

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

128

SAO-23-2023 (O&M)
Date of decision: 19.01.2024

BALWINDER SINGH

..Appellant

Versus

USHA KHANNA (DECEASED) THROUGH LRS.

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sanjeev Kumar Arora, Advocate
for the appellant.Mr. Rahul Arora, Advocate
for respondent.ANIL KSHETARPAL, J(Oral)

1. This second appeal against the order has been filed by the plaintiff to assail the correctness of order passed by the First Appellate Court remanding the case back to the trial Court for fresh decision. The plaintiff claims that the First Appellate Court should have sought report from the trial Court after framing additional and distinct issue with regard to the existence of settlement between the parties. He submits that as per Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908 (hereinafter referred to as the "CPC"), the Appellate Court can remand the case back to the trial Court only after setting aside the judgment and decree passed by the trial Court.

2. On the other hand, the learned counsel representing the respondent has drawn the attention of the Court to the following observations made by the First Appellate Court while remanding the case back to the trial Court:-

"33. The Trial Court ignored the real facts and came to the conclusion on the basis of compromise, which was

introduced by the plaintiff after death of Usha Khanna and after his acquittal in the criminal case. The amendment in plaint was allowed just on the basis of no objection made by Sh. Gaurav Khanna Advocate. The plaintiff himself did not utter a single word regarding the compromise in his examination-in-chief. The impugned judgment and decree were passed by the Trial Court without application of mind. The written statement filed to the amended plaint is not verified nor it bears signatures of the legal heirs of Usha Khanna.

34. In this appeal, the appellants have placed on record copy of compromise dated 17.06.2019 (original was seen and returned). This compromise was entered into Balwinder Singh plaintiff and legal heirs of Usha Khanna. It is mentioned in this compromise that the next date of hearing in the civil suit is 15.7.2019 and after summer vacation, this suit will be withdrawn by Balwinder Singh and other party will not pursue the criminal case and will give statements in getting the accused in criminal case FIR No.97/2015 acquitted. This compromise was signed by Balwinder Singh plaintiff, Ritu Sodhi, Subhash Khanna. The names of Sh. Raj Kumar Kakkar Advocate and Sh. Gaurav Khanna Advocate were typed on one side of the compromise, which does not bear signature of Sh. Raj Kumar Kakkar Advocate. However, Sh. Gaurav Khanna signed it. On other side, name of Sh. Prithvi Puggal Advocate was typed, who signed the same.

35. The record of trial Court shows that the suit was pending for 15.07.2019, but the plaintiff did not withdraw the suit on that day, rather continued to proceed with the same. On 16.10.2019, Sh. Gaurav Khanna Advocate put his appearance in the suit and all subsequent proceedings show his connivance with the plaintiff as discussed above in detail. The appellants are required to be granted sufficient opportunities to protect their rights by contesting the suit in due course of law.

36. Keeping in view above detailed discussion, this Court finds that the impugned judgment and decree are liable to be set-aside. Therefore, the appeal is allowed without costs. The impugned judgment and decree are set-aside and the case is remanded to the Trial Court/successor Court to decide the suit afresh under provisions of law, with the following directions:

- (I). To go through the pleading of parties and frame the issues arising from the same, particularly about compromise as pleaded in para No.4A of the amended plaint;
- (II). To allow the plaintiff to lead evidence on the additional issue(s);

(III). To see, whether Sh. Gaurav Khanna was having power of attorney of legal heirs of Usha Khanna on 20.11.2019 and he was competent to cross-examine PW1 and PW2? If not, grant opportunity to the legal heirs of Usha Khanna through their Counsel to cross examine these witnesses;

(IV). To grant sufficient opportunities to the legal heirs of Usha Khanna to lead their evidence;

(V). If an application relating to alleged compromise dated 17.06.2019 is filed, the same be decided under provisions of law.

37. The parties are directed to appear before the trial court/successor court on 11.04.2023 at 10.00 A.M. Trial Court record be returned along with copy of this judgment. The appeal file be compiled and consigned to the AV Judicial Record Room, Ferozepur.”

3. In order to comprehend the issue involved in the present case, the relevant facts, in brief, are required to be noticed.

4. Sh. Balwinder Singh, the appellant filed a suit for recovery of Rs.45,00,000/- along with *pendente lite* and future interest against Smt. Usha Khanna wife of Sh. Subhash Khanna. It is the case of the defendant that during the pendency of the suit, a settlement was arrived at between the parties. Smt. Usha Khanna and the defendant died during the pendency of the suit. The aforesaid settlement deed was produced before the Court. In the appeal also, the original deed of settlement was produced and returned. As per the aforesaid settlement, the suit was to be withdrawn by the appellant after the summer vacations and he also undertook not to pursue the criminal case filed against the respondent. The settlement deed was allegedly signed by Sh. Balwinder Singh, Smt. Ritu Sodhi and Sh. Subhash Khanna. The learned counsel representing the respondent (defendant herein) had also signed the same. Subsequently, the plaintiff did not withdraw the suit and Sh. Gaurav Khanna, Advocate, entered appearance on behalf of the legal

representatives of defendant and ultimately the suit was decreed. The First Appellate Court on appreciation of evidence formed an opinion that Sh. Gaurav Khanna in connivance with the plaintiff allowed the suit to be decreed.

5. In the aforesaid situation, the First Appellate Court has remitted the case back to the trial Court in order to give an opportunity to the parties to lead further evidence. The Court has also directed the trial Court to frame separate/additional issue with regard to the settlement as pleaded in para 4A of the amended plaint. The learned counsel representing the appellant submits that the Appellate Court can remand the case back to the trial Court for fresh decision only on the basis of evidence, which has already been led. He refers to the provision of Order XLI Rule 23A, which in turn makes a reference to Rule 23 of the CPC.

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

7. Order XLI Rule 23 of the CPC only envisages that if the suit has been decided on a preliminary issue, then the evidence already led by the parties shall be read. However, it does not debar the Court to permit the parties to lead further evidence.

8. Though, the First Appellate Court has the enabling power to seek report from the trial Court after framing additional issues without remitting the case back to the trial Court, however, the procedure may not be sufficient in all cases. Wherever, the Appellate Court finds that retrial of the case is necessary, Order XLI Rule 23A of the CPC do enables the Appellate Court to pass such order.

9. Keeping in view the aforesaid facts and discussion, no ground to interfere is made out.
10. Dismissed accordingly.
11. However, the trial Court is requested to make a sincere endeavour for expeditious disposal of the suit.
12. All the pending miscellaneous applications, if any, are also disposed of.

January 19th, 2024

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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No