



121 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO-608-2018(O&M)
Date of decision : 17.07.2024

Smt. Kamlesh Kumari ...Appellant

Vs.

M/s J.M. Paper Mills and others ...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Yagsimant Attri, Advocate for
Mr. Rajinder Goyal, Advocate
for the petitioner.

Mr. Gaurav Tangri, Advocate
for respondents No.1 and 2.

Mr. Baldev Singh, Advocate
for respondent No.3.

None for respondent no.4.

Dr. Deepak Jindal, Advocate
for respondents No. 5 and 6.

ANIL KSHETARPAL, J. (Oral)

1. In this second appeal, the plaintiff assails the correctness of the First Appellate Court's order remitting the matter back to the trial Court for fresh decision. The plaintiff filed the suit for recovery of Rs.68,44,267/- alongwith interest @ 18% per annum from 10.07.2013, till the realization of the amount.

2. In substance, the plaintiff claimed that she being the guarantor has paid the amount and the same is required to be recovered from the principal borrower. The suit filed by the plaintiff was decreed on 21.03.2018, qua defendants No. 1 to 2 but dismissed qua defendants No. 3 to 6. Only the



plaintiff filed the first appeal. A reading of the impugned order shows that the Court neither noticed the facts nor there was any discussion with respect to the evidence. By a short order the Court observed that during the course of arguments, the following two issues cropped up for adjudication:-

- “1. Whether the agreement of guarantee was a continuing guarantee;*
- 2. Whether after making the payment of outstanding amount before the SARFAESI Court the guarantee ceased to exist or it was a continuing guarantee and therefore adding the defendant No.4 as an additional security or as a sole guarantee had absolved Kamlesh Kumari from any further liability.”*

3. Thereafter, the Court remitted the matter back to the trial Court. Order XLI Rule 23 and 23-A of the Code of Civil Procedure, 1908 enable the First Appellate Court to remit the matter back to the lower court. Order XLI Rule 23 of the Code of Civil Procedure, 1908 is not applicable because the trial Court did not decide the suit on a preliminary point. Under Order XLI Rule 23-A, of the Code of Civil Procedure, 1908, the order remitting back the case to the Lower Court can be passed only if the judgment passed by the trial Court is set aside on merits and re-trial is considered necessary. It is evident from the reading of the impugned order that both the parameters that are required to be fulfilled, if the Court decides to remit the matter back to the lower court, have not been fulfilled. The Court has not applied both the parameters before passing the impugned order. It is also evident that the Court has not even noticed the contents of submissions, which were made before it.

4. The scope and ambit of the aforesaid provisions with respect to



remand has been explained by the Hon'ble Supreme Court in '***P.Purushottam Reddy and Another v. Pratap Steels Ltd***'. (2002) 2 SCC 686. The relevant para is extracted here 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 XLI 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 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 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 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.”

5. In view of the aforesaid observations, no further deliberation is

considered necessary. The impugned order passed by the First Appellate Court is set aside while restoring the appeal to its original number.

6. The parties through their learned counsel are directed to appear before the First Appellate Court on 12.08.2024.
7. The appeal stands disposed of.
8. All the pending miscellaneous applications, if any, are also disposed of.

17.07.2024

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Whether speaking/reasoned :

Whether Reportable :

(ANIL KSHETARPAL)

JUDGE

Yes No

Yes No