

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

**SAO-91 of 2015 (O&M)  
Date of Order:31.10.2023**

**Jyoti****.Appellant****Versus****Raj Kumar****..Respondent****CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL**

**Present:   Mr. Kulwant Singh, Advocate, for the appellant.  
              Mr. Ojas Bansal, Advocate, for the respondent.**

**ANIL KSHETARPAL, J**

1.           This appeal has been filed by the defendant challenging the order passed by the First Appellate Court.

2.           The First Appellate Court has remanded the case back to the trial Court for deciding it afresh only on the ground that the plaintiff was required to be given an opportunity to appear and face cross-examination.

3.           The plaintiff filed a suit for possession by way of specific performance of the agreement to sell. The trial court dismissed the suit. The First Appellate Court found that the plaintiff entered the witness box and tendered his affidavit in lieu of the examination-in-chief on 23.07.2014. Thereafter, the hearing of the case was adjourned for cross-examination of the plaintiff. However, due to the oversight the learned counsel representing the plaintiff closed the plaintiff's evidence without permitting the defendant to cross-examine the plaintiff. Thus, the First Appellate Court formed an opinion that the plaintiff was required to be given an opportunity to appear and face cross-examination. Thus, the First Appellate Court chose to remand the case back to the trial Court for deciding it afresh.

4.           The correctness of the aforesaid order has been challenged in

the present appeal.

5. The enabling power of the First Appellate Court to remand the case back to the trial court is regulated by Section 107 read with Order XLI Rule 23 and 23-A CPC. In fact, this issue came up for hearing before this court in SAO No.20 of 2018, which was decided on 17.07.2023. The relevant portion of the aforesaid judgment is extracted as under:-

“8. *The power of the First Appellate Court to remand the case back to the trial court is regulated by Section 107 read with Order XLI Rule 23 and 23-A CPC which are extracted as under:-*

***“Section 107-Power of Appellate Court-***

*(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-*

*(a) to determine a case finally;*

*(b) to remand a case;*

*(c) to frame issues and refer them for trial;*

*(d) to take additional evidence or to require such evidence to be taken.*

*(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.”*

***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, which 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.*

**23A-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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.”*

5. *As per Order XLI Rule 23 CPC, the Appellate Court may remand the case back to the trial court only if the suit has been decided on a preliminary point and the same is reversed in appeal. In the present case, the suit was not decided on a preliminary point.*

6. *Order XLI Rule 23-A CPC permits the First Appellate Court to reverse the impugned decree and order re-trial if considered necessary. However, Order XLI Rule 25 CPC permits the First Appellate Court to frame additional issues and refer them for trial to the Court whose decree is subject matter of appeal. Order XLI Rule 25 CPC only permits the First Appellate Court to seek a report on additional issues which may be framed by the First Appellate Court. Under Rule 25 the First Appellate Court is not required to remand a case back to the trial court. The First Appellate Court has not*

*recorded any finding that re-trial of the case is necessary. In the present case, there is a decree in favour of the defendants which confers a valuable right. Such decree cannot be set aside only because some additional issues have been framed by the First Appellate Court. The First Appellate Court should have resorted to the recourse provided under Order XLI Rule 25 of the Code of Civil Procedure.”*

6. The First Appellate Court is both a Court of fact and law. The First Appellate Court should have permitted the plaintiff to appear in the witness box and face cross-examination. However, the First Appellate Court is not justified in setting aside the judgment and decree and remanding the case back to the trial court for the aforementioned reason only.

7. For the reasons already recorded in SAO No.20 of 2018, the present appeal is allowed. The judgment passed by the First Appellate Court is set aside. The first appeal filed by the plaintiff is restored to its original number. The First Appellate Court is directed to permit the plaintiff to appear in the witness box while giving an opportunity to the defendant to cross-examine the plaintiff. Thereafter, the First Appellate Court will proceed to decide the appeal.

8. The parties along with their learned counsel shall appear before the First Appellate Court on 24.11.2023 as the next date of hearing.

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

**October 31, 2023**  
**nt**

**(ANIL KSHETARPAL)**  
**JUDGE**

**Whether speaking/reasoned**  
**Whether reportable**

**:YES/NO**  
**:YES/NO**