



In the High Court of Punjab and Haryana, at Chandigarh

Second Appeal Order No. 39 of 2019 (O&M)

Date of Decision: 07.04.2025

Shiv Dutt (Since Deceased) through his Legal Representative Pawan Kumar

... Appellant(s)

Versus

Smt. Sushila Devi and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. M.K.Verma, Advocate
for the appellant(s).

Mr. Ajay Jain, Advocate
for respondent No.1.

Anil Kshetarpal, J.

1. The legal representative of defendant No.1-Pawan Kumar assails the correctness of the First Appellate Court's order remitting the matter back to the Trial Court for fresh decision.

2. On 07.05.2019, the following order was passed:-

“Learned counsel for the appellant submits that suit of the plaintiff seeking the relief of permanent injunction and mandatory injunction was dismissed by the trial Court and the first Appellate Court remanded the case back to the trial Court after setting aside the judgment on two grounds; firstly, no issue was framed regarding counter claim filed by defendant No.1 and the same remained undecided and secondly, the issue of maintainability of the suit was decided against the plaintiff

despite the fact that onus to prove this issue was on the defendant and no submissions were put forth on this issue. In case, counter claim was not decided, the first Appellate Court could frame additional issues and call for report from the trial Court.

Notice of motion for 28.08.2019.

Proceedings before the trial Court will continue. The trial Court will also frame additional issues on the counter claim filed by the defendant and proceed in accordance with law. However, passing of final order by the trial Court, shall remain stayed, till the next date of hearing.”

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. The learned counsel representing the respondent No.1 submits that the Trial Court has framed the following additional issues and the parties have been permitted to lead evidence which has been partly recorded:-

“9A. Whether the defendant No.1 is entitled to decree for permanent and mandatory injunction as prayed for in counter claim? OPD/Counter Claimant

9B. Whether the counter claim is not maintainable? OPP

9C. Whether counter claim is bad for deficient court fees? OPP”

5 It is evident that the First Appellate Court has erred in remitting the matter back to the Trial Court only on the ground that no issue was framed with respect to the counter claim filed by the defendant No.1. The First Appellate Court should have either sought report of the Trial Court after framing the additional issues or would have called upon the parties to lead their respective evidence. Pursuant to impugned order of the First Appellate Court, the additional issues have now been framed, hence, the impugned order shall be treated to have been passed under Order XLI Rule 25 CPC. The Trial Court, after recording evidence on the additional issues, send the report to the First Appellate Court who shall then proceed to decide the appeal.

6. It would be noted here that the First Appellate Court can remit the matter back to the Trial Court only after reversing its judgment on merits and coming to a conclusion that retrial of the case is necessary. In this case, the First Appellate Court has not recorded a finding that the Trial Court’s judgment is wrong on merits and retrial of the case is considered necessary.

7. Keeping in view the aforesaid facts, the present appeal is allowed and the order passed by the First Appellate Court is modified and is

converted it into the Order Under XLI Rule 25 CPC. The first appeal filed by the plaintiff shall stand restored to its original number. The Trial Court is directed to forward the report within the next three months. The parties, through their learned counsel, are directed to appear before the First Appellate Court on 04.08.2025.

8. The miscellaneous application(s) pending, if any, shall stand disposed of.

(Anil Kshetarpal)
Judge

April 07, 2025
“DK”

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No