

2023:PHHC:118181

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

SAO-37-2023 (O&M)

Date of decision: 06.09.2023

Bhag Singh (deceased) through his LR

..Appellant

Versus

Baldev Singh and others

.Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Amit Kumar Saini, Advocate for the appellant

Mr. Aayush Gupta, Advocate for respondent no.1 to 3

ANIL KSHETARPAL, J (Oral)

1. This Second Appeal against the order of the First Appellate Court while remanding the case back to the trial court for deciding afresh has been filed by the defendant. Learned First Appellate Court, after allowing the plaintiff's application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') to produce in additional evidence, a copy of the judgment passed in the civil suit titled as '**Bhag Singh vs. Hari Singh and others**' has remitted the matter back to the trial court for deciding afresh.

2. Learned counsel representing the defendant submits that the First Appellate Court was not correct in remanding the case back to the trial court merely because an application for additional evidence has been allowed. While referring to Order XLI Rule 27 of CPC, the learned counsel representing the appellant contends that the additional evidence could be led before the First Appellate Court and the defendant

(appellant) also could be given an opportunity to rebut the additional evidence, which has been permitted to be led.

3. On the other hand, the learned counsel representing the respondent submits that the defendant himself sought an opportunity to lead the rebuttal evidence. Therefore, the First Appellate Court has correctly remanded the matter back to the trial court.

4. In fact, this issue has been examined in detail by this Court in SAO-82-2015 titled as '**Smt. Bhagwan Devi (since deceased) through her LRs vs. Smt. Veena Devi @ Krishna Devi and another**' decided on 18.07.2023, in the following manner:-

“4. The power of the Appellate Court to remand the case back to the lower court is regulated by Section 107 read with Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908 (hereinafter referred to as ‘CPC’). Rule 23 of Order XLI of CPC enables the Appellate Court to remand the case back to the trial court if the judgment has been passed on a preliminary issue and the aforesaid finding on the preliminary issue has been set aside by the Appellate Court. Rule 23A enables the Appellate Court to remand the case back to the trial court if the decree is reversed in appeal and a re-trial is considered necessary. Thus, the power of remand of the Appellate Court is available only in the eventualities provided under Rule 23 and 23A of Order XLI. It is incumbent for the Appellate Court to set aside the judgment and decree passed by the trial court on merits and conclude by giving adequate reason for necessity of retrial of the suit. On a careful reading of the operative part of the impugned judgment, it is evident that the court has neither set aside the judgment of the trial court on merits nor it has

recorded the reasons for which the re-trial is considered necessary. Learned counsel representing the respondent though requested to explain the reasons for necessity of re-trial, however, he failed to draw the attention of the Court in this regard.”

5. The First Appellate Court is a court of facts and law. It is required to re-appreciate the evidence. Moreover, the First Appellate Court can record the evidence. Under Order XLI Rule 23-A of CPC a case can be remanded back only after the First Appellate Court comes to a conclusion that the reasons recorded by the trial court are wrong and re-trial is considered necessary. Both the conditions are required to be fulfilled before an order of remanding the case back to the trial court is passed. It is evident that the First Appellate Court has failed to discuss any merits of the case before remitting the case back to the court of first instance.

6. Keeping in view the aforesaid facts, the impugned order passed by the First Appellate Court is set aside. The first appeal is restored to its original number. The parties through their learned counsel are directed to appear before the First Appellate Court on 04.10.2023.

7. Disposed of.

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

06.09.2023

rekha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE