

136 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO-38-2023 (O&M)

Date of decision: 02.02.2024

Gurmeet Singh and others

....Appellants

Versus

Mohan Singh and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Arihant Jain, Advocate for the appellants
Mr. Rakesh Gupta, Advocate for respondent no.2 and 3

ANIL KSHETARPAL, J (Oral)

1. The learned First Appellate Court, after allowing the application for permission to lead additional evidence has permitted the plaintiffs to prove the registered Will dated 24th June, 1997 allegedly executed by Sh. Hari Singh, their father has remitted the case back to the trial court for fresh decision, after framing distinct issue with regard to both the Wills. The correctness of the aforesaid order is challenged before this Court. On 11th August 2023, the following order was passed by this Court:-

“Learned counsel representing the appellant inter alia contends that the First Appellate Court has erred in remanding the case back to the trial Court, similarly on allowing the application for permission to lead additional evidence.

Notice be issued to respondent Nos.1 to 3 for 22.08.2023.

Dasti only.

The appellant shall have liberty to serve the respondents through their counsel-Sh.Jugral Kishore Garg, District Court, Sangrur.”

2. Heard the learned counsel representing the parties at length and with their able assistance perused the paperbook.

3. The learned counsel representing the appellants submits that the First Appellate Court has erred in allowing the application for permission to lead an additional evidence. He submits that both the attesting witnesses of the Will dated 24th June, 1997 have died and therefore, the First Appellate Court has erred in allowing the application. He submits that the civil suit filed by the plaintiffs was dismissed and therefore, the First Appellate Court should have decided the appeal.

4. On the other hand, the learned counsel representing the respondents submits that after the case was remitted back to the trial court, deposition of two witnesses have already been recorded and the plaintiffs have closed their evidence.

5. The enabling power of the Appellate Court to remit the case back to the trial court is regulated by Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908 (hereinafter referred to as ‘CPC’). While interpreting Order XLI Rule 23 and 23A, the Supreme Court in **P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686**, has explained the aforesaid provision 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.”

6. Order XLI Rule 25 CPC enables the Appellate Court to seek report from the Subordinate Court, after framing the additional issues. In this case, the First Appellate Court has not made any discussion on the merits of the case. After allowing the application filed by the plaintiffs under Order XLI Rule 27 CPC, the court has remitted the case back to the trial court. This is not in consonance with Order XLI Rule 23A CPC. In fact, the appropriate procedure for the First Appellate

Court was to seek report, after culling out distinct issues, on which the report was required. The First Appellate Court was also entitled to permit the parties to lead their evidence. The power of remand back to the trial court in a civil case has serious consequences. This order can be passed only after the judgment of the court below is set aside on merits and re-trial is considered necessary. Unless these twin conditions are fulfilled, the First Appellate Court is not expected to remit the case back to the trial court.

7. As per as the argument of the learned counsel representing the appellant that the application for additional evidence should have been allowed, it may be noted that under Order XLI Rule 27 CPC, the court has power to permit the parties to produce additional evidence on three different grounds. Clause B of Order XLI Rule 27(1) enables the court to permit a party to produce any document or produce any witness, which will enable the court to pronounce the judgment or for any other substantial cause. It is evident that both the parties are claiming succession to the property of Sh.Hari Singh, on the basis of two different Wills, allegedly executed by Shri Hari Singh. In such circumstances, the First Appellate Court has exercised discretion, which does not require interference.

8. Keeping in view the aforesaid facts, the impugned order passed by the First Appellate Court on 29th May, 2023 is set aside to the limited extent. It is declared that the First Appellate Court has erred in remanding the case back to the trial court. Hence, the First Appellate Court is directed to cull out the additional issues. It has been brought to

the notice of the Court that the trial court has already framed two additional issues and recorded evidence of the plaintiffs.

9. Keeping in view the aforesaid facts, the order of remand shall stand substituted by an order of seeking report from the trial court. The trial court is requested to grant opportunity to the defendant to lead their evidence and submit report to the First Appellate Court. Thereafter, the First Appellate Court will proceed to decide the appeal afresh. The first appeal is restored to its original number. The parties, through their counsels, are directed to appear before the First Appellate Court on 29.02.2024.

10. Disposed of.

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

02.02.2024

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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE