

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO No.6 of 2023 (O&M)

Reserved on : 03.02.2023

Date of Decision: 08.02.2023

Darshan Singh

....Appellant

VERSUS

Santokh Singh

....Respondent

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Aditya Dasaur, Advocate for the appellant.

Mr. Sarju Puri, Advocate for the caveator-respondent.

ALKA SARIN, J.

The present appeal has been preferred by the plaintiff-appellant aggrieved by the order dated 11.01.2023 passed by the First Appellate Court, by virtue of which the judgment and decree passed by the Trial Court has been set aside and the matter has been remitted to the Trial Court with a direction to pass a judgment afresh after giving categoric findings on the additional issues framed by the First Appellate Court.

Learned counsel appearing on behalf of the plaintiff-appellant has contended that though the First Appellate Court has the power to remand the case, however, the same is to be exercised only in a rare situation. Learned counsel for the plaintiff-appellant would further contend that after framing of the additional issues the First Appellate Court could have itself recorded the evidence and decide the case on merits. It is further the contention of learned counsel for the plaintiff-appellant that detailed findings had been returned by the Trial Court and without reversing the findings returned by the Trial Court the judgment and decree passed by the Trial Court has simply been set aside and the matter has been remanded to

the Trial Court for a decision afresh. In support of his argument, learned counsel for the plaintiff-appellant has relied upon judgments of the Hon'ble Supreme Court in the cases of **Zarif Ahmad (D) through LRs and Another vs. Mohd. Farooq**, [2015 (1) RCR (Civil) 794] and **Smt. Bachahan Devi & Anr. vs. Nagar Nigam, Gorakhpur & Anr.** [2008 (2) RCR (Civil) 367].

Per contra learned counsel for the caveator-defendant-respondent has contended that since the issue whether the jurisdiction of the civil court was barred was not decided, hence, the matter has rightly been remanded by the First Appellate Court. According to counsel, there is no error or illegality in the impugned order.

I have heard learned counsel for the parties.

In the present case vide a detailed judgment the Trial Court had decreed the suit of the plaintiff-appellant vide judgment and decree dated 09.12.2019. Aggrieved by the said judgment and decree an appeal was preferred by the defendant-respondent. Vide the impugned order, the First Appellate Court has framed additional issues and without so much as even advertng to the findings recorded by the Trial Court, has set aside the judgment passed by the Trial Court and remanded the matter back to decide afresh. Hon'ble Supreme Court in the case **Zarif Ahmad** (*supra*) in para 13 has held as under :

“13. No doubt, Section 107 of CPC empowers the appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 Order 41 C.P.C provides that where evidence on

record is sufficient, appellate court may determine the case finally. It is not a healthy practice to remand a case to trial court unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, a case should be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues, but it is not so in the present case.”

In the case of the **Bachahan Devi** (*supra*), it has been held as under :

“9. Under Order 41 Rule 25, if it appears to the Appellate Court that any fact essential for the decision in the suit was to be determined, it could frame an issue on the point and refer the same for trial, to the Court from whose decree the appeal is preferred and in such case, shall direct such court to take additional evidence required. The order of remand should not be passed as a matter of routine. The First Appellate Court which has the power to analyse the factual position can decide the issue and the additional issues. In the instant case the First Appellate Court, inter alia, observed as follows :

“As such, it would not be proper for the first Appellate Court in such matter to itself record the

evidence and to give its findings in regard to newly created issues. The Hon'ble High Court has also held that in the present matter under the provision of Order 41 Rule 25 of Civil Procedure Code, becomes mandatory (shall) though in this provision, the word 'may' has been used. No doubt in the present matter also the Appellate Court has framed 6 additional issues which are legal in nature and also factual, with the result if the Appellate Court gives its findings relating to said legal and factual issues after itself recording (receiving) evidence then the aggrieved party would be prevented from his right of filing first appeal. Accordingly, the aforesaid ratio laid down by the Hon'ble High Court is fully applicable in the present matter.”

10. A bare reading of the provision makes it clear that the same comes into operation when 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 for the right decision of the suit upon the merits. In order to bring in application of Order 41 Rule 25 the appellate court must come to a conclusion that the lower court has omitted to frame issues and/or has failed to determine any question of fact which in the opinion of

the appellate court are essential for the right decision of the suit on merits. Once the appellate court comes to such a conclusion it may, if necessary, frame the issues and refer the same to the trial court. In other words there is no compulsion on the part of the appellate Court to do so. This is clear from the use of the expression 'may'. But the further question that arises is whether in such a case the appellate court is bound to direct the trial court to take additional evidence required. This is a mandatory requirement as is evident from the provision itself because it provides that the lower court shall proceed to try such case and shall return the evidence to the appellate court together with findings therein and the reasons therefor. As noted above, the provision becomes operative when the appellate court comes to the conclusion about the omission on the part of the lower court to frame or try any issue. Once the appellate court directs the lower court to do so, it is incumbent upon the trial court to take additional evidence required. As has been rightly contended by learned counsel for the appellant, there may be cases where additional evidence may not be required. But where the additional evidence is required, then the lower court has to return the evidence so recorded to the appellate court together with the findings thereon and the reasons therefor. Requirement

for recording the finding of facts and the reasons disclosed from the facts is because the appellate court at the first instance has come to the conclusion that the lower court has omitted to frame or try any issue or to determine any question of fact material for the right decision of the suit on merits. It has to be noted that where a finding is called for on the basis of certain issues framed by the appellate court, the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of the first instance. This position was highlighted in Gogula Gurumurthy and Others v. Kurimeti Ayyappa, (1975(4) SCC 458), where it was inter-alia observed in para 5 as follows:

“We consider that when a finding is called for on the basis of certain issues framed by the appellate Court the appeal is not disposed of either in whole or in part. Therefore the parties cannot be barred from arguing the whole appeal after the findings are received from the court of first instance. We find the same view taken in Gopi Nath Shukul v. Sat Narain Shukul, (AIR 1923 Allahabad 384).”

The First Appellate Court in the present case, if was of the view that certain important issues arising in the present case had not been decided by the Trial Court, after framing the additional issues the Court

could have sent the matter back to the Trial Court for recording of the evidence on the additional issues as framed and for submitting a report thereupon. It is trite that on appeal the matter is not to be remanded in a casual manner. In view of the settled law, if it appears to the First Appellate Court that further evidence would be required, the matter may be remitted to the Trial Court for submitting a report after recording the evidence. However, in case the Court is of the opinion that the evidence on the record is sufficient to decide the issue, it may do so without remitting the matter for a report on the additional issues. In the present case the First Appellate Court has acted contrary to the settled law and has mechanically remitted the matter to the Trial Court. The impugned order, therefore, cannot be sustained.

In view of the above, the impugned order is set aside. The First Appellate Court is directed to decide the appeal afresh in accordance with law.

Disposed off in the above terms.

08.02.2023
jk

(ALKA SARIN)
JUDGE

NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO