

In the High Court of Punjab and Haryana, at Chandigarh**Second Appeal Order No. 53 of 2016 (O&M)****Date of Decision: 05.09.2023**

Babu Lal

... Appellant(s)

Versus

Pawan Kumar and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.Present: Mr. Hemant Sarin, Advocate
for the appellant(s).Mr. Mukul Aggarwal, Advocate
for the respondent No.1.**Anil Kshetarpal, J.**

1. This is the plaintiff's appeal against the order passed by the First Appellate Court while remanding the case back to the trial Court for *de novo* trial of the case.

2. In order to comprehend the issue involved in the present litigation, the relevant facts, in brief, are required to be noticed. The appellant (plaintiff before the trial Court) filed a suit for specific performance of the agreement to sell with a consequential relief of permanent injunction. He claims to be in possession of the suit land for the last 20 years. The suit was filed on the premise that the defendant No.1 for himself as well as the power of attorney holder of the remaining defendants entered into an agreement to sell with respect to the land measuring 27 kanals and 8 marlas on receipt of the earnest money of ₹11,40,000/- on

01.03.1998. Thereafter, the defendant No.1, on 07.03.2005, received an

additional payment of ₹8,30,000/- and the date for execution of the sale deed was extended upto 25.03.2005. In the month of September, 2005, a suit for specific performance was filed. The defendant No.1 entered appearance and filed the written statement for himself as well as the general power of attorney for the other defendants, admitting the claim of the plaintiff while praying for decreeing the suit. The statement of the defendant No.1 on oath was recorded to the same effect. An application under Order I Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”) was filed by certain persons including Yogesh etc. while alleging that the property belongs to the Trust. The defendant No.1 filed an application under Order VII Rule 4 and 6 CPC for permission to withdraw the written statement. On 28.11.2009, both the applications, namely, the application under Order I Rule 10 CPC as well the application filed by the defendant No.1 under Order XII Rule 4 and 6 CPC were dismissed. Thereafter, the trial Court framed the issues and permitted the parties to lead their respective evidence. The plaintiff lead his evidence, whereas, the defendants did not lead any evidence. The trial Court partly decreed the suit while ordering the defendant No.1 to refund the amount of ₹8,30,000/- along with interest @ 9% per annum. Only, the plaintiff filed an appeal. During the pendency of the appeal, the plaintiff filed an application for permission to lead additional evidence. The defendant No.4 filed an application for permission to file the written statement and lead evidence. The First Appellate Court has remanded the matter back to the trial Court for deciding it afresh while recording the following reasons:-

- i) The trial Court decided the suit in haste, as an application

for permission to lead additional evidence was decided on 31.08.2010, but the trial Court did not grant sufficient time to the parties to file the revision petition before the higher Court.

- ii) The trial Court has referred to the trust deed No. 947 dated 03.09.1996, though it was never tendered into evidence.
- iii) The trial Court permitted the defendant No.1 to file the written statement on his own behalf as well as on behalf of all the remaining defendants No.2 to 17, though, no copy of the power of attorney of the remaining defendants was filed.
- iv) The trial Court has not framed the issue with regard to the fact that some part of the property, in fact, belongs to the Trust.

3. Heard the learned counsel representing the parties at length and with their able assistance, perused the paper-book.

4. The learned counsel representing the appellant submits that the First Appellate Court was erroneous in setting aside the judgment of the trial Court without examining the same on merits. He submits that the application for permission to lead additional evidence filed by the appellant as well as the written statement filed by the defendant No.4 shall have been examined by the First Appellate Court and if required, the Court shall have permitted the parties to lead evidence. The learned counsel further submits that the enabling power of the First Appellate Court to remand the case back to the

trial Court is regulated by Order XLI Rule 23A CPC which does not permit the First Appellate Court to remand the matter back to the trial Court, unless the decree of the trial Court is reversed in appeal and retrial, is considered necessary. The learned counsel also relies upon the judgment of the Supreme Court in *P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686* and *Municipal Corporation, Hyderabad v. Sunder Singh (2008)8 SCC 485*.

5. On the other hand, the learned counsel representing the respondent No.1 relies upon the judgment passed by the Supreme Court in *J.Balaji Singh v. Diwakar Cole and Others (2017) 14 SCC 207*.

6. In fact, the scope of Section 107 read with Order XLI Rule 23, 23A and 25 CPC has been explained by the Supreme Court in *P.Purushottam Reddy's case (supra)* in the following manner:-

“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 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 of 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 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 in as much 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 therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 11 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause 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 23A has been inserted in Order 41 which provides for a 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 23A as it is under Rule 23. After the amendment all the

cases of wholesale remand are covered by Rule 23 and 23A. 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 v. Sushila (AIR 1965 SC 365 at p. 399), it is well settled that inherent powers can be availed of ex debito justitiae 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 de hors the Rules 23 and 23A. 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 11 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing 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 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.”

7. On the other hand, the judgment passed in **J.Balaji Singh’s** (*supra*) has been decided on the peculiar facts of the case. The Supreme Court, after considering that an application under Order XLI Rule 27 CPC has been allowed by the First Appellate Court held that the order passed by the High Court to remand the case back to the trial Court was justified. In **J.Balaji Singh’s case** (*supra*), the attention of the Bench was not drawn to the judgment passed by the Supreme Court in **P.Purushottam Reddy’s case**

(*supra*).

8. In this case, the suit was filed before the trial Court in the month of September, 2005, which was decided after a period of five years. Thereafter, the defendants never filed any appeal. The appeal was only filed by the plaintiff. An application for leading additional evidence was also filed by the plaintiff. The defendant No.4 did not appear before the trial Court, though, he filed an application for permission to file the written statement. The First Appellate Court could have decided the matter itself. The First Appellate Court was also wrong in observing that after dismissing the application for leading additional evidence, the Court should have granted an opportunity to the parties to file the revision petition before the higher Court. There is no such procedure prescribed in the law. The second reason assigned by the First Appellate Court with regard to the argument that the part of the property is a Trust property, it shall be noticed that the Appellate Court itself shall have examined the matter.

9. The First Appellate Court can also frame an additional issue, if required. It also had the power to examine the written statement filed by the defendant No.4.

10. Keeping in view the aforesaid facts, the order passed by the First Appellate Court is not sustainable. Hence, the present appeal is allowed and the impugned order is set aside. The case is remanded back to the First Appellate Court to decide the appeal in accordance with law. The parties, through their learned counsel, are directed to appear before the First Appellate Court on 05.10.2023.

11. The miscellaneous application(s) pending, if any, shall stand disposed of.

(Anil Kshetarpal)
Judge

September 05, 2023
“DK”

Whether speaking/reasoned :Yes/No
Whether reportable : Yes/No