123 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO-4-2019 (O&M)
Date of decision: 27.05.2024

Sunil Kumar

....Appellant

Versus

The Lord Krishna Govt. and another

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr.Lalit Kumar, Advocate for the appellant

ANIL KSHETARPAL, J (Oral)

1. Despite the receipt of notice by respondent no.1, there is no representation on its behalf.

2. This Second Appeal against Order of the First Appellate Court remitting the matter back to the trial court has been filed by the defendant. The plaintiff (respondent herein) filed the suit for recovery of Rs.2,24,201/- alongwith interest on the ground that defendant no.1 and 2 became defaulters and did not pay the instalments. Defendant no.1 and 2, while contesting the case, denied that they had taken any loan from the Society and in a plaintiff's complaint under Section 138 of the Negotiable Instruments Act, 1882; the plaintiff-Society has received Rs.76,700/- from defendant no.1 and Rs.51,125/- alongwith a cheque of Rs.25,575/- from defendant no.2. Thus, a total amount of Rs.1,53,400/- has already been received by the Society.

3. Upon appreciation of the pleadings, the trial court culled out the following issues for adjudication:-

"1. Whether the plaintiff is entitled to recovery of Rs.2,24,201/- along with cost and interest as prayed for? OPP.
2. Whether the suit of the plaintiff is not maintainable? OPD.
3. Whether the plaintiff has no cause of action of no locus standi to file the present suit? OPD.
4.Whether the plaintiff has not come to court with clean hands and suppressed the material facts? OPD.
5.Whether the suit is time-barred?OPD.
6. Relief."

4. While deciding issue no.1, the trial court held as under:-

"14. After hearing the learned counsel for the parties and after having gone through the case file minutely, this court is of the considered view that the plaintiff has miserably failed to prove this issue in his favour. In this context, it is appropriate to mention here that admittedly, the loan of Rs.1,50,000/- was paid by the plaintiff-society to the defendants on 20.10.2005 for a period of three months @ 9 per cent per annum. Document Ex.P1 FDR issued by the defendants makes it explicit. There is nothing on record which could suggest that the said agreement was renewed between the plaintiff and the defendants. Mere self-serving statement of the plaintiff that on failure of the defendants in returning the loan amount with interest within the stipulated period, the defendants agreed to repay the same after some time @ 12 per cent per annum is not sufficient. Evidence to that effect has to be of clinching nature and the same is lacking. Admittedly, the said loan amount along with interest to that period was received by the plaintiff-society. In such circumstances, nothing remains of the plaintiff-society towards the defendants.

15.Moreover, it is also appropriate to mention here that the suit of the plaintiff is barred by law of limitation. Admittedly, the loan amount was paid on 20.10.2005. The present civil suit was filed on 21.11.2013.There is no written acknowledgment regarding the admission of the liability on behalf of defendants after the lapse of the period of the limitation. This court finds it appropriate to maintain here that the suit of the plaintiff is highly time barred as the Limitation Act, 1963 provides the period of limitation and the time from which the period begins to runs and the schedule of period of Limitation Act 1963 provides three years as period of limitation to recover the amount from the time when the right to sue first accrues. Thus, the period of limitation for any recovery suit is three years from the date when such right accrues. In the present case, an amount of Rs,1,50,000/- was deposited by the *plaintiff-Society with the defendants @ 9 per cent per annum on 20.10.2015 for a period of three months vide document Ex.P1 and the said fixed deposit receipt was to mature on 20.01.2006. In this way, the plaintiff had a right to file the suit of recovery of the said amount up to three years from the date of maturity of the fixed deposit amount i.e. 20.01.2006. The plaintiff has failed to show that the suit of the plaintiff is within the period of limitation. It is pertinent to mention here that the section 3 of the Limitation Act lays down that a suit or an appeal or an application filed beyond the time prescribed, therefore, shall be dismissed although, limitation is not set up as the defence by the opposite party. In a civil suit, when a plea which should have been raised by a party as a defendant in a suit-or respondent in an appeal or as an opposite party in an application is not raised by him, the court may take no notice of it, but the case with regard to the plea of limitation is different in as much as by virtue of this section, the court is under a duty to raise the point itself and dismiss the suit, appeal or application, if it has been filed beyond the time prescribed for it by the schedule of the Limitation Act which prescribes a period for each suit, appeal or application and also states when the time so limited begins to run. What section 3 of Limitation Act says is that every suit instituted after the prescribed period shall be dismissed, although limitation has not been set up as a defence. It is the duty of the plaintiff to convince the court that his suit is within time. Nothing on record shows the case of the a plaintiff within the period of the limitation. Accordingly, issue no.1 is hereby decided against the plaintiff and in favour of the defendants."*

5. The First Appellate Court has held that the trial court has not given the findings on the remaining issues except on issue no.5. Hence, the court remitted the matter back to the trial court. It is obvious that the First Appellate Court has overlooked the findings of the trial court recorded under issue no.1. Though, it is correct that under issue no.1, the court has also discussed about the maintainability of the suit on the ground that it was filed beyond the prescribed period of limitation, however, in para 14, the trial court has categorically recorded that the plaintiff has failed to prove its case. Consequently, the First Appellate

Court has erred in remitting the matter back to the trial court. Even otherwise, the trial court in para 16 of its judgment has recorded that the onus to prove the aforesaid issues was on the defendants, however, in view of the findings returned on issue no.1, the other issues are decided against the plaintiff. Thus, the First Appellate Court has overlooked the finding even on the remaining issues culled out by the trial court. In any case, the enabling power of the Appellate Court to remit the matter back to the lower court is regulated by Order XLI Rule 23 A CPC. In this case, Order XLI Rule 23 CPC is not applicable because the suit was not decided on a preliminary issue whereas Order XLI Rule 23A CPC can be invoked only if the judgment passed by the lower court is set aside or reversed in appeal and the re-trial is considered necessary. In this case, the First Appellate Court has failed to fulfill both the requirements which have been elaborately examined by 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 it 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."

6. Keeping in view the ratio decendi laid down by the Supreme Court, the impugned order passed by the First Appellate Court, being un-sustainable, is set aside. The appeal is restored to its original number. The First Appellate Court shall have liberty to decide issue

no.5, if found necessary. The parties through their counsels are directed to appear before the First Appellate Court on 19.07.2024.

7. Disposed of.

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

27.05.2024 **(ANIL KSHETARPAL)**
rekha **JUDGE**
Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No