before the learned Trial Court) was allowed and the matter was remanded to learned Trial Court to decide the same afresh. (Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present appeal are that the plaintiffs filed a civil suit before the learned Trial Court for seeking a declaration that they are owners in possession of the suit land mentioned in the head note of the plaint based on the Will executed by Kanta Devi and Mutation No. 473 sanctioned by the revenue authorities and sale deed dated 19.8.2000 executed by defendant no. 1 in favour of defendant no.2 are illegal, null and void. A consequential relief of permanent prohibitory injunction for restraining the defendants from taking forcible possession of the suit land was also sought. It was pleaded that the suit land was earlier owned and possessed by Kanta Devi. She executed a Will in favour of the plaintiffs and the plaintiffs are owners in possession of the suit land after 1.4.2002, the date of her death. The pedigree table of the parties is as under:-

CHUHA



3. Kanta Devi was married to defendant no.1 about 33 years ago. Defendant No. 1 turned her out of his house within 3-4 months of the marriage by saying that she had a defect in her right foot. The matter was resolved through Khangi Divorce. Defendant No.1 solemnized his second marriage with Kashmiro Devi after 8-9 months of Khangi Divorce. Hardayal Singh, Shashi Pal, Rohit Kumar and Shama Devi were born to defendant no. 1 and Kashmiro. Plaintiffs and their predecessor-in-interest gave shelter to Kanta Devi and constructed one house for her. Kanta Devi started residing with the plaintiffs and the plaintiffs took care of her throughout her lifetime. Kanta Devi executed a Will in favour of the plaintiffs on 30.3.2000 in her sound disposing state of mind. She died on 1.4.2000 and her last rites

were performed by the plaintiffs. The revenue authorities sanctioned the mutation in favour of defendant no. 1 which is bad. Defendant no.1 sold the land to defendant no.2 based on the mutation. The plaintiffs requested the defendants to acknowledge their title but in vain. Hence, the suit was filed to seek the relief mentioned above.

4. The suit was opposed by defendant no. 1 by filing a written statement, taking preliminary objection regarding lack of maintainability and locus-standi, plaintiffs being estopped from filing the present suit by their acts and conducts, the suit being bad for non-joinder of necessary parties and the suit having not been properly valued for the purpose of Court fees and jurisdiction. The contents of the plaint were denied on merits. However, it was admitted that the suit land was earlier owned and possessed by Kanta Devi. It was asserted that Kanta Devi was married to defendant no.1. She never expressed any intention to execute any document related to her estate. The defendant inherited the estate of Kanta Devi being her legal heir. The plaintiffs and proforma defendants propounded a false Will. They failed to prove the due execution of the Will before the revenue authorities and the mutation was attested in favour of

defendant no.1. It was specifically denied that defendant no.1 had divorced Kanta Devi or that the plaintiffs had taken care of Kanta Devi during her lifetime. Mangtu was the owner of the property before Kanta Devi and he had no relations with the plaintiffs. The suit was filed without any basis. Hence, it was prayed that the suit be dismissed.

5. A separate written statement was filed by defendant no.2, taking preliminary objections regarding lack of locus standi, cause of action and maintainability and the suit having not been properly valued for the purpose of Court fees and jurisdiction. The contents of the plaint were denied on merits. However, it was not disputed that Kanta Devi was the owner of the suit land. It was denied that Kanta Devi executed any Will in favour of the plaintiffs. It was asserted that defendant no.1 transferred his right to defendant no.2 for a consideration of ₹1,50,000/-. Defendant no. 2 is the owner in possession after the purchase of the land. Therefore, it was prayed that the suit be dismissed.

6. Separate replications denying the contents of the written statements and affirming those of the plaint were filed.

7. The learned Trial Court framed the following issues on 22.4.2003 and an additional issue on 28.6.2004:-

1. Whether the plaintiffs are owners in possession of the suit land? OPP.
2. Whether the Will dated 30.3.2000 executed by deceased Kanta Devi is valid and genuine Will? OPP.
3. Whether the plaintiffs are entitled for relief of injunction? OPP.

3-A. Whether defendant No.1 has contracted second marriage with Kashmiro Devi? If so its effect? OPP.

4. Whether the suit is not maintainable? OPD.
5. Whether the plaintiffs are estopped by their acts and conduct? OPD.
6. Whether the suit is bad for non-joinder of necessary parties? OPD.
7. Whether the suit is not properly valued? OPD.
8. Whether the plaintiffs have no locus standi to file the suit? OPD.
9. Whether defendant No. 2 Kant Devi is a bona-fide purchaser ? OPD.
10. Relief.

8. The parties were called upon to produce the evidence and the plaintiffs examined plaintiff no. 3 (PW-1), Sat Dev (PW-2), Kuldeep Chand (PW-3), Ramesh Chand (PW-4), Anup Kumar (PW-5) and Renu Thakur (PW-6). The defendants examined Parvesh Kumar (DW-1), Naresh Kumar (DW-2), Parveen Kumar (DW-3), Chain Singh (DW-4), Hardyal Singh, (LR No. 1) (DW-5),

Nand Lal (DW-6), Hakam Singh (DW-7) and Dhani Ram (DW-8).

9. The learned Trial Court partly decreed the suit bearing Civil Suit No. 172 of 2000 on 26.6.2007 and declared plaintiffs no. 1 to 3, 6 and 7 and defendants no. 3 to 5 as owners-in-possession to the extract of 1/8th shares each of the suit land based on natural succession. A consequential relief of permanent prohibitory injunction was also granted.

10. Being aggrieved from the judgment and decree passed by the learned Trial Court, two appeals were filed which were decided by learned Additional District Judge, Fast Track Court, Una on 22.11.2008. The judgment and decree passed by the learned Trial Court were set-aside and the matter was remanded to the learned Trial Court for a fresh decision after deciding the effect of the death of deceased plaintiff Chanchal Singh.

11. The learned Trial Court permitted the legal representatives of Chanchal Singh to be brought on record. Learned Trial Court held that the execution of the Will was not proved. It was duly proved that defendant no.1 had divorced

Kanta Devi in a Khangi Panchayat. He married Kashmiro Devi after the divorce. Kanta Devi had inherited the property from her father and her estate would devolve upon the heirs of her father. The execution of the sale deed in favour of defendant no. 2 by defendant no. 1 was bad for want of competence. The plea of defendant no. 2 that he was a bona-fide purchaser for consideration was not proved. Hence, the learned Trial Court answered Issue no. 1 partly in affirmative, issue no. 3 and 3(a) in affirmative, the rest of the issues in negative and partly decreed the suit.

12. Being aggrieved from the judgment and decree passed by the learned Trial Court, three separate appeals were filed. These were disposed of by the learned First Appellate Court by means of a common judgment. Learned First Appellate Court concurred with the findings recorded by the learned Trial Court that the execution of the Will by Kanta Devi was not proved. The plaintiffs mentioned Gurdas as one of the collateral but he or his legal heirs were not on record. Similarly, Usha Devi was not arrayed as a party whose name was mentioned in the pedigree table (Ex.D-1). The name of Suman Devi was not mentioned anywhere and she was wrongly joined. The suit could not have

been decreed in the absence of the necessary parties. Therefore, the matter was remanded with a direction to decide the same afresh after affording an opportunity to the plaintiffs to implead all the necessary parties to the suit.

13. Being aggrieved from the judgment passed by the learned First Appellate Court, the present appeal has been filed asserting that the learned First Appellate Court erred in remanding the matter to the learned Trial Court. The estate of Kanta Devi was in dispute. Plaintiffs claimed her estate based on the Will and defendant no. 1 claimed the estate being a natural heir. The learned First Appellate Court should have decided the matter as per the material available on record. Hence, it was prayed that the present appeal be allowed and the judgment and decree passed by the learned First Appellate Court be set-aside.

14. I have heard Mr. N.K. Thakur, learned Senior Advocate, assisted by Mr Divya Raj Singh Thakur, Advocate for the appellants/plaintiffs, Ms Devyani Sharma, learned Senior Advocate, assisted by Mr Basant Pal Thakur, Advocate, for the respondent/defendant no.1 and Mr Ajay Sharma, learned Senior

Advocate, assisted by Mr Atharv Sharma, Advocate, for respondent no.6/LR of original defendant no. 2.

15. Mr. N.K. Thakur, learned Senior Counsel for the original plaintiffs submitted that the learned First Appellate Court erred in remanding the matter to the learned Trial Court with a direction to enable the plaintiffs to implead the necessary parties. He submitted that all the parties were before the Court and learned First Appellate Court did not appreciate this fact. The parties have been in litigation since 2000 and it was not proper to relegate the parties to the learned Trial Court. There was sufficient material before the learned First Appellate Court to decide the matter as per the law. Hence, he prayed that the present appeal be allowed and the judgment passed by the learned First Appellate Court be set-aside.

16. Ms. Devyani Sharma, learned Senior Counsel submitted that the matter could not have been remanded to the learned Trial Court for impleading the necessary parties. Once the Court concluded that all the parties were not arrayed before the Court, the Court was bound to dismiss the suit for non-joinder of necessary parties. Learned First Appellate Court erred

in allowing the plaintiffs to implead the necessary parties; therefore, she prayed that the direction to implead the necessary party be set-aside.

17. Mr. Ajay Sharma, learned Senior Counsel submitted that three appeals were filed before the learned First Appellate Court and three appeals should have been preferred before this Court. One appeal is not maintainable; hence he prayed that the appeal be dismissed.

18. I have given considerable thought to the rival submissions at the bar and have gone through the records carefully.

19. The following points arise for determination in the present appeal:-

1. Whether the present appeal is maintainable in the present form? OPA.
2. If Point No.1 is answered in the affirmative, whether the judgment passed by the learned First Appellate Court is sustainable?
3. Final order.

20. For the reasons to be recorded hereinafter, the findings on aforesaid points are as follows:-

Point No.1 : Yes.

Point No. 2	:	No
Final order	:	The appeal is allowed as per the operative part of the judgment.

Point No.1:

21. Mr. Ajay Sharma, learned Senior Counsel submitted that three appeals were preferred before the learned First Appellate Court and three appeals should have been filed before this Court challenging the judgments passed by the learned First Appellate Court. In the absence of three separate appeals, the present appeal is barred by the principle of res-judicata. This submission cannot be accepted. It was laid down by a five-judge bench in ***Mussammat Lachhmi v. Mussammat Bhulli*, *AIR 1927 Lah 289*** that the principle of *res-judicata* applies to the original proceedings and not to the appellate proceedings. Speaking through Tek Chand, J. It was observed as under:-

> "It must, therefore, be settled at the very outset whether section 11 applies to appeals or whether its operation is limited only to suits meaning proceedings in an action in Courts of the first instance as distinguished from proceedings in appellate Courts. After a careful examination of the section, I have reached the conclusion that it applies to suits only and not to appeals. It is no doubt true that in the body of the Civil Procedure Code as well as in other enactments the word 'suit' is often used as including proceedings before an appellate Court, and

also other proceedings of a civil nature. But having regard to the phraseology used in section 11 and more particularly to Explanation II, which, it might be noted, was for the first time added in 1908, the word 'Court' as used in this section can but mean the trial Court, and 'suit' signifies proceedings beginning with the plaint and ending with the decree in that Court. It seems to me that no other interpretation is possible. If the word 'suit' is to be taken as including 'appeal' the section becomes inconsistent with Explanation II. This was specifically ruled by LeRossignol, J. (Chevis, J. concurring), in ***Dalipav. Rani Suraj Kaur[48 P.P. 1916, p. 139.]***, where at page 139 it is stated. "The word 'Court' referred to in section 11 of the Code of 1908 is the original Court, subject to the proviso that Court's judgment cannot be held to be final until the time for appeal has lapsed or till the appeal has been finally decided. This view is confirmed by the language of Explanation II to the section". In ***MussammatFakhar-un-Nissa v. Malik Rahim Bakhsh[23 P.R. 1897.]***, and ***Malik Rahim Bakhsh v. MussammatFakhar-un-Nisa[31 P.R. 1898.]*** (which latter was a judgment delivered on review in the earlier case), Chatterji and Stogdon, JJ., were also inclined to take the same view and in ***Ram Lal v. ChhabNath [(1890) I.L.R. 12 All. 578.]***, Edge, C.J. and Brodhurst, J., definitely laid down that "section 13 of the Code of 1882 did not apply to appeals, but the principle of *res judicata* did, as section 13 is not exhaustive". I feel strengthened in this view by the fact that after these judgments had been delivered under the Code of 1882, the legislature deliberately enacted Explanation II for the first time in 1908, which read with the main clause of the section, leaves no doubt whatever that 'suit' does not include 'appeal'."

22. Therefore, the submission that the present appeal will be barred by the principle of *res-judicata* cannot be accepted and this point is answered in the affirmative.

Point No. 2:

23. The question whether the learned First Appellate Court can remit the matter to the learned Trial Court for non-joinder of necessary party or not was considered by this Court in ***Shyampati Vs. Munshi Ram and others 2003(1) Civil Court Cases 28 (HP)***and it was held that it is not permissible to remit the matter to the Trial Court to enable the joining of the necessary parties. It was observed:-

> "9. In order to appreciate their respective contentions we will refer to Order 1, Rule 9 and Order I, Rule 10(2) CPC and the case law. Order I, Rule 9 is:
>
> > 'Mis-joinder and non-joinder.-No suit shall be defeated by reasons of the mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties before it:
> >
> > Provided that nothing in this rule shall apply to non-joinder of a necessary party."
>
> Order I, Rule 10(2) is:
>
> > "Court may strike out or add parties.-The Court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court to be just, order

> that the name of any party improperly joined, whether as plaintiff or defendant by struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

10. In ***State of Punjab v. Nathu Ram, AIR 1962 SC 89***, while interpreting Order I, Rule 9 CPC before the addition of proviso, the learned Judges have held in paragraph 5 that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the matter, but if it is not possible for the Court to deal with the matter in the absence of a party it has to refuse to proceed further and dismiss the matter and such eventuality will occur in the absence of necessary party. It is made clear that Rule 9 will not apply to the defect in the suit as of non-joinder of necessary parties as it cannot proceed in their absence.

11. In ***Kanakarathanammal v. V.S. Loganatha Mudaliar and another, AIR 1965 SC 271***, a Constitution Bench of the Supreme Court while interpreting Order I, Rule 9, again, before the addition of proviso, has held that for want of necessary parties the suit is bound to fail, though the Court can direct the necessary parties to be joined under Order I, Rule 10(2) CPC at the trial stage without prejudice to the plea of limitation of said parties. The learned Judges while examining the case in which the plaintiff had inherited the property of her mother under Section 12 of the Hindu Succession Act has failed to implead her brother who had also inherited the property along with her. The observations of learned Judges in paragraph 15 are:

> "It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits

we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under Section 12 of the Act. That, in fact, is the conclusion which the Trial Court had reached and yet .10 action was taken by the appellant to bring the necessary parties on the record. It is true that under Order I, Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order I, Rule 10, sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all three heirs are before the Court. If the appellant persisted in proceedings with the suit on the basis that she was exclusively entitled to the suits property, she took the risk and it is now too late to allow her to rectify the mistake. In ***Naba Kumar Hazra v. Radhashyam Mahish, AIR 1931 PC 229***, the Privy Council had to deal with a similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded

> before the Privy Council. In support of this plea, reliance was placed on the provisions of Order I, Rule 9 of the Code. In rejecting the said prayer, Sir George Lowndes who spoke for the Board observed that "they are unable to hold that the said Rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India."

12. The same view was taken in ***Vishnu Mahadeo Pandse v. Rajen Textile Mills (P) Ltd. and another, AIR 1975 SC2079; Sri Ram Paricha v. Jagannath and others, AIR 1976 SC 2335*** and ***Profulla Chorone Requitte and others v. Satya Choron Requitte, AIR 1979 SC 1682***.

13. In ***Bal Niketan Nursery School v. Kesari Prasad, (1987)3 SCC 587***, the learned Judges were dealing with Order 1, Rule 10 CPC and not with Order I, Rule 9 and have held that Order 1, Rule 10 has been expressly provided to meet the situation where bona fide mistake has occurred in the filing of the suit in the name of wrong person, which is required to be set right to promote the cause of justice.

14. In another judgment of the Supreme Court in ***Ramesh Hirachand Kundan Mai v. Municipal Corporation of Greater Bombay and others, (1992)2 SCC 524***, again the learned Judges were dealing with Order I, Rule 10(2) CPC and have held that though the plaintiff is dominuslitis and he may choose to implead only those persons as a defendant against whom he wishes to proceed but under Order I, Rule 10(2) the Court may at any stage of the suit direct addition of necessary or proper parties to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit.

15. In ***Laxmi Shankar Harishankar Bhatt v. Yashram Vasta(Dead) by LRs., (1993)3 SCC 49***, the learned Judges have held that in the absence of any clear finding based on relevant material about the existence of other co-

owners and their being necessary parties, the plaintiff cannot be non-sucked on the ground of non-joinder of parties.

16. In ***Beharilal and another v. Smt.Bhuri Devi and others, AIR 1997 SC 1879***, the learned Judges have held that omission to join proper parties is not fatal.

17. In ***Anokhe Lai v. Radhamohan Bansal and others, AIR 1997 SC 257***, the learned Judges have held that when the plaintiff who is dominuslitis of the suit is opposed to joining of the third party and the consequences of joining of the said party involve de novo trial, the Court should not joint such party as the defendant. For coming to the conclusion the learned Judges have relied upon the judgment of the Privy Council in ***Naba Kumar Hazra v. RadhashyamMahish (supra)***.

18. In Division Bench of Kerala High Court in ***Venkideswara Prabhu Ravindranatha Prabhu v. Surendra natha Prabhu Sudhakara Prabhu and others, AIR 1985 Kerala 265***, for want of joining of a partner who is a necessary party in a suit of dissolution of partnership and settlement of accounts suit was held bad keeping in view the proviso of Order I, Rule 9. Similarly, Madras High Court in ***S.Guhan and others v. Rukmani Devi Arundale and others, AIR 1998 Madras I***, held that in a suit for framing of a Scheme for the proper administration of the Trust under Section 92(1) CPC the Trust is a necessary party and in the absence of which the suit deserves to be dismissed in view of proviso to Order I, Rule 9.

19. In ***Gopibai Manaklal and others v. Mohammed Hussain and others, AIR 1993 MP 21***, the Madhya Pradesh High Court refused to rectify the defect of non-joinder of necessary parties on the ground that the plaintiff failed to take steps to join the necessary panics despite the objection of non-joinder of necessary parties taken at the earliest. (See ***Smt. Umma Saghir v. District Judge, Gorakhpur and others, AIR 1990 All 100; Lakshmi Narain v. The District Judge, Fatehpur and others, AIR 1992 All 119; Venkatesh Iyer***

v. Bombay Hospital Trust and others, AIR 1998 Bom. 373).

20. After perusing the judgments of the Supreme Court and various High Courts there remains no doubt that the general rule is that a suit cannot be dismissed on the ground of non-joinder of proper parties but this rule does not apply in case of non-joinder of necessary parties. All the objections on the ground of non-joinder of parties must be taken at the earliest but if despite an objection the plaintiff declines to add necessary parties, he can not subsequently be allowed in appeal to rectify the error by applying for amendment.

21. So far the proviso of Order I, Rule 10(1) and (2) is concerned, it is to help the honest plaintiff who by committing a bona fide mistake has not added the necessary parties and who is ready and willing to amend his suit as and when the defect is pointed out. Though the Court has wide discretion in the matter of joinder of necessary or proper party, it must be exercised in a reasonable manner so as not to cause inconvenience or embarrassment to the plaintiff who is the dominuslitis and in exceptional cases, where the Court is satisfied that the presence of a particular person is absolutely necessary to effectively and completely adjudicate upon and settle all the points involved in the suit, it can implead that party as a defendant notwithstanding the objection of the plaintiff. But this power should be exercised so as not to introduce a new cause of action or alter the nature of the suit. It should be exercised at the stage of trial and avoided to be exercised at the appeal stage, more so, if despite objections at the earliest the plaintiff fails to implead the necessary parties.

22. Applying the ratio of the above judgments to the facts of the present case we are of the view that the District Judge was not right in setting aside the decree and judgment of the Trial court on merit to give an opportunity to the plaintiff to add necessary parties when he had failed to do so despite the preliminary objection of non-joinder of necessary parties by, the defendants in

their written statement; Despite the specific averments that Jiu Rampur and Shimla, the plaintiff did not care to verify this fact and thereafter implead them as defendants. Despite the oral evidence and the revenue record produced by the defendants that the suit land was jointly owned by the original Balku, and his brothers Jiu Nath and Padoo the plaintiff did not care to implead them or their legal representatives. If they were not in the land of living. Even after the finding of the Trial Court that the suit was bad for want of non-joinder of legal representatives of Jiu Nath and Padoo (Patu), co-owners of the suit land, the plaintiff did not show his willingness to implead them in his appeal before the District Judge and insisted that the findings of the Trial Court were erroneous."

24. This question was again considered by this Court in ***Ajay Kumar vs. Arya Samaj Dharamshala and others 2002 (1) Shim. LC 426*** and it was held:-

"16. In ***Het Ram and others v. Narain Singh and others, F.A.O. No. 121 of 2001, decided on 2.11.2001***, the dispute between the parties was with regard to the enjoyment of an easementary right as to the use of water. The water source regarding which easementary rights were being claimed by the plaintiffs therein was located in the land belonging to the State of Himachal Pradesh. An objection was inter alia raised by the defendants as to the suit being bad for the non-joinder of the necessary party, that is, the State of Himachal Pradesh. The plaintiffs resisted the objection. An issue was, therefore, framed-whether the suit was bad for non-joinder of necessary parties? The learned trial Court answered the issue in the affirmative by holding that State of Himachal Pradesh was a necessary party and due to its non-joinder, the suit was bad. It was also held that certain other co-owners of the land through which enjoyment of water was being

claimed were also necessary parties. The suit of the plaintiffs was dismissed both on merits as well as on the grounds of non-joinder of necessary parties by the learned trial Court. In an appeal preferred by the plaintiffs before the first appellate Court, findings of the learned trial Court holding the suit to be bad for non-joinder of necessary parties were affirmed. The first appellate Court, however, after setting aside the dismissal of the suit remanded the case to the learned trial Court by holding that an opportunity ought to have been afforded by the trial Court to implead the necessary parties before proceeding to dismiss the suit. The defendants assailed the order of the first appellate Court remanding the suit to the trial Court by way of an appeal before this Court. In support of the order of the first appellate Court, a contention was raised on behalf of the plaintiffs that in view of the provisions contained in Order 1 Rule 10(2), Code of Civil Procedure, the Court had ample power to strike out or make additions of parties and as such the first appellate Court was well within its rights to direct the trial Court to give an opportunity to the plaintiffs to implead necessary parties. Assailing the order, it was contended on behalf of the defendants that in view of the proviso to Order 1 Rule 9, Code of Civil Procedure, the suit for want of necessary parties must fail and there is no question of giving an opportunity to the plaintiffs to implead the necessary parties when the defendants did not care to implead them inspite of an objection having been raised in this regard by the defendants.

17. A Division Bench of this Court after noting the case law on the subject, allowed the appeal, set aside the order of the first appellate Court and remanded the first appeal for disposal in accordance with law. It was held that no opportunity was required to be given to the plaintiffs to implead parties once the Court had come to the conclusion that the suit was bad for non-joinder of necessary parties.

18. The ratio laid down by the Division Bench of this Court

applies to the present case on all fours and as such it is held that once the Court comes to the conclusion that the suit before it is bad for non-joinder of necessary parties, the suit has to be dismissed without affording the plaintiffs an opportunity to implead such necessary parties.

19. In ***Kanakarathanammal v. V.S. Loganatha Mudaliar and another, AIR 1965 SC 271***, a Constitution Bench of the Supreme Court while interpreting Order 1 Rule 9, before addition of proviso, has held that for want of necessary parties, the suit is bound to fail, though the Court can direct the necessary parties to be joined under Order 1 Rule 10(2) C.P.C. at the trial stage without prejudice to the plea of limitation of said parties. The learned Judges while examining the case in which the plaintiff had inherited the property of her mother under Section 12 of the Hindu Succession Act had failed to implead her brother who had also inherited the property along with her. The observations of learned Judges in paragraph 15 are:-

> "It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of thethree heirs on whom the said property devolves by succession under Section 12 of the Act. That, in fact,/is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1 Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1 Rule 10, sub-rule 2 direct the necessary parties to be joined, but all this can and

should be done at the stage of trial and that too without prejudice to the said parties plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all three heirs are before the Court. If the appellant persisted in proceeding with the suit on the basis that she was exclusively entitled to the suits property, she took the risk and it is now too late to allow her to rectify the mistake. In ***Naba Kumar Hazra v. Radhashyam Mahish, AIR 1931 PC 229***, the Privy Council had to deal with a similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of Order 1 Rule 9 of the Code. In rejecting the said prayer, Sir George Lowndes who spoke for the Board observed that "they are unable to hold that the said Rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India."

20. The same view was taken in ***Vishnu Mahadeo Pandse v. The Rajen Textile Mills (P) Ltd. and another, AIR 1975 SC 2079; Sri Ram Paricha v. Jagannath and others, AIR 1976 SC 2335*** and ***Profulla Chorone Requitte and others v. Satya Choron Requitte, AIR 1979 SC 1682.***"

25. Therefore, the learned First Appellate Court erred in remitting the matter to the learned Trial Court for enabling the plaintiff to join all the legal heirs of Mangtu as necessary parties.

26. There is a force in the submission of Sh. N.K. Thakur learned Senior Counsel that an order of remand is not to be passed lightly since it gives rise to fresh litigation. It was laid down by Gauhati High Court in ***Lalit Mohan Nath v. Mohan Nath*, *AIR 1974 Gau 68*** that when there is sufficient evidence to enable the Appellate Court to pronounce the judgment, the Court should not remand the matter. It was observed:-

> "**12.** Rules 23 and 25 of Order 41 give power to appellate Court to remand a case. Rule 23 gives power to the Appellate Court to make a remand when the trial Court has disposed of the suit on the preliminary point and on appeal the decree of the trial Court is reversed by the Appellate Court. This rule is not attracted to the present case. Rule 25 gives power to the Appellate Court to remand a case where a trial Court has omitted to frame or try any issue or has omitted to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit on merit; it may frame issue, if necessary, and refer the same to the trial Court for trial of the same. In this connection consideration of Rule 24 is essential. Rule 24 enjoins on an appellate Court to determine a case finally where the evidence on record is sufficient to enable the appellate court to pronounce the judgment. An appellate Court cannot, obviously exercise powers simultaneously under Rules 24 and 25. When there is sufficient evidence to enable the appellate Court to pronounce judgment, it is its duty to do it under Rule

> 24; it cannot pass on to Rule 25 to make a remand. Remand means a delay in the disposal of the suit, and delay defeats justice. In my opinion, resorting to Rule 25 is illegal, if an appeal can be disposed of under Rule 24.

27. The Hon'ble Supreme Court also took a similar view in ***P. Purushottam Reddy v. Pratap Steels Ltd.*, (2002) 2 SCC 686**, wherein it was observed:-

> "**10.** 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 23-A in Order 41 of the Code of Civil Procedure by the CPC Amendment Act, 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 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 a 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 of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before the 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 CPC to order a remand if such a remand was considered pre-eminently necessary *ex debitojustitiae*, though not covered by any specific provision of Order 41 CPC. 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 23-A has been inserted in Order 41 which provides for 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 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. 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 v. Sushila Mahendra Nanavati [AIR 1965 SC 364: 66 Bom LR 681] (AIR at p. 399)***, it is well settled that inherent powers can be availed of *ex debitojustitiae* 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 dehors Rules 23 and 23-A. 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 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting 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 23-A or Rule 25 CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

28. It was held in ***Shivakumar v. Sharanabasappa, (2021) 11 SCC 277: 2020 SCC OnLine SC 385*** that where the material on

record was sufficient, the Appellate Court should not remand the matter to the Trial Court. It was observed at page 318:

> "**26.4.** A conjoint reading of Rules 23, 23-A and 24 of Order 41 brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Rule 24 of Order 41 CPC and to determine the suit finally. It is only in such cases where the decree in the challenge is reversed in appeal and a retrial is considered necessary that the appellate court shall adopt the course of remanding the case. It remains trite that an order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the trial court may not be considered proper in a given case because the first appellate court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case."

29. A similar view was taken in ***Nadakerappa v. Pillamma,*** ***2022 SCC OnLine SC 387,*** wherein it was observed:

> "25. The Division Bench, without assigning any cogent reasons, has set aside the order of the learned Single Judge and has remanded the matter to the Land Tribunal. It is settled law that the order of remand cannot be passed as a matter of course. An order of remand cannot also be passed for the mere purpose of remanding a proceeding to the lower court or the Tribunal. An endeavour has to be made by the Appellate Court to dispose of the case on

> merits. Where both sides have led oral and documentary evidence, the Appellate Court has to decide the appeal on merits instead of remanding the case to the lower court or the Tribunal. We are of the view that, in the instant case, the Division Bench has remanded the matter without any justification."

30. Therefore, the learned First Appellate Court erred in remanding the matter to the learned Trial Court.

31. Hence, the judgment passed by the learned First Appellate Court cannot be sustained and this point is answered in negative.

Final Order

32. In view of the above, the present appeal is allowed and the judgment dated 20.6.2011, passed by learned Additional District Judge, Una is ordered to be set-aside and the matter is remitted to learned First Appellate Court to decide the matter afresh as per the law.

33. It is expressly made clear that the observations made hereinbefore are related to the disposal of the present appeal and do not constitute any expression of opinion on the merits of the case.

34. The parties are free to agitate all the pleas which have been taken before this Court or before the learned First

Appellate Court and the matter shall be decided uninfluenced by whatever has been stated by this Court while deciding the present appeal.

35. The parties through their counsel are directed to appear before the learned First Appellate Court on 04.12.2023.

(Rakesh Kainthla)
Judge

16th November, 2023
(Chander)