

SAO-43-2023 (O&M)

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2024:PHHC:003625

**130 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

SAO-43-2023 (O&M)

Date of decision: 11.01.2024

Gurmail Singh

....Appellant

Versus

Darshan Singh through his LRs

..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. S.S.Gill, Advocate for the appellant
Mr. Namit Gautam, Advocate for the respondent

ANIL KSHETARPAL, J (Oral)

1. In this Second Appeal against Order, the plaintiff assails the correctness of the order passed by the First Appellate Court on 14.07.2023, while remanding the case back to the trial court for fresh decision, after framing the additional issues.

2. In order to comprehend the issue, some relevant facts, in brief, are required to be noticed.

3. The appellant (the plaintiff before the trial court) filed a suit for confirmation of the possession through the specific performance of the agreement to sell dated 14.05.2008. The aforesaid suit was contested by the defendants and the trial court on appreciation of evidence, by a detailed judgment, decreed the suit on 16.08.2016. Defendants filed an appeal before the First Appellate Court to challenge the correctness of the judgment and decree

passed by the trial court. The First Appellate Court has also made certain observations that the trial court holds no competence to sit as a First Appellate Court to decide if the attachment of the property ordered in other civil suit was correct or not? Thereafter, the court culled out the following issues for adjudication:-

“Whether the defendant borrowed a sum of Rs.5 lacs and as security he executed mortgage deed dated 26.05.2008 ? OPD.

Whether defendant never intended to execute agreement to sell dated 14.05.2008 and never received Rs.1 lac as earnest money and the said amount was interest incurred upon the amount of Rs.5 lacs borrowed by him? OPD.”

4. On this basis of the questions extracted above, the First Appellate Court has remanded the case back to the trial court and has set aside the judgment and decree passed by the trial court.

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

6. On 01.12.2023, while issuing the notice of motion, the following order was passed:-

“The learned counsel representing the appellant inter alia contends that the First Appellate Court has erred in remanding the case back to the trial Court only on culling out the additional issues. He contends that at the most, the Court shall have sought report from the trial Court in accordance with Order XLI Rule 25 of the Code of Civil Procedure, 1908.

Notice of motion for 15.12.2023.

The appellant shall have liberty to serve the legal representatives of the respondent through their counsel in the trial court.

Dasti.

To be listed in the urgent list.”

7. Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908 (hereinafter referred to as ‘CPC’) enables the Appellate Court to remand the case back to the trial court. Order XLI Rule 23 is not applicable to the facts of the present case as the trial court did not decide the suit at a preliminary issue and it was not reversed by the First Appellate Court. Order XLI Rule 23A enables the court to remand the case back to the trial court if the impugned decree is reversed in appeal and a re-trial is considered necessary. In **P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686**, the Supreme Court has explained the aforesaid provisions 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.”

8. Learned counsel representing the respondent failed to highlight and prove that the First Appellate Court, except making certain objections, has not, in detail, examined, analyzed and set aside the findings of the trial court. Order XLI Rule 25 CPC enables the First Appellate Court to cull out new or additional issues and seek report from the trial court. In this case, certain additional issues were culled out by the First Appellate Court. Hence, an appropriate course for the First Appellate Court was to seek report from the trial court on those additional issues.

9. Keeping in view the aforesaid facts and discussion, the impugned order is modified. In place of remanding the case back to the trial court, there shall be order to seek report from the trial court on the additional issues. The trial court is requested to submit its report within a period of 6 months, after permitting the parties to lead evidence. In the meantime, the first appeal is restored to its original number. The parties through their learned counsel are directed to appear before the First Appellate Court on 15.04.2024. The First Appellate Court shall wait for the report of the trial court and thereafter, proceed to decide the matter in accordance with law.

10. Disposed of accordingly.

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

11.01.2024
rekha

(ANIL KSHETARPAL)
JUDGE

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