



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO No.90 of 2015 (O&M)

Date of Order:23.07.2024

Chotta Singh and others

.Appellants

Versus

Kehar Singh and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Parveen Kumar Garg, Advocate
for the appellants.

Mr. Harshit Jain, Advocate
for the respondents.

ANIL KSHETARPAL, JCM No.23921-CII-2015

1. For the reasons mentioned in the application, which is supported by the affidavit, the delay of 50 days in filing the appeal is condoned.

2. CM stands disposed of.

MAIN

3. The defendants assail the correctness of the First Appellate Court's order remitting the suit back to the trial court for deciding fresh. The plaintiffs filed a suit for possession of agricultural land with a consequential relief of permanent injunction which was dismissed by the trial court after appreciating the evidence. The plaintiffs filed first appeal against its dismissal. They also filed an application under Order XLI Rule 27 CPC for permission to lead the additional evidence and culling out of additional issues by the Court. The First Appellate Court culled out the additional



issues but did not decide application under Order XLI Rule 27 CPC. The First Appellate Court culled out the following two issues:-

- “(i) Whether the plaintiffs are the legal heirs of Santa Singh and Banta Singh?OPP
- (ii) Whether Santa Singh had died on 20.08.1977 and Banta Singh died on 10.03.1979, if so, its effect?OPP”

4. Thereafter, the court set aside the trial court's judgment and decree and remitted the suit back to the trial court for fresh decision while giving liberty to the plaintiffs to file application before the trial court for additional evidence.

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

6. The scope and ambit of the appellate court to remit the matter back to the lower court for fresh decision is regulated by Order XLI Rule 23 and 23-A of the Code of Civil Procedure, 1908, which has been explained in **P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686.**

The operative part of the judgment reads 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 XLI 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 XI 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 XLI 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 XX 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 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 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.”.

7. In this case, Order XLI Rule 23 CPC will not be applicable because the trial court did not decide the suit on a preliminary point. Under Order XLI Rule 23-A CPC, the appellate court has the enabling power to remit the matter back to the lower court only if the judgment passed by the lower court is set aside after discussing the merits and re-trial is considered necessary. The impugned judgment passed by the First Appellate Court fails to fulfill any of the aforesaid necessary requirements. If the appellate court frames additional issues, it can permit the parties to lead evidence or direct the trial court to record evidence and send report. This eventuality is covered by Order XLI Rule 25 CPC. However, Order XLI Rule 25 CPC does not provide for setting aside the judgment of the trial court which has serious consequences.



8. Keeping in view the aforesaid facts and discussion, the impugned order passed by the First Appellate Court is set aside while restoring the first appeal to its original number. The First Appellate Court shall have the liberty to either permit the parties to produce evidence on the additional issues or seek report from the trial court.
9. The appeal is allowed.
10. The parties through their learned counsel are directed to appear before the First Appellate Court, on 20.08.2024.
11. Needless to observe that the First Appellate Court shall also decide an application for permission to lead additional evidence.
12. All the pending miscellaneous applications, if any, are also disposed of.

July 23, 2024
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned :YES/NO
Whether reportable :YES/NO