

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

146

1. SAO-52-2023 (O&M)
Date of decision: 29.01.2024

PARMINDER KUMAR @ PARMENDER KUMAR
..Appellant

Versus

RAM AVTAR AND ANOTHER
..Respondents

2. SAO-53-2023 (O&M)

PARMINDER KUMAR @ PARMENDER KUMAR
..Appellant

Versus

SUSHILA DEVI AND ANOTHER
..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Ankush Singla, Advocate
for the appellant.

Mr. Mudit Johan, Advocate
with Mr. Abhimanyu singh, Advocate
for respondent No.1 (in SAO-52-2023)
for respondent No.2 (in SAO-53-2023).

Mr. Sherry K. Singla, Advocate
for respondent No.2 (in SAO-52-2023).

ANIL KSHETARPAL, J(Oral)

1. With the consent of the learned counsel representing the parties, two connected appeals against the order passed by the First Appellate Court remitting the case back to the trial Court shall stand disposed of by this common order.
2. In order to comprehend the issue involved in the present case, the relevant facts, in brief, are required to be noticed.

3. The appellant-Sh. Parminder Kumar filed a suit for grant of decree of specific performance of the agreement to sell dated 23.03.2005. The suit was contested by defendant No.1, in which he claimed that the agreement to sell dated 23.03.2005, was merely a paper transaction. Previously, an agreement to sell dated 07.11.2003, regarding the same suit land was executed between the plaintiff and defendant No.1 and the agreement dated 23.03.2005, was executed in order to save the stamp duty by reflecting lesser amount of total sale consideration than the actual amount that was spent in the transaction. It was claimed that the agreement to sell dated 07.11.2003 was cancelled vide endorsement dated 24.04.2008, and therefore, the suit for specific performance of the agreement to sell dated 23.03.2005, was not maintainable. Defendant No.2 claimed that she is a bonafide purchaser of the property.

4. The trial Court framed the following issues for adjudication after examining the pleadings filed by the respective parties:-

- “1. Whether the plaintiff is entitled to decree for specific performance of contract dated 23.3.2005? OPP*
- 2. Whether the present suit is not maintainable in the present form? OPD*
- 3. Whether the plaintiff has not come to the Court with clean hands and suppressed the material facts? OPD*
- 4. Whether the suit property is Benami and the suit is filed on asking of father of plaintiff Balram? OPD*
- 5. Whether the suit is false and frivolous and the same is liable to be dismissed? OPD*
- 6. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD*
- 7. Whether the suit is time barred? OPD*
- 8. Whether the defendant No.2 is bonafide purchaser? OPD*
- 9. Relief.”*

5. The trial Court vide judgment and decree dated 24.10.2017, decreed the suit. The objection of defendant No.1 with regard to the

endorsement of cancellation executed in the year 2008, was specifically examined by the Court before deciding the suit.

6. Defendant No.1 filed the first appeal. The same has been allowed after framing comprehensive issue, which reads as under:-

“i) Whether plaintiff is entitled to decree for specific performance of contract on basis of agreement to sale dated 23.03.2005 as executed by defendant No.1 Ram Avtar Gupta in favour of plaintiff Parminder Kumar in the presence of witnesses? OPP”

7. In para 15, the First Appellate Court has observed that the document Ex.D-2 was not properly tendered in evidence and the issues have not been framed correctly.

8. With these observations, the Appellate Court chose to remit the matter back to the trial Court. The correctness of the aforesaid order has been challenged in these appeals.

9. It may be clarified that two separate first appeals were filed by the defendant No.1 and 2.

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

11. On the one hand, the learned counsel representing the appellant contends that under Order XLI Rule 25 of the Code of Civil Procedure, 1908 (hereinafter referred to as the ‘CPC’), the Appellate Court is entitled to frame a new issue and seek report from the trial Court. He submits that in this case, the issue has already been framed and decided by the trial Court. He further submits that under Order XLI Rule 23A of the CPC, the Appellate Court can remit the matter back to the trial Court only after reversing the judgment and decree by discussing the case on merits and when a retrial is

considered necessary. He submits that the Appellate Court has neither discussed the case on merits nor set aside the findings of the trial Court.

12. On the other hand, the learned counsel representing the respondent while defending the judgment of the First Appellate Court submits that the trial Court failed to properly mark exhibits and proceeded to decide the matter in a cursory manner.

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

14. The following proviso to Rule 4 of Order XIII added by the State of Punjab and Haryana:-

“Provided that where the Court is satisfied that the document, not endorsed in the manner laid down in the above rule, was in fact, admitted in evidence, it shall treat the document as having been properly admitted in evidence unless non-compliance with this rule has resulted in miscarriage of justice.”

15. Thus, it is evident that the Appellate Court has the jurisdiction not only to mark the document as an exhibit but also to exhibit the document, which has not been marked. The error in the marking of document as an exhibit is not sufficient to remit the case back to the First Appellate Court. It is also evident that issue No.(ii) is in fact an expanded form of issue No.(i), which was originally framed by the trial Court while calling upon the parties to lead evidence. The learned counsel representing the appellant has drawn the attention of the Court to para 12 of the judgment of the trial Court, wherein, the effect of alleged endorsement of cancellation executed in the year 2008 has been discussed.

16. The First Appellate Court has also framed issue No.(iii), which reads as under:-

“iii) Whether plaintiff has actually entered ‘agreement to sale’ dated 07.11.2003 after which ‘agreement to sale’ dated 23.03.2005 was prepared merely on the asking on plaintiff for the purpose of saving him from heavy duty and that once agreement dated 07.11.2003 stood cancelled on 24.04.2008, then alleged agreement dated 23.03.2005 was automatically merged and collapsed as it was having not other foundation or purpose? OPD-1 (Onus to prove over defendant No.1)”

17. As already noticed, the aspect involved in the issue extracted above has also been considered and discussed by the trial Court in its judgment.

18. The First Appellate Court has a bounden duty to reappraise the evidence while critically analyzing the reasons recorded by the trial Court. Undoubtedly, there is an enabling power vested in the Appellate Court to remit the case back to the Lower Court for a fresh decision, however, the same is regulated by the provisions of Order XLI Rule 23 and 23A of the CPC and the Court shall refrain from using this method until and unless the conditions laid down in the aforementioned Sections are not fulfilled. The First Appellate Court shall try to decide a matter on its own and seek a report from the trial Court on an issue if required as a general rule. The Code of Civil Procedure, 1908, has laid down clear rules for remanding a matter to the trial Court for fresh decision.

19. 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.”

20. It is evident that the First Appellate Court has failed to discuss the reasons recorded by the trial Court before setting aside the judgment of the trial Court, which was necessary in order to remand the case.
21. Keeping in view the aforesaid facts, the impugned order dated 25.09.2023, is set aside being erroneous and the First Appellate Court is directed to decide the matter afresh keeping in view the guidelines laid down in Order XLI Rule 23 and 23A of the CPC.
22. The parties through their learned counsel are directed to appear before the First Appellate Court on 23.02.2024.
23. All the pending miscellaneous applications, if any, are also disposed of.

January 29th, 2024
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(ANIL KSHETARPAL)
JUDGE

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