



**118 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of decision : 11.03.2025

1.

SAO-24-2019 (O&M)

Rajesh Kumar and others

...Appellants

Vs.

Manjit Singh and another

...Respondents

2.

SAO-25-2019 (O&M)

Rajesh Kumar and others

...Appellants

Vs.

Lovejeet Singh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sangram S. Saron, Advocate
Mr. Amisha Batra, Advocate
for the appellants (in both the appeals).

Mr. G.S. Bhatia, Advocate
Mr. Gurcharan Dass, Advocate
for respondents No. 1 to 3.

ANIL KSHETARPAL, J. (Oral)

1. The appellant assails the correctness of two similar orders passed by the First Appellate Court remitting the matter back to the lower Court for fresh decision after getting the property demarcated. There were two cross suits filed, one by the plaintiffs (appellants herein) for grant of decree of permanent injunction, whereas, the cross-suit was filed by the defendants against the appellant. The trial Court decreed the appellant's suit whereas, dismissed the suit filed by the respondents, namely, Manjit Singh and others. Two appeals



were filed before the First Appellate Court. The First Appellate Court held that demarcation of the property is necessary in order to decide the controversy involved in the present case. Thus, the First Appellate Court remitted the matter back to the lower Court for fresh decision.

2. These two appeals have been filed to challenge the order of the First Appellate Court

3. During the pendency of these appeals, fresh demarcation has been carried out and the report has been placed on record.

4. The enabling power of the First Appellate Court to remit the matter back to the lower Court is regulated by Order 41 Rule 23 and 23-A of the Code of Civil Procedure, 1908, which has been explained by the Hon'ble 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 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. Order 41 Rule 23 and Rule 23-A of the Code of Civil Procedure, 1908, requires the Appellate Court to set aside the judgment of the lower Court on merits and form an opinion as to whether re-trial of the case is necessary or not. In absence of these two findings, which are a *sine qua non*, the Appellate Court has no power to remit the matter back to the lower Court.

6. In this case, the First Appellate Court has neither set aside the judgment of the trial Court on merits nor came to the conclusion that re-trial of the case is necessary. The First Appellate Court is a Court of fact and law both.



It is well within its power to appoint a Local Commissioner to demarcate the area. However, this cannot be the only reason to remit the matter back to the lower Court after setting aside the judgment and decree which has been passed by the lower Court.

7. Since the demarcation has already been carried out as directed by the First Appellate Court, hence, the trial Court is directed to remit the file to the First Appellate Court. Both the appeals are allowed. The impugned orders passed by the First Appellate Court are set aside. The First Appellate Court will take into consideration all the facts including the demarcation report, which has been submitted after demarcating the disputed property while deciding the appeal on merits.

8. The parties through their learned counsel are directed to appear before the First Appellate Court on 04.04.2025.

9. All the pending miscellaneous applications, if any, are also disposed of.

11.03.2025
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned :	Yes	No
Whether Reportable :	Yes	No