

SAO-54-2023 (O&M)
and another connected case 1 2023:PHHC:156268

**149-1 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

1.SAO-54-2023 (O&M)

Virender Gandhi

....Appellant

Versus

Kashmir Singh and another

..Respondents

2.SAO-55-2023 (O&M)

Sarita

....Appellant

Versus

Kashmir Singh and another

..Respondents

Date of decision: 06.12.2023

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Piyush Aggarwal and
 Mr. Jaskaran Singh, Advocates for the appellant

 Mr. Sanjiv Gupta, Advocate for the respondents

ANIL KSHETARPAL, J (Oral)

1. While issuing notice of motion on 09.11.2023, the
following order was passed by this Court:-

*“Learned counsel representing the
appellant (the defendant before the trial Court)
inter alia contends that the first appellate Court
has erred in setting aside the judgment and
decree passed by the trial Court only because a
specific issue with regard to the readiness and
willingness on the part of the plaintiff to perform
their part of contractual obligation was not*

framed. He submits that the power of the first appellate Court to remand the case back to the trial Court is regulated by Order 41 Rule 23 and 23-A of the Code of Civil Procedure. He submits that as per Order 41 Rule 25, the Appellate Court may frame issues, however, that itself is not sufficient to remand the case back to the trial Court after setting aside the judgment and decree passed in favour of a party.

Notice of motion returnable for 30.11.2023

The appellant shall have liberty to serve the respondents through their learned counsel before the Trial Court.

Dasti as well.

To be listed in the urgent list.”

2. Once again, the learned counsel representing the parties have been heard. While interpreting Order XLI Rule 23, 23-A, 25 and Section 25 of the Code of Civil Procedure, 1908 (hereinafter referred to as ‘CPC’), the Supreme Court in **P.Purushottam Reddy and another vs. Pratap Steels Ltd. (2002) 2 SCC 686**, has 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 23-A 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 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 23-A 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 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. 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 [AIR 1965 SC 364 : 66 Bom LR 681] (AIR 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 dehors Rules 23 and 23-A. 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 23 or Rule 23-A 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 23-A 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.”

3. Learned counsel representing the respondents submits that pursuant to the order of remand, the trial court has already recorded some part of the evidence.

4. Be that as it may be. Once the order passed by the First Appellate Court remanding the case back to the trial court is not sustainable, it would not be appropriate for this Court to deny the relief to the appellant only because some evidence has been led. Once the judgment of the First Appellate Court has been set aside, the file available in the trial court will be forwarded to the First Appellate Court. The First Appellate Court shall decide the same in accordance with law. The First Appellate Court shall be at liberty to cull out additional issue/issues and either call upon the parties to record evidence or it shall seek report from the trial court.

5. Keeping in view the aforesaid facts, the impugned orders passed by the First Appellate Court in both the appeals are set

SAO-54-2023 (O&M)
and another connected case 6 2023:PHHC:156268

aside. The first appeals are restored to their original numbers. The parties through their counsels are directed to appear before the First Appellate Court on 21.12.2023.

- 6. Disposed of.
- 7. All the pending miscellaneous applications, if any, are also disposed of.

06.12.2023	(ANIL KSHETARPAL)
rekha	JUDGE
Whether speaking/reasoned :	Yes/No
Whether reportable :	Yes/No