

133 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO-25-2016 (O&M)

Date of decision: 26.02.2024

Sukhdev Singh

....Appellant

Versus

Gurmit Kaur and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Vijay Lath, Advocate for the appellant

Mr. Sumeet Jain, Advocate for the respondents

ANIL KSHETARPAL, J (Oral)

1. In this Second Appeal against order, the defendant assails the correctness of the impugned order passed by the First Appellate Court, while remitting the case back to the trial court for deciding afresh, after framing the following additional issue:-

“Whether Pritam Kaur has bequeathed her estate in favour of respondent No.1 vide legal and valid Will dated 14.03.2006, if so, its effect? OPD.”

2. In this case, Smt. Gurmit Kaur filed a suit for possession and recovery of mesne profits for use and occupation of the premises. The civil suit was contested by the defendant (appellant herein). From the pleadings of the parties, the following issues were identified by the trial court:-

“1. Whether the plaintiff is entitled to get possession of the suit land as alleged? OPP.

2. Whether plaintiff is entitled to recover Rs.1,80,000/- as alleged along with interest, if so at what rate? OPP.

3. Relief.”

3. The trial court, after permitting the parties to lead their evidence, dismissed the suit vide judgment and decree dated 16.02.2013. The appellate court, in an appeal filed by the defendant, remitted the matter back to the trial court. It is evident that the First Appellate Court has not set aside the judgment passed by the trial court after discussing the merits of the case. The First Appellate Court has set aside the judgment and decree passed by the trial court only on the ground that proper and distinct issue with respect to the validity of the Will dated 14.03.2006, propounded by the defendant, has not been culled out by the trial court.

4. Order XLI Rule 23-A of the Code of Civil Procedure, 1908 enables the First Appellate Court to remand the case back to the court below, after reversing the judgment and decree passed by the court below and while arriving at conclusion that re-trial of the case is considered necessary. While discussing the scope of the enabling power of the appellate court to remand the case back to the court below, 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.”

5. After critically analysing the reasons recorded by the trial court and evaluating the evidence produced by the parties, the First Appellate Court has not set aside the judgment and decree passed by the trial court. Thus, the First Appellate Court has erred in passing the impugned order.

6. Keeping in view the aforesaid discussion, the impugned order passed by the First Appellate Court is set aside which shall stand substituted by an order directing the trial court to submit the report, after recording evidence on the additional issue, which was identified by the First Appellate Court in the impugned judgment. The trial court is requested to submit the report, within a period of 6 months from the date of receipt of the certified copy of this order. Once the report is submitted, the First Appellate Court shall proceed to decide the appeal on merits. The parties through their counsels are directed to appear before the First Appellate Court on 15.03.2024. This Court has been informed that because of an interim order granted by this Court on 29.03.2016, no further proceedings have taken place before the trial court. If that be so, the parties through their counsels are directed to appear before the trial court on 27.03.2024.

7. Disposed of.

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

26.02.2024

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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE