

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

109

SAO-79-2015 (O&M)
Date of decision: 11.01.2024

HARMINDER SINGH AND ANR. ..Appellants

Versus

PRITAM KAUR AND ANR. ..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. T.V.S. Lehal, Advocate
for the appellants.

Ms. Priyanka Gupta, Advocate
for Mr. Vipul Dharwani, Advocate
for respondent No.2.

ANIL KSHETARPAL, J(Oral)

1. In this second appeal against order, the correctness of the First Appellate Court’s order remanding the case back to the trial Court for fresh decision is questioned. The dispute between the parties is with regard to the succession of the property left behind by Sh. Ajit Singh @ Jit Singh, who is claimed to be the real paternal uncle of the plaintiffs. He died unmarried and issueless. The plaintiffs claim that late Sh. Ajit Singh @ Jit Singh bequeathed his entire property in favour of the plaintiffs by a registered Will dated 19.01.2005, whereas, he died on 01.04.2008. The plaintiffs filed a suit claiming decree of declaration that they have become owner of the property by virtue of the aforesaid Will. The defendants contested the suit. The trial Court decreed the suit on 31.01.2012. Before the First Appellate Court, the defendants (respondents herein) filed an application for permission to lead additional evidence, which was allowed by the Court. However, while allowing the application, the Court remanded the case back to the trial Court

for fresh decision after setting aside the judgment and decree passed by trial Court.

2. While issuing notice of motion on 15.10.2015, the following order was passed:-

“Learned counsel for the appellants, inter alia, submits that execution of Will dated 19.1.2005 has been proved on record with reference to attesting witnesses and scribe in terms of Section 68 of the Evidence Act. Lower Appellate Court has remanded the case, on the basis of acceptance of application of additional evidence, wholly on erroneous grounds inasmuch as that the plea of property being ancestral has never been pleaded and proved by the defendants in the suit nor the alleged fact of entitlement of Pritam Kaur, alleged wife of Ajit Singh @ Jit Singh has come on record either in the pleadings of the defendants or by way of any evidence on record. The plea raised for the first time without any foundation in terms of pleadings is not to be entertained. Learned counsel further states that without reversing the findings on all the issues, lower Appellate Court was not justified in remanding the case under Order 41 Rule 23-A of CPC.

Notice of motion for 16.11.2015.

Trial Court is directed to adjourn the case beyond the date fixed by this Court.”

3. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook.

4. The learned counsel representing the parties are not in dispute that the First Appellate Court has failed to set aside the findings of fact arrived at by the trial Court on various issues culled out for decision. It is also evident that the First Appellate Court has remanded the case back to the trial Court for fresh decision merely on the ground that an application for additional evidence has been allowed.

5. Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908 (hereinafter referred to as the ‘CPC’), enable the Appellate Court to remand the case back to the trial Court. Order XLI Rule 23 of the Code of

Civil Procedure, 1908 deals with a situation where the suit is decided upon a preliminary point is reversed in appeal. In the present case, Order XLI Rule 23 is not applicable.

6. Order XLI Rule 23A of the CPC, provides that the Appellate Court shall have the power of remanding the case back to the trial Court after the decree is reversed in appeal and retrial is considered necessary. Order XLI Rule 25 of the CPC enables the Court to frame additional issues itself and record evidence or ask for a report on the said issues from the trial Court.

7. In this case, the First Appellate Court has failed to critically examine the reasons recorded by the trial Court and has mechanically set aside the decree passed by the trial Court.

8. As already noted, the First Appellate Court has reversed the judgment and decree passed by the trial Court only because an application for additional evidence has been allowed. For remanding a case for a fresh decision, some particular conditions are required to be fulfilled and order of remand is not permissible in ordinary circumstances.

9. The Supreme Court has explained the scope of Section 107 read with Order XLI Rule 23, 23A and 25 CPC in **P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686**, 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.”

10. In view of the aforesaid facts and discussion, the order passed by the First Appellate Court remanding the case back to the trial Court is set aside.
11. Allowed accordingly.
12. It may be noted here that this Court has not interfered with that part of the order vide which the application for leading additional evidence has been allowed.
13. The first appeal is restored to its original number.
14. The parties through their learned counsel are directed to appear before the First Appellate Court on 12.02.2024.
15. All the pending miscellaneous applications, if any, are also disposed of.

January 11th, 2024
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(ANIL KSHETARPAL)
JUDGE

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