

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

110

SAO-44-2018 (O&M)
Date of decision: 18.07.2024

AJMER SINGH ..Appellant

Versus

MEWA SINGH AND ORS ..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Kulbhushan Raheja, Advocate
for the appellant.

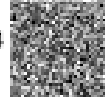
Mr. Varun Garg, Advocate
for respondents No.1 to 4 & 8.

None for the remaining respondents.

ANIL KSHETARPAL, J(Oral)

1. The correctness of the First Appellate Court's order while allowing the respondents application under Order VI Rule 17 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') and remitting the matter back to the trial Court for fresh decision is assailed by the plaintiff. The dispute is with regard to the inheritance of property left behind by late Sh. Chuhar Singh. The plaintiff and defendants are successors in interest of common ancestor late Sh. Chuhar Singh. The plaintiff filed a suit claiming that late Sh. Chuhar Singh executed a registered Will dated 03.03.1981 in favour of the plaintiff and defendant No.1. The defendants contested the suit, which was decreed. During the course of evidence, the defendants led evidence to prove that the Will dated 03.03.1981 was revoked, however, the trial Court ignored the evidence of revocation of Will on the ground that this fact has not been included in the pleadings by the defendants. The defendants

filed first appeal against the judgment and decree passed by the trial Court



on 15.03.2015. During the pendency of the appeal, the defendants filed application for permission to amend the plaint in order to aver about the revocation of the Will, which as already noticed, has been allowed. In the same, the First Appellate Court has remitted the matter back to the trial Court.

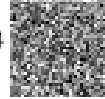
2. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook.

3. The learned counsel representing the appellant has made the following two submissions:-

i. The defendants have withdrawn their admission as they admitted that late Sh. Chuhar Singh executed a registered Will on 03.03.1981. He submits that the defendants cannot be permitted to withdraw the admission.

ii. He further submits that the First Appellate Court has overlooked Order XLI Rule 23A of the CPC before remitting the matter back to the trial Court. While elaborating, he submits that the First Appellate Court has not set aside the judgment passed by the trial Court on merits and there is no finding that a fresh trial is considered necessary.

4. Per contra, the learned counsel representing the respondents submits that evidence with regard to the revocation of Will dated 03.03.1981 has already been led and the First Appellate Court has only permitted the defendants to include the assertions in the written statement, which has already been filed. He submits that the plaintiff may be required to be given



an opportunity to cross-examine defendants witnesses. Hence, re-trial is necessary.

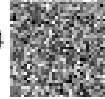
5. This Court has considered the submissions of the learned counsel representing the parties.

6. With respect to the first submission of the learned counsel representing the appellant, it may be noticed that the defendants by way of an amendment are not withdrawing their admission. They are only asserting a subsequent development, which is with respect to revocation of the Will. Moreover, the correctness of revocation of Will is yet to be established. The trial Court has refused to look into the document evidencing revocation of Will on the ground that it is beyond the pleadings. This inadvertent error has been allowed to be rectified. This Court does not find it appropriate to interfere with the same.

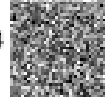
7. However, there is merit in the second submission of the learned counsel representing the appellant.

8. In SAO-57-2023, titled as “Abdul Quddoors Vs. Ajit Singh (since deceased) through legal representatives and another”, decided on 08.01.2024, this Court has examined the scope and enabling power of the Appellate Court to remand the case back to the trial Court, which reads as under:-

“3. From the reading of the order passed by the First Appellate Court, it is evident that the Court has found that in para Nos. 23 and 24 of the trial Court judgment, the onus was wrongly shifted on the defendants and the First Appellate Court allowed the application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”). In fact, the scope of Order XLI Rule 23 and 23A CPC has been explained by the Supreme Court 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.”

4. The learned counsel representing the respondent No.1 submits that the Supreme Court, in ***Shivakumar and Others v. Sharanabasappa and Others* (2021) 11 SCC 277**, has held that in appropriate cases, it is permissible for the Appellate Court to remand the case back to the trial Court. In ***Shivakumar's case*** (*supra*), the Court has held that the power of remanding the case back to the trial Court is required to be exercised sparingly and in the exceptional cases. It should not be exercised in routine. The Appellate Court can remand the case back to the trial Court either under Order XLI Rule 23 or 23A CPC. Order 23A provides that the Appellate Court can only remand the case back to the trial Court if the decree is reversed in appeal and retrial of the case is considered necessary. The First Appellate Court has all the powers to record additional evidence or seek report from the trial Court after framing an additional issue or allowing the application for additional evidence. Efforts should always be made by the Appellate Court to decide the case on merits, rather than remanding the case back to the trial Court because it entails delay and the decree, which has



been passed, is set aside without going deep into the matter.”

9. As per the aforesaid judgment, the First Appellate Court can send back the case to the lower Court for fresh decision only when the judgment of the lower Court is set aside on merits and re-trial is considered necessary.

10. In the present case, the impugned order does not fulfill any of the parameters. Hence, the First Appellate Court’s impugned order remitting the above mentioned matter back to the trial Court is partly set aside to the extent which remits the matter back to the trial Court.

11. The First Appellate Court is requested to proceed with the case in accordance with the provisions of law.

12. The first appeal is restored to its original number.

13. The parties through their learned counsel are directed to appear before the First Appellate Court on 12.08.2024.

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

July 18th, 2024

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**(ANIL KSHETARPAL)
JUDGE**

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