



**In the High Court of Punjab and Haryana, at Chandigarh**

**Second Appeal Order No. 5 of 2020 (O&M)**

**Date of Decision: 24.04.2025**

Chander Mohan

... Appellant(s)

Versus

Madan Mohan and Others

... Respondent(s)

**CORAM: Hon'ble Mr. Justice Anil Kshetarpal.**

Present: Mr. Berjeshwar Singh Jaswal, Advocate  
for the appellant(s).

Mr. Deepak Arora, Advocate  
for respondents No.1 and 5.

Mr. Jaivir Singh Chandail, Additional Standing  
Counsel for U.T. Chandigarh-respondent No.6.

**Anil Kshetarpal, J.**

1. The defendant No.1 assails the correctness of the First Appellate Court's order remitting the matter back to the Trial Court for fresh decision after permitting the defendants No.3 and 5 to cross-examine the defendant No.1.

2. The dispute in the present case is with regard to the property left behind by Smt. Amarwati (widow of late Sh.Sardari Lal), who left behind her two sons and four daughters. Plaintiff-Madan Mohan claims that Smt.Amarwati died intestate, whereas the defendant No.1-Chander Mohan propounded a registered Will dated 21.08.2006 in his favour. The defendants No.3 and 5 also claim that Smt. Amarwati died intestate. During the course of trial, the learned counsel representing the defendants No.3 and 5 was not

given any opportunity to cross-examine both the attesting witnesses of the Will, namely Yaspal, Advocate and Makhan Masih. It is evident that the stand taken by the defendants No.3 and 5 was at variance with the defendant No.1. There was an *inter se* dispute between the defendant No.1 on one hand and defendants No.3 and 5 on the other hand. Hence, an opportunity to cross-examine the attesting witnesses of the Will was required to be given to the defendants No.3 and 5. However, only on this score, the First Appellate Court was not required to remit the matter back to the Trial Court.

3. The enabling power of the Appellate Court to remit the matter back to the Trial Court is regulated by Order XLI Rule 23 of the Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”) which 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. It is evident that the First Appellate Court has neither set aside the judgment of the Trial Court nor recorded a finding that retrial of the case is necessary. The First Appellate Court could have granted an opportunity to the learned counsel representing the defendants No.3 and 5 to cross-examine the attesting witnesses of the Will or direct the Trial Court to send a report after granting him an opportunity.

5. Keeping in view the aforesaid facts, the First Appellate Court's

order is set aside to the limited extent. The First Appellate Court will either permit the defendants No.3 and 5 to cross-examine the attesting witnesses of the Will or seek report from the Trial Court in this regard. The parties, through their learned counsel, are directed to appear before the First Appellate Court on 23.05.2025.

6. At this stage, the learned counsel representing the defendants No.3 and 5 submits that he should be directed to cross-examine the defendant No.1. The learned counsel representing the appellant (defendant No.1) submits that an opportunity was granted to the learned counsel representing the defendants No.3 and 5 to cross-examine defendant No.1 and he was duly cross-examined. There is a lack of clarity in the impugned order on this aspect. The First Appellate Court will examine the Trial Court's record if the learned counsel representing the defendants No.3 and 5 has already been granted an opportunity to cross-examine the defendant No.1 and if that be so, then no further opportunity to cross-examine the defendant No.1 shall be granted.

7. With the observations made above, the present appeal is disposed of. The miscellaneous application(s) pending, if any, shall also stand disposed of.

**(Anil Kshetarpal)**  
**Judge**

**April 24, 2025**  
**"DK"**

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No