



SAO-3-2023 (O&M)

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**262 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH****SAO-3-2023 (O&M)**

Date of decision: 30.05.2024

Naresh Kumar @ Naresh Kohli

....Appellant

Versus

Raksha and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Vishal Munjal, Advocate for the appellant

ANIL KSHETARPAL, J (Oral)

1. This Second Appeal against the First Appellate Court's order remitting the matter back to the trial court has been filed by the defendants.

2. In order to comprehend the issues involved in the present case, some relevant facts, in brief, are required to be noticed.

3. Smt. Santosh and her daughter Smt. Raksha jointly filed a suit for the grant of decree of declaration to the effect that the defendants are joint owners in possession of super structure of shop no.133 existing over the municipal site, which was previously in possession of Sh.Girdhari Lal alongwith the plaintiffs as joint tenants. The plaintiffs also prayed for partition of the property by metes and bounds and for decree of permanent injunction. The suit was dismissed after the defendants contested the suit. Smt. Raksha-plaintiff no.2 filed the first appeal in the year 2016. She filed an application for leading additional evidence in the year 2017. The First Appellate Court has allowed the



application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). The First Appellate Court has also noticed that there is a typographical omission in the memo of parties prepared by the trial court. On these two grounds, the First Appellate Court has remitted the matter back to the trial court for fresh decision.

4. Respondent no.1, despite receipt of the notice, has not entered appearance. Only she had filed the first appeal.

5. Heard the learned counsel representing the appellant at length and with his able assistance perused the paperbook.

6. The First Appellate Court has failed to appreciate that there is an inadvertent error in the memo of parties prepared by the trial court. Smt. Santosh alongwith her daughter Smt. Raksha jointly filed the suit through a common counsel. The defendants contested the same by filing the written statement. Thereafter, the trial court settled the following issues:-

“1. Whether plaintiffs are entitled to declaration as prayed for? OPP.

2. Whether plaintiffs are entitled for partition by metes and bounds of the shop in dispute? OPP.

3. Whether plaintiffs are entitled to permanent injunction as prayed for ? OPP.

4. Whether plaintiffs have got no locus standi to file the present suit? OPD.

5. Whether suit is bad for non joinder of the necessary parties? OPD.

6. Whether suit of plaintiffs is barred by limitation? OPD.

7. Whether suit of plaintiffs is not maintainable? OPD.

8. Whether the suit of plaintiff is collusive between the plaintiffs and defendants no.1 to 3? OPD.

9. Relief.”



7. The parties were permitted to lead evidence. Plaintiff no.2 Rekha, although in the memo of parties her name is Raksha, appeared in evidence as PW1. The defendants also led evidence. The suit was dismissed by the trial court by a detailed and elaborate judgment. As already noticed, the First Appellate Court has set aside the same only on the aforementioned two grounds. The enabling power under Order XLI Rule 23A CPC to remit the matter back to the lower court can be resorted to only if the judgment passed by the court below is set aside on merits and the re-trial is considered necessary.

8. In **P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686**, the Supreme Court has explained the provisions relating to remand 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.”

9. The First Appellate Court has remitted the matter back to the trial court without discussing the reasoning given by the trial court. Moreover, the First Appellate Court has erred in failing to notice that there was only an inadvertent omission in the memo of parties prepared by the trial court. It is not the case of Smt.Raksha @ Rekha that she was not given an opportunity to lead evidence. Thus, the First Appellate Court could have either itself ordered the correction of memo of parties of the trial court or directed the parties to get the memo corrected from



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the trial court. Furthermore, allowing of application for the additional evidence is not sufficient to remand the case back to the trial court. The First Appellate Court, being the court of fact and law, has the power and authority to call upon the plaintiff to lead additional evidence or seek report from the trial court.

10. Keeping in view the aforesaid facts and discussion, the result is inevitable. The impugned order passed by the First Appellate Court is set aside, while restoring the first appeal to its original number. The appellant, through his learned counsel, is directed to appear before the First Appellate Court on 25.07.2024.

11. Disposed of.

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

30.05.2024
rekha
Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE