



138 IN THE HIGH COURT OF PUNJAB AND HARYANA
 AT CHANDIGARH

SAO-15-2025 (O&M)

Date of decision : 27.05.2025

Avtar Singh @ Pavtar Singh

...Appellant

Vs.

Jhalman Singh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Parvinder Singh, Advocate
 for the appellant.

 Mr. Deepak Verma, Advocate
 for the respondents.

ANIL KSHETARPAL, J. (Oral)

1. Defendant No.1 assails the correctness of the First Appellate Court's order remitting the matter back to the lower Court for fresh decision on the ground that the finding on issues No. 3 and 9 have been recorded in para 22 and 23 of the judgment, which have been included under issues No.1 and 2.

2. The plaintiff filed a suit for declaration to the effect that he is absolute owner in possession of 93 kanals 18 marlas land on the basis of sale deeds dated 22.04.1980, 30.04.1980, 16.05.1980 and 11.05.1984 and in fact, defendant No.1 is only 'Benamidar'. Hence, he has no right in the property. The suit was contested by the defendants and the trial Court culled out the following issues:-

- "1. Whether plaintiff is entitled to the relief of declaration as prayed for? OPP
2. Whether plaintiff is entitled to the consequential relief of permanent injunction as prayed for? OPP



3. *Whether suit of the plaintiff is not within time? OPD*
4. *Whether plaintiff is estopped from filing the present suit by his own act, conduct and admissions? OPD*
5. *Whether suit is not properly valued for the purpose of court fee and jurisdiction? OPD*
6. *Whether plaintiff has no cause of action to file the present suit? OPD*
7. *Whether plaintiff has concealed true and material facts from this Hon'ble Court and therefore not entitled to any relief, claimed for? OPD*
8. *Whether plaintiff has no locus standi to file the present suit? OPD*
9. *Whether suit is bad for non joinder and misjoinder of necessary parties? OPD*
10. *Whether present suit has been filed by the plaintiff in collusion with defendant no.2? OPD1*
11. *Relief."*

3. By an elaborate judgment, the trial Court dismissed the suit. It was also held that the suit is not maintainable in view of the provisions of Prohibition of Benami Transaction (Prohibition Act), 1988. However, while recording issue-wise finding, the Court included para 22 and 23 under issues No. 1 to 3 and not specific issues No. 3 and 9. In fact, the Court has observed that issues No.3 and 9 have not been pressed, though, the finding was recorded in para 22 and 23. The First Appellate Court has remitted the matter back to the Lower Court only on this ground.

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 XLI Rule 23-A of the Code of Civil Procedure, 1908 provides that the Appellate Court is required to set aside the judgment of the trial Court on merits and remit the matter back to the lower Court only after recording finding that re-trial of the case is necessary. The trial Court is required to record such finding after considering all aspects of the matter. As

already noticed, the Court has remitted the matter back only on account of a small error committed by the trial Court while recording finding with regard to issues No. 3 and 9.

6. Learned counsel representing the respondents submits that evidence produced by the plaintiff has not been discussed by the trial Court. The First Appellate Court is a Court of law and fact both. Hence, the First Appellate Court can examine the evidence produced by the plaintiff, if already not considered by the trial Court.

7. With these observations, the impugned order passed by the First Appellate Court is set aside while restoring the First Appeal to its original number.

8. The parties through their learned counsel are directed to appear before the First Appellate Court on 09.07.2025.

9. The appeal is disposed of.

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

27.05.2025

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(ANIL KSHETARPAL)
JUDGE

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