

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO-28 of 2016 (O&M)
Date of Order:24.01.2024

Mahesh Dass

.Appellant

Versus

Ishwar Singh and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

**Present: Mr. Sanjiv Gupta, Advocate
for the appellant.**

**Mr. Rakesh Chopra, Advocate
Mr. Jashan Chopra, Advocate,
for respondent no.1.**

ANIL KSHETARPAL, J

1. The defendant no.1, in this Second Appeal against the Order assails the correctness of the order passed by the first appellate court while remanding the case back to the trial court after allowing an application for permission to lead the additional evidence. The respondent (plaintiff) before the trial court filed a suit for possession by way of specific performance of the agreement to sell, which was dismissed by the trial court on 03.09.2012.

2. The plaintiff filed the first appeal. He also filed an application for permission to lead additional evidence to prove that the stamp papers were issued by a stamp vendor who did not hold the valid licence on the day the stamp papers were issued. The first appellate court allowed the application and thereafter proceeded to remand the case back to the trial court while observing that the trial court has made certain observations without any concrete basis.

3. In this appeal, the correctness of the aforesaid order has been

challenged. After discussing the provisions of Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908, in SAO-82 of 2015, this court has held as under:-

4. The power of the Appellate Court to remand the case back to the lower court is regulated by Section 107 read with Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). Rule 23 of Order XLI of CPC enables the Appellate Court to remand the case back to the trial court if the judgment has been passed on a preliminary issue and the aforesaid finding on the preliminary issue has been set aside by the Appellate Court. Rule 23A enables the Appellate Court to remand the case back to the trial court if the decree is reversed in appeal and a re-trial is considered necessary. Thus, the power of remand of the Appellate Court is available only in the eventualities provided under Rule 23 and 23A of Order XLI. It is incumbent for the Appellate Court to set aside the judgment and decree passed by the trial court on merits and conclude by giving adequate reason for necessity of retrial of the suit. On a careful reading of the operative part of the impugned judgment, it is evident that the court has neither set aside the judgment of the trial court on merits nor it has recorded the reasons for which the re-trial is considered necessary. Learned counsel representing the respondent though requested to explain the reasons for necessity of re-trial, however, he failed to draw the attention of the Court in this regard."

4. The learned counsel representing the respondent while relying upon the judgment passed in **J.Balaji Singh v. Diwakar Cole and Others (2017) 14 SCC 207**, submits that the appellate court was not required to discuss the case on merits particularly when the court decided to remand the

case for deciding afresh to the trial court.

5. On the other hand, the learned counsel representing respondent no.1 while relying upon the judgments passed in **P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686** as well as **H.V.Vedavyasachar vs. Shivshankara and another, (2009) 8 SCC 231**, has contended that under order XLI Rule 23A of the Code of Civil Procedure, 1908, the remand order can only be passed by the appellate court after setting aside the findings arrived at by the lower court and the court can even do so briefly but in the facts of the case at hand the findings of the court below have not been set aside, not even briefly.

6. On a careful perusal of the Order XLI Rule 23A of the Code of Civil Procedure, 1908, it is evident that before the appellate court decides to remand the civil case back to the lower court, twin conditions are required to be fulfilled, namely, the judgment passed by the trial court is set aside and the re-trial of the case is considered necessary. Unless these two mandatory conditions are fulfilled, it is not appropriate for the appellate court to remand the case back to the trial court. This was the issue which was considered in **P.Purushottam Reddy's case (supra)**. The judgment passed in **J.Balaji Singh's case (supra)** has also been considered by this court in **Babu Lal vs. Pawan Kumar and others (SAO No.53 of 2016, decided on 05.09.2023)**. It is evident that in **J.Balaji Singh's case (supra)**, the first appellate court after allowing the application proceeded to record the additional evidence and accepted the appeal, however, the High Court refused to interfere. In the peculiar facts of the aforesaid case, the Supreme Court proceeded to remand the case back to the first appellate court. It is evident that the aforesaid case has been decided in the peculiar facts of the case. The attention of the

Bench was not drawn to the judgment passed in **P.Purushottam Reddy's case (supra)** which interprets the provisions of Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908, elaborately. The view taken in **P.Purushottam Reddy's case (supra)** has been consistently followed in the subsequent judgments passed by the Supreme Court including the judgment passed in **H.V.Vedavyasachar's case (supra)**.

7. Keeping in view the aforesaid facts, the order of remand passed by the First Appellate Court is set aside. The First Appellate Court is directed to frame a distinct/additional issue and further direct the trial court to submit a report on the aforesaid issue after permitting the parties to lead evidence. On receipt of the report from the trial Court, the First Appellate Court shall proceed to decide the matter in accordance with law.

8. Disposed of accordingly.

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

January 24, 2024
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned :YES/NO
Whether reportable :YES/NO