

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

SAO No. 88 of 2016 (O&M)

Date of Decision: January 07, 2019

Chanda Gupta

.....APPELLANT

VERSUS

Ashok Kumar Gupta

.....RESPONDENT

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Varun Sharma, Advocate
for the appellant.

Mr. Rahul Rampal, Advocate
for the respondent.

SURINDER GUPTA, J.(Oral)

Heard.

Learned Civil Judge (Sr. Division), Jalandhar while deciding the suit filed by the appellant recorded findings on all the issues except issue no. 4(a) framed on 29.10.2010 which reads as follows:-

4(a) Whether the plaintiff has concealed material facts from the Court? OPD

Before the Ist Appellate Court, appellant/respondent raised the plea that finding on issue no. 4(a) had not been recorded while deciding the suit on merit and learned Ist Appellate Court remanded the appeal with directions to the trial Court to record findings on issue no. 4(a) and decide the case afresh.

Learned counsel for the appellant has argued that findings of

the trial Court on other issues were not set aside and order passed by the learned Ist Appellate Court is not in accordance with the provisions of Order 41 Rule 23, 23(a) 24, 25 of Code of Civil Procedure (for short CPC).

Learned counsel for the respondent has argued that issue no. 4 (a) framed by the trial Court is with regard to concealment of material facts and findings on this issue will affect the findings on all the other issues framed in this case, as such, the Ist Appellate Court has rightly set aside the judgment and decree passed by the trial Court and directed it to record the findings on issue No. 4(a) and decide the case afresh.

Appellate Court can remand the case for fresh decision as per provisions contained in Order 41 Rule 23, 23(a), 25 of CPC which reads as follows:-

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 directions 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 to 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 retrial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.*

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 shall 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 therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time].*

The suit was filed seeking relief of mandatory injunction directing the defendant/respondent to hand over the vacant possession of the disputed house with plea that possession of the defendant over the suit property is that of licensee.

Learned trial Court recorded the findings on all the issues while decreeing the suit. However, issue No. 4(a) framed on 29.10.2010 appears to have escaped attention of the Court. The order of the learned Ist Appellate Court setting aside judgment passed by the trial Court on the sole ground that findings have not been recorded on issue No. 4(a) is not legally sustainable as per provisions of Order 41 Rule 23, 23-A or 25 CPC. The Ist Appellate Court could call report of the trial Court on issue No. 4(a) and while deciding the appeal on merits could see the impact on the finding of issue No. 4(a) on merit of other issues and decide the appeal on merits.

In view of my above discussions, order dated 02.08.2016 passed by Additional District Judge, Jalandhar is set aside to the extent that

appeal was accepted and judgment and decree passed by the trial Court was set aside for non-recording of finding on issue No. 4(a). The Ist Appellate Court will call report of the trial Court on issue No. 4(a) and then proceed to decide the appeal on merits in accordance with law.

Parties are directed to appear before the Ist Appellate Court on 29.01.2019, on which date, the Ist Appellate Court will take the appeal and proceed further as per observations recorded above.

Disposed of.

January 07, 2019
Jyoti-II

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No