



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

SAO-111-2017 (O&M)

Date of decision : 06.03.2025

Rajender

...Appellant

Vs.

Room Ram and another

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. D.K. Tuteja, Advocate
for the appellant.

Ms. Parul Saini, Advocate for
Mr. Pritam Singh Saini, Advocate
for respondents No. 1 and 2.

ANIL KSHETARPAL, J. (Oral)

1. The plaintiff assails the correctness of the First Appellate Court's order remitting the case file back to the trial Court for fresh decision after observing that distinct issue on the validity of the Will has not been culled out by the trial Court.

2 The plaintiff filed a suit for declaration with a consequential relief of permanent injunction claiming the property of his sister, namely, Smt. Maya Devi by virtue of Will dated 12.07.2000. The defendant contested the suit and claimed that Smt. Maya Devi never executed the Will in favour of the plaintiff. In para 33, the trial Court upon appreciation of evidence recorded a finding of fact that the Will Ex.P2 executed by Smt. Maya Devi is proved and is free from all suspicious circumstances.

3. The First Appellate Court remitted the matter back to the lower



Court by merely observing that the proper issues were not culled out by the trial Court.

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. It is evident that the First Appellate Court has neither set aside the findings of fact arrived at by the trial Court on merits nor found that re-trial of the case is necessary. There are two requirements are a *sine qua non* for exercise of power under Order 41 Rule 23-A of the Code of Civil Procedure, 1908.
- 6. The First Appellate Court has also overlooked that the trial Court recorded specific finding of fact with respect to genuineness of the Will. In such circumstances, it was not appropriate for the First Appellate Court to remit the matter back to the lower Court.
- 7. Consequently, 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 01.04.2025.
- 9. The appeal is disposed of.
- 10. All the pending miscellaneous applications, if any, are also disposed of.

(ANIL KSHETARPAL)
JUDGE

06.03.2025

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Whether speaking/reasoned :
Whether Reportable :

Yes
Yes

No
No