

121-1 IN THE HIGH COURT OF PUNJAB AND HARYANA

AT CHANDIGARH

1.SAO-89-2017 (O&M)

Jagjit Singh and others

....Appellants

Versus

Hardial Singh (deceased) through his LR and others

..Respondents

2.SAO-90-2017 (O&M)

Jagjit Singh and others

....Appellants

Versus

Jagnam Singh (deceased) through his LRs and others

..Respondents

3.SAO-91-2017 (O&M)

Jagjit Singh and others

....Appellants

Versus

Balbir Singh (deceased) through his LRs and others

..Respondents

4.SAO-15-2018 (O&M)

Balbir Singh (since deceased) through his LRs

....Appellants

Versus

Jagjit Singh and others

..Respondents

Date of decision: 21.03.2024

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Sanjeev Kumar Arora, Advocate for the appellants
SAO-89-2017, 90-2017 & 91-2017 and
respondents no.1 to 4 and 6 in SAO-15-2018

Ms. Puja Chopra, Advocate for the appellants
in SAO-15-2018

ANIL KSHETARPAL, J (Oral)

1. These four connected Second Appeals have been filed by both the parties assailing the correctness of the order passed by the First Appellate Court, remanding the cases back to the trial court for fresh decision.

2. The plaintiff's suit for the grant of decree of declaration qua property as mentioned in the headnote A of the plaint with a consequential relief of permanent injunction was decreed whereas the counter claim filed by defendant no.3-Kuldeep Kaur and Jaspal Singh was dismissed as not pressed. As many as three appeals were filed before the First Appellate Court. The First Appellate Court found that the trial court has not examined the objection with regard to the civil court's jurisdiction. In fact, the court found that the essential issue arising out of the pleadings is with regard to civil court's jurisdiction and it was not culled out. The court has remanded the case back to the trial court for deciding it afresh.

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

4. Order XLI Rule 25 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') enables the appellate court to frame

additional issues and refer them for trial to the trial court. However, it does not empower the appellate court to remand the case back to the trial court. In fact, the enabling power of the appellate court to remand the case back to the lower court is regulated by Order XLI Rule 23 and Rule 23-A CPC. Rule 23 empowers the appellate court to remand the case back to the trial court if the suit was decided on a preliminary issue and the same is reversed by the Appellate Court. This is not the situation in the present case. Rule 23 A provides that where the appellate court reversed the decree in appeal and a re-trial is considered necessary, then the appellate court can remit the case back to the lower court.

5. This issue has been examined in detail in **P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686**, wherein the Supreme Court 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. It is evident from the reading of the judgment passed by the appellate court that the court has remanded the case back to the trial court only upon on framing an additional issue. The judgment passed by the trial court has not been set aside on merits and the court has not recorded any reason as to why the re-trial of the case is considered necessary. These two conditions are the sine qua non for the appellate court to remand the case back to the lower court.

7. In SAO-15-2018 the appellants’ grievance is that her application for permission to lead additional evidence has not been decided by the appellate court.

8. After having considered the matter, this Court considers it appropriate to set aside the impugned order passed by the appellate court on 03.10.2017, with a direction to the appellate court to proceed in accordance the law. It shall be open to the appellate court to seek report on the additional issue from the trial court, if considered necessary. The

appellate court can also call upon the parties to lead evidence on the aforesaid issue.

9. Consequently, all the four appeals are allowed. Needless to observe that the application filed by the appellant in SAO-15 shall also be decided by the appellate court before deciding the appeal.

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

21.03.2024
rekha

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No