

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

144

SAO-10-2023 (O&M)
Date of decision: 23.07.2024

SUKHDEV SINGH

..Appellant

Versus

SWARAN SINGH AND ANR

..Respondents

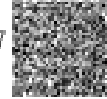
CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Amit Arora, Advocate
for the appellant.Mr. Vikas Gupta, Advocate
for respondents.ANIL KSHETARPAL, J(Oral)

1. The defendant assails the correctness of the First Appellate Court's order remitting the matter back to the trial Court for fresh decision. The plaintiffs filed a suit for grant of decree of permanent injunction, which was dismissed on 17.09.2019. The plaintiffs filed first appeal. During the pendency of the first appeal, the plaintiffs filed an application under order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') seeking permission of the Court to lead additional evidence.

2. The First Appellate Court has reversed the judgment of the trial Court while making the following observations:-

"11. It was the duty of the court to assist the parties in identification of the respective properties. The court has to assist in seeking the identification by way of demarcation in terms of the allotment as well as in consultation with jamabandi/khasra girdawari with the help of some revenue official. No opportunity was granted to the plaintiffs to prove their ownership identifiable with specific plots/ area, as such, prejudice has been caused to the appellants/plaintiffs. Accordingly, the impugned judgment and decree passed by the learned trial court is set aside and the matter is remanded back to the learned

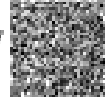


trial court/ successor court of Ms. Anuradha, the then Additional Civil Judge, Senior Division, Tarn Taran for 09.12.2022. The learned trial court will afford opportunity to the plaintiffs to seek amendment of the plaint for declaration and after seeking reply, the court will frame fresh issues. If the plaintiffs failed to move an application for amendment of the plaint for seeking declaration of ownership and possession, the suit will be deemed dismissed and appeal will also deemed dismissed. If the parties seeking amendment to have a relief of declaration and thereafter, the matter is put up for evidence, the court will appoint revenue officer for identification and demarcation of the properties of the parties at the expenses of both the plaintiffs and the defendant and will decide the matter afresh regarding the title on the basis of allotment or any legal and valid purchase if permissible as per law and will give fresh decision.”

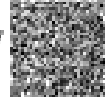
3. In SAO-57-2023, titled as “Abdul Quddoors Vs. Ajit Singh (since deceased) through legal representatives and another”, decided on 08.01.2024, this Court has examined the scope and enabling power of the Appellate Court to remand the case back to the trial Court, which reads as under:-

“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.”*

4. It is evident that the First Appellate Court has neither set aside the judgment passed by the trial Court after discussing the merits of the case nor the Court has found that re-trial of the case is necessary. The First Appellate Court is entitled to re-appreciate the evidence and record findings.

It can also allow the application for additional evidence if the party makes



out a case, however, before sending the case back to the lower Court, the Court is required to fulfill the mandatory requirements of Order XLI Rule 23A of the CPC.

5. In this case, the judgment of the First Appellate Court fails to fulfill the aforesaid requirements.

6. Consequently, the appeal is allowed. The impugned order passed by the First Appellate Court is set aside while restoring the first appeal to its original number.

7. The parties through their learned counsel are directed to appear before the First Appellate Court on 20.08.2024.

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

July 23rd, 2024

Ay

(ANIL KSHETARPAL)
JUDGE

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