

2023:PHHC:133714
**131 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

SAO-71-2019 (O&M)
Date of decision: 13.10.2023

Subhash

....Appellant

Versus

Brij Pal and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Ms. Nancy Vashistha, Advocate for the appellant
Mr. Ajit Singh, Advocate for
Mr. Arun Sharma, Advocate for respondent no.1 to 4

ANIL KSHETARPAL, J (Oral)

1. This second appeal against the order passed by the First Appellate Court has been filed by the plaintiff to challenge the correctness of the order of remanding the case back to the trial court for fresh decision.

2. In order to comprehend the issue involved in the present case, some relevant facts, in brief, are required to be noticed. The plaintiff (appellant) filed a suit for the grant of decree of permanent injunction restraining the defendants from interfering or causing obstruction in use, enjoyment, construction of the plaintiff over the land measuring 20 marlas. It is claimed by the plaintiff that an oral partition took place in the year 2013 between the plaintiff, his family members and the defendants and as per the aforesaid settlement all the co-sharers were given a specific portion towards the northern side of the suit property, whereas the plaintiff and his

family members were handed over possession of a Bara located on the western side of the disputed area. Subsequently, the oral partition was reduced into a form of writing i.e. in the shape of a ‘memorandum of settlement’ on 12.11.2013 and now most of the co-sharers have raised construction in accordance with the aforesaid settlement. Defendant no.4 contested the suit by filing the written statement. Defendant no.1, 2 and 3 adopted the written statement filed by defendant no.4. It was claimed that the suit property is a joint property in possession of all the co-sharers. The averment regarding the oral partition was denied by the defendants. The trial court, on analysing the pleadings, framed the following issues:-

“1. Whether the plaintiff is entitled to the relief of permanent injunction, as prayed for? OPP.

2. Whether the suit of the plaintiff is legally not maintainable? OPD.

3. Whether the plaintiff has no locus standi to file the present suit? OPD.

4. Relief.”

3. The family partition between the parties dated 12.11.2013, was produced as Ex.P1. The trial court granted decree for permanent injunction restraining the defendants from interfering or causing obstruction in the use, occupation, enjoyment and construction of the plaintiff. The defendants filed

the first appeal. The First Appellate Court has remanded the case back to the trial court, while recording the following reasons:-

i) The trial court has failed to carefully examine the revenue record, which shows that some part of the suit property has been mortgaged in favour of the Bank.

ii) As per the revenue record, some of the co-owners have already sold the property. However, the trial court failed to carefully examine the entries.

iii) The parties are co-sharers, and therefore the plaintiffs cannot be permitted to construct, as it amounts to ousting all other co-sharers.

4. This Court has considered the submissions made by the parties. The First Appellate Court has enabling power to remand the case back to the trial court for deciding afresh in accordance with Order XLI Rule 23 and 23-A of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'), which are extracted as under:-

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.]*

5. In this case, Order XLI Rule 23 CPC is not applicable as the suit was not decided on a preliminary point, which was reversed in appeal. Under Order XLI Rule 23-A of CPC, the court has enabling power to remand the case back if the decree is reversed in appeal and a re-trial is considered necessary. Thus, the Appellate Court's power to remand the case back to the trial court is regulated by Order XLI Rule 23 and 23-A of CPC. The Appellate Court cannot exercise the power of remanding the case back to the trial court beyond the scope of the statutory provision. It is evident from the reading of the judgment passed by the First Appellate Court that there is no finding as to why re-trial has been considered necessary, which is the sine qua non for remanding the case back to the trial court. If the First Appellate Court finds that the finding of the trial court was not correct, re-appreciation of evidence at the hands

of the First Appellate Court is permissible. In fact, the First Appellate Court has an authority to re-hear the suit. The First Appellate Court is a court of fact and law. It is evident that the First Appellate Court has not fulfilled the requirements as per Order XLI Rule 23-A of CPC.

6. Keeping in view the aforesaid facts and discussion, the judgment passed by the First Appellate Court is set aside. The matter is remitted back to the First Appellate Court to decide the appeal afresh, after granting opportunity of hearing to the parties. The parties through their learned counsel are directed to appear before the First Appellate Court on 14.11.2023. The appeal before the First Appellate Court shall stand revived to its original number.

7. Disposed of, accordingly.

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

13.10.2023

rekha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE