

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

128

SAO-45-2019 (O&M)
Date of decision: 24.07.2024

GURDEEP KAUR

..Appellant

Versus

GURMIT SINGH AND OTHERS

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. G.S. Nagra, Advocate
for the appellant.

Mr. Jaideep Verma, Advocate
for respondent No.1.

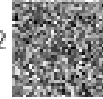
ANIL KSHETARPAL, J(Oral)

1. The defendant No.5 assails the correctness of the First Appellate Court's order remitting the matter back to the trial Court. The plaintiff's suit for grant of decree of declaration on the basis of Will dated 25.05.2007 was dismissed by the trial Court. In first appeal, it was held that the evidence of attesting witness Sh. Jaspal Singh could be read in evidence because he died after recording examination-in-chief. The First Appellate Court has also found that the trial Court has failed to record specific finding on issue No.3.

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

3. The enabling power of remitting the matter back to the lower Court is regulated by Order XLI Rule 23 and 23A of the Code of Civil Procedure, 1908.

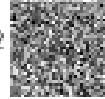
4. In **SAO-57-2023, titled as "Abdul Quddoors Vs. Ajit Singh (since deceased) through legal representatives and another"**, decided on **08.01.2024**, this Court has examined the scope and enabling power of the



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.”

5. The Appellate Court ordinarily should not remit the matter back to the lower Court unless it reverses the finding of the lower Court on merits and forms an opinion that a re-trial of the case is necessary. This is *sine qua non* for remitting the case back to the lower Court.
6. In this case, the First Appellate Court has not fulfilled any of the parameter.
7. Hence, the appeal is allowed. The impugned order passed by the First Appellate Court is set aside while restoring the appeal to its original number.
8. The parties through their learned counsel are directed to appear before the First Appellate Court on 21.08.2024.
9. It is clarified that this Cout has only set aside the impugned order to the limited extent of remitting the matter back to the trial Court.
10. All the pending miscellaneous applications, if any, are also disposed of.

July 24th, 2024

(ANIL KSHETARPAL)
JUDGE

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