

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal No.2 of 2014

1. Smt. Parvati Bai, aged 45 years, W/o Amrit Bhai Patel,

2. Smt. Pooja Ben, aged 40 years, W/o Neeraj Bhai,

Both R/o Indira Vihar, Transport Nagar, Korba (CG)

---- Appellants/
(Defendants)

Versus

1. Heeralal, S/o Dhaniram,

2. Vimal Kumar, S/o Dhaniram,

3. Chhedoo, S/o Dhaniram,

4. Ramjilal, S/o Sunderlal Thawait,

5. Gorelal, S/o Sunderlal Thawait,

6. Rajesh Kumar, S/o Sunderlal Thawait,

7. Jagdish Kumar, S/o Sunderlal Thawait,

8. Ajay Kumar, S/o Baboolal,

9. Krishna Devi, Wd/o Baboolal,

10. Seetaram, S/o Pardeshi,

11. Ramin Bai, Wd/o Pardeshi,

All R/o Purani Basti, Korba, Tah. & Distt. Korba (C.G.)

---- Respondents/
(Plaintiffs)

For Appellants:	Mr. Shree Kumar Agrawal, Senior Advocate with Mr. Anand Kumar Gupta, Advocate.
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For Respondents:	Mr. Prafull N. Bharat, Advocate.
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Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

03/10/2016

1. This is an appeal under Order 43 Rule 1 (u) of the CPC by which the first appellate Court in exercise of jurisdiction under Order 41 Rule 23-A of the CPC has made wholesale remand to the trial Court for permitting the parties to amend their pleadings and adduce further evidence and to decide the suit thereafter, in accordance with law.
2. This appeal was admitted for consideration on the following substantial question of law: -

"Whether the First Appellate Court is justified in directing open remand in exercise of power under Order 41 Rule 23-A of the Code of Civil Procedure, without holding that retrial is necessary."
3. The suit filed by the respondents / plaintiffs only for permanent injunction restraining the defendants from interfering with the suit land bearing Khasra No.335/6 was decreed by the trial Court by its judgment and decree dated 19-10-2012 against which the defendants preferred appeal before the first appellate Court. The first appellate Court by its impugned judgment and decree dated 19-9-2013 allowed the appeal and made wholesale remand to the trial Court.
4. In the appeal preferred by the defendants, Mr. Shree Kumar Agrawal, learned Senior Counsel appearing for the appellants / defendants, would submit that the first appellate Court having reached to a finding that the plaintiffs are not in possession of

the suit land and the defendants are in possession of the land ought not to have remanded the matter for permitting the plaintiffs to seek relief of possession and to adduce evidence on the said relief of possession, as no cross-appeal or cross-objection was filed for questioning the issue / finding decided by the trial Court. Mr. Agrawal would further submit that wholesale remand under Order 41 Rule 23-A of the CPC can only be made when the findings of the trial court on all issues are reversed and retrial is considered necessary. He would place reliance upon the judgment of this Court in the matter of **Anish Fulara v. Devcharan**¹.

5. On the other hand, Mr. Prafull N. Bharat, learned counsel appearing for the plaintiffs / respondents, would support the impugned judgment and decree.
6. I have heard learned counsel for the parties, perused the judgment and decree impugned cautiously and analyzed the submissions made herein-above and also gone through the records of the Courts below thoroughly and extensively.
7. According to Order 41 Rule 23-A of the CPC, the appellate Court may remand the suit to the trial Court even though such suit has been disposed of on merits. It provides that where the trial Court has disposed of the suit on merits and the decree is reversed in appeal and a retrial is considered necessary, the appellate Court may remand the suit to the trial Court. Thus, on twin conditions

1 2014(2) C.G.L.J. 2

being satisfied, the appellate Court can exercise the same power of remand under Order 41 Rule 23-A of the CPC. Section 107 of the CPC provides power of the appellate Court.

8. In the case in hand, admittedly, no cross-objection or cross-appeal was preferred. According to Mr. Bharat, there was no occasion for preferring any cross-objection as the issues were decided in favour of the plaintiffs and the trial Court has recorded a finding that the plaintiffs are in possession over the suit land. However, the first appellate Court clearly came to the conclusion that the defendants are in possession as construction has already been made by the plaintiffs and plaintiffs have not sought relief of possession over the suit land and, therefore, the first appellate Court directed the plaintiffs to make necessary amendment seeking relief of possession and also directed the defendants to file demarcation report on their own expenses.

9. The first appellate Court has made wholesale remand in exercise of the power conferred under Order 41 Rule 23-A of the CPC.

Order 41 Rule 23-A of the CPC reads as under: -

"23-A. Remand in other cases.-Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

10. The question would be whether the first appellate Court is justified in remanding the matter under Order 41 Rule 23-A of the CPC without reversing the decree in appeal and without holding

that the retrial is necessary.

11. Order 41 Rule 23-A of the CPC has been inserted in the Code by Act 104 of 1976 with effect from 1-2-1977. According to Order 41 Rule 23-A of the CPC, the appellate Court may remand the suit to the trial Court even though such suit has been disposed of on merits. It provides that where the trial Court has disposed of the suit on merits and the decree is reversed in appeal and the appellate Court considers that retrial is necessary, the appellate Court may remand the suit to the trial Court. Thus, on twin conditions being satisfied, the appellate Court can exercise the same power of remand under Order 41 Rule 23-A of the CPC.

12. In the matter of **P. Purushottam Reddy and another v. Pratap Steels Limited**², the Supreme Court has held that unless the decree in appeal is reversed by the first appellate Court and retrial is considered necessary, wholesale remand cannot be made by the first appellate Court. It has been held 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 the CPC Amendment Act, 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 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

2 (2002) 2 SCC 686

the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand inasmuch 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 therefor of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before the 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 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 41 CPC. In cases where additional evidence is required to be taken in the event of any one of the clauses 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 Manilal Nanavati v. Sushila Mahendra Nanavati*³, 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 *dehors* 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 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting 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

3 AIR 1965 SC 364

23 or Rule 23A or Rule 25 CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.

11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary. Neither Rule 23 nor Rule 23A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to clause (c) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise inasmuch as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not - in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were

open before it for consideration and decision."

13. In the matter of **Municipal Corporation, Hyderabad v. Sunder Singh**⁴, the Supreme Court while considering the scope of Order 41 Rule 23 of the CPC has held that the Court should be loathe to exercise its power under Order 41 Rule 23 of the CPC and an order of wholesale remand should not be passed routinely. It was held as under: -

"11. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order XLI Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties."

14. In the matter of **Ashwinkumar K. Patel v. Upendra J. Patel and others**⁵, the Supreme Court has held that the appellate Court should not ordinarily remand a case under Order 41 Rule 23 of the CPC, as remand orders lead to unnecessary delay and cause prejudice to the parties and the appellate Court should itself consider material available and should decide the appeal one way or other. It was held as under: -

"7. In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, CPC to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High

4 JT 2008(7) SC 247

5 AIR 1999 SC 1125

Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima-facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary. "

15. Very recently, the Supreme Court in the matter of **Lisamma Antony and another v. Karthiyayani and another**⁶ in no uncertain terms held that remand of a case for re-appreciation of evidence and fresh decision results in harassment of litigant and shakes faith of litigants in court. Relevant paragraph of the report states as under: -

"17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for reappreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court."

16. Similarly, in the matter of **Zarif Ahmad (Dead) Through Legal Representatives and another v. Mohd. Farooq**⁷, following the principles of law laid down in **P. Purushottam Reddy** (supra), the Supreme Court has held that remand should be made only in rare situations, and observed as under: -

"13. No doubt, Section 107 CPC empowers the

6 (2015) 11 SCC 782

7 (2015) 13 SCC 673

appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 Order 41 CPC provides that where evidence on record is sufficient, the appellate court may determine the case finally. It is not a healthy practice to remand a case to the trial court unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, should a case be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues, but it is not so in the present case."

17. Very recently, Their Lordships of the Supreme Court in the matter of **A.A. Prakasan v. Anupama and others**⁸ have clearly held that remand should not be made merely on an amendment being allowed and observed as under: -

"3. The High Court has as a consequence of its decision to permit amendment, set aside the judgment of the trial court and remanded the matter. We are of the view that even after the amendment was permitted, further question whether any fresh issue was required to be framed or fresh evidence was to be led was required to be gone into before setting aside the judgment. In case it becomes necessary to frame additional issue and permit the parties to lead further evidence, a report could be called for from the trial court on such additional issue. Remand could be ordered only if the judgment of the trial court was erroneous and the appeal court could not decide the matter and not merely on an amendment being allowed."

18. In the considered opinion of this Court, the two conditions precedent for invoking wholesale remand is on fulfillment of twin conditions as laid down in the afore-cited case i.e. **Anish Fulara** (supra), firstly, the decree is reversed in appeal and secondly, retrial is considered necessary. The trial Court has not recorded

8 JT 2016(9) SC 294

any such finding though came to the conclusion that the plaintiffs are not in possession and the defendants are in possession, and the plaintiffs have not sought relief of possession, but only sought relief of injunction as such, decree in appeal was neither reversed nor retrial was considered necessary, therefore wholesale / open remand is unsustainable in law.

19. Disposal of appeal by the first appellate Court by directing the defendants to submit demarcation report and further directing the plaintiffs to seek relief of possession is also unwarranted in view of the express provision contained in Order 41 Rule 31 of the CPC. The first appellate Court ought to have decided the first appeal on its merits on the basis of evidence available on record and if found necessary, it could have taken the aid of the provisions contained in Section 107 of the CPC. It could not have remanded the suit to the trial Court as neither the appellants / defendants sought an opportunity to produce demarcation report nor the plaintiffs / respondents sought an opportunity to amend the plaint. It is remand only for re-appreciation of evidence available on record which is impermissible in law.

20. For the foregoing reasons, the substantial question of law formulated for the decision of this miscellaneous appeal is answered in negative.

21. In view of the aforesaid discussion, the appeal is allowed. The

impugned judgment is set aside and the matter is remanded to the first appellate Court by restoring C.A.No.2-A/2013 to the said Court to decide the appeal afresh in accordance with law on the basis of material available on record without being prejudiced by any of the findings recorded herein within a period of three months from the date of receipt of certified copy of this order, as the parties are already represented and the first appeal was preferred on 19-11-2012, no further notice is necessary.

22. Parties are directed to appear before the first appellate Court on 2-11-2016.

Sd/-
(Sanjay K. Agrawal)
Judge

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