

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

140

SAO-1-2024 (O&M)
Date of decision: 04.03.2024

HARJIT KAUR ALIAS MUKHTIAR KAUR
..Appellant

Versus

SADHU SINGH (DECEASED) THROUGH LRS & ORS.
..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Gurbachan Singh Bhatia, Advocate
for the appellant.

Mr. Imran Farooqi, Advocate
for respondent No.1.

ANIL KSHETARPAL, J(Oral)

1. This second appeal against the order passed by the First Appellate Court while remanding the case back to the trial Court has been filed by the defendant.
2. In order to comprehend the issue involved in the present case, the relevant facts, in brief, are required to be noticed.
3. Sh. Sadhu Singh-respondent filed a suit for permanent prohibitory injunction claiming that he is the absolute owner of the suit land and defendant has no right, title or interest in the same.
4. In fact, he has also sought declaration that he should be declared the absolute owner of the suit property. The civil suit was contested and dismissed by the trial Court on 31.05.2012, however, in appeal, the First Appellate Court vide judgment dated 06.03.2014 remanded the case back to the trial Court. After retrial, the Court again dismissed the suit vide judgment

and decree dated 19.01.2016, against which, an appeal was filed by the plaintiff. The First Appellate Court has remanded the case back to the trial Court on the second occasion on the following three grounds:-

- i. The trial Court has not referred to the statement of DW-1 Smt. Bharpoor Kaur.*
- ii. The trial Court has failed to explain as to how the testimony of plaintiff's witnesses namely Sh. Jatinder Kumar, Sh. Gurmeet Singh and Sh. Ashok Kumar have been considered.*
- iii. Though, defendant Smt. Harjit Kaur suffered statement on 03.08.2015 during retrial of the matter that the witnesses already examined by her as DW-1 to DW-5 be read and considered, however, the plaintiff was required to be given opportunity to cross-examine those witnesses after remand by the First Appellate Court.*

5. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook.

6. The learned counsel representing the appellant contends that the First Appellate Court has erred in remanding the case back to the trial Court.

7. This Court has considered the submissions of the learned counsel representing the parties.

8. In SAO-57-2023, titled as "Abdul Quddoors Vs. Ajit Singh (since deceased) through legal representatives and another", decided on 08.01.2024, this Court has examined the scope and enabling power of the Appellate Court to remand the case back to the trial Court, which reads as under:-

"3. From the reading of the order passed by the First Appellate Court, it is evident that the Court has found that in para Nos. 23 and 24 of the trial Court judgment, the onus was wrongly shifted on the defendants and the First Appellate Court allowed the application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC"). In fact, the scope of Order XLI Rule 23 and 23A CPC has been explained by the Supreme Court in P.Purushottam Reddy and Another

v. Pratap Steels Ltd. (2002) 2 SCC 686, 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.”

4. The learned counsel representing the respondent No.1 submits that the Supreme Court, in **Shivakumar and Others v. Sharanabasappa and Others (2021) 11 SCC 277**, has held that in appropriate cases, it is permissible for the Appellate Court to remand the case back to the trial Court. In **Shivakumar’s case** (supra), the Court has held that the power of remanding the case back to the trial Court is required to be exercised sparingly and in the exceptional cases. It should not be exercised in routine. The Appellate Court can remand the case back to the trial Court either under Order XLI Rule 23 or 23A CPC. Order 23A provides that the Appellate Court can only remand the case back to the trial Court if the decree is reversed in appeal and retrial of the case is considered necessary. The First Appellate Court has all the powers to record additional evidence or seek report from the trial Court after framing an additional issue or allowing the application for additional evidence. Efforts should

always be made by the Appellate Court to decide the case on merits, rather than remanding the case back to the trial Court because it entails delay and the decree, which has been passed, is set aside without going deep into the matter.”

9. Under Order XLI Rule 23 of the Code of Civil Procedure, 1908 (hereinafter referred to as the ‘CPC’), the Appellate Court has the enabling power to remand the case back to the trial Court if the suit was decided on a preliminary point, which is reversed in appeal.

10. Order XLI Rule 23A of the CPC provides that the Appellate Court can remand the matter back to the trial Court if the decree is reversed in appeal and a retrial is considered necessary. Thus, the Appellate Court before remanding the case back to the lower Court is required to reverse the decree after critically analyzing the reasons recorded by the Court below.

11. In this case, the First Appellate Court has failed to reverse the judgment and decree passed by the trial Court. The judgment of the First Appellate Court only refers to a small error here and there in the appreciation of evidence, however, substance of the matter has not been discussed at all. The Appellate Court has all the powers to permit the parties to lead further evidence or seek report from the trial Court if there is error apparent in the procedure followed by the trial Court, however, a small technical error in appreciation of evidence cannot be the only reason to set aside the judgment passed by the trial Court.

12. It shall be considered here that the First Appellate Court has remanded the case back to the trial Court twice. The parties have already got two opportunities to produce their evidence. Repeating the process of

remanding the case back to the lower Court is inappropriate and it will lead to delay in the dispensation of justice.

13. Keeing in view the aforesaid discussion, the appeal is allowed. The impugned order passed by the First Appellate Court remanding the case back to the trial Court is set aside. The First Appellate Court is directed to proceed with the matter.

14. However, this shall not debar the First Appellate Court from seeking report from the trial Court or permitting the parties to lead further evidence.

15. The first appeal is restored to its original number. The First Appellate Court will proceed with the matter forthwith.

16. The parties through their learned counsel are directed to appear before the First Appellate Court on 03.04.2024.

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

March 04th, 2024

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(ANIL KSHETARPAL)
JUDGE

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