

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO No.105 of 2018 (O&M)

Date of Order:30.01.2024

Babu Ram (deceased) through LRs and others**.Appellants****Versus****Hukam Chand @ Hakam Rani and others****..Respondents****CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL****Present: Mr. Anurag Jain, Advocate
for the appellants.****Mr. Aditya Dassaur, Advocate
for respondent no.1.****ANIL KSHETARPAL, J**

1. The defendant no.1 assails the correctness of the order passed by the First Appellate Court on 31.10.2018, by which the judgment and decree passed by the trial court has been set aside and the First Appellate Court has remitted the case back to the trial court on the following two grounds:-

(1) No opportunity has been awarded to the plaintiff to lead rebuttal evidence on issue no.2.

(2) The application for additional evidence filed by the defendants has not been decided.

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

3. The plaintiff filed a suit for grant of decree of declaration with a consequential relief of joint possession claiming that he is the owner in possession of 3 kanals and 7 marlas of land out of the land measuring 11 kanals and 14 marlas.

4. The suit was contested by the defendants and dismissed by the trial court by a detailed judgment. However, as noticed, the First Appellate Court remitted the matter back to the trial court for fresh decision.

5. The learned counsel representing the appellant (defendant no.1) submits that on both the counts, the First Appellate Court has committed factual error. He submits that the plaintiff has been granted 29 opportunities to lead rebuttal evidence and the application for additional evidence was dismissed by the trial court on 28.02.2011 while dismissing the plaintiff's suit.

6. The learned counsel representing the respondents submits that after recasting of the issues, sufficient opportunity was not granted to the plaintiff. However, he does not dispute that the application for additional evidence filed by the defendant stood decided by the trial court.

7. As per Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908, the appellate court has enabling power to remand the case back to the lower court for fresh decision. After discussing the scope of such enabling power, the Supreme Court in **P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686**, has laid down as under:-

“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.”

8. The First Appellate Court is a court of fact and law both. The First Appellate Court can grant opportunity to the party to lead further evidence if felt necessary. However, the enabling power to remand the case back to the lower court is required to be exercised in rare and exceptional cases. Order XLI Rule 23 A provides that enabling power to remand the case back to the trial court should be exercised if the decree is reversed in appeal and a re-trial is considered necessary. Thus, before passing the order of remand back to the lower court in a civil case, the First Appellate Court is required to fulfill twin conditions, 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). It is evident that in this case, the First Appellate Court has erred in remitting the case back to the trial court without fulfilling the requirements of law.

9. Keeping in view the aforesaid facts and discussion, the impugned order passed by the First Appellate Court on 31.10.2018 is set aside while directing the First Appellate Court to decide the matter afresh. The first appeal filed by the plaintiff shall stands restored to its original number.

10. The parties through their counsel are directed to appear before the First Appellate Court, on 23.02.2024.

11. Disposed of accordingly.

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

January 30, 2024
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned

:YES/NO

Whether reportable

:YES/NO