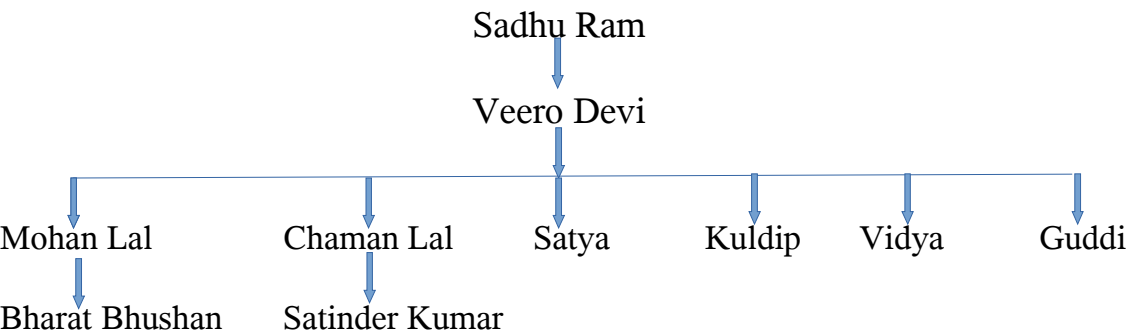






SAO-37-2017

1. In second appeal, the plaintiff assails the correctness of First Appellate Court’s order remitting the matter back to the trial Court for fresh decision.
2. Detailed facts are not required to be noticed because this Court is of the considered view that the First Appellate Court has committed a fundamental error in remitting the matter back to the trial Court without setting aside the decree passed by the trial Court on merits and without concluding that the re-trial of the case is necessary. However, to complete the narration, certain relevant facts are as under:
3. In order to understand *inter se* relationship between the parties, the family tree drawn by the respondent's counsel is extracted as under:-



4. The dispute is with regard to the property left behind by Smt.Veero Devi. Sh. Bharat Bhushan filed a suit for declaration to the effect that he and defendant No.1 are the co-sharers in joint possession of land measuring 11 kanals 05 marlas and 3 kanals out of land measuring 46 kanals 05 marlas on the basis of a registered Will executed by Smt. Veero Devi on 11.08.1997. In that suit, Sh. Satinder Kumar, Sh. Chaman Lal, Sh. Mohan Lal and others were impleaded as a party. Sh. Kulwant Singh and Sh. Rajbir Singh,



defendants No. 9 to 10, respectively, are purchasers of some part of the property from Sh. Chaman Lal.

5. It has been disclosed that previously Sh. Chaman Lal filed a Civil Suit No. 143 of 2003 claiming the property of Smt. Veero Devi to the exclusion of others on the basis of two unregistered Wills dated 02.04.1997 and 22.08.1998. The aforesaid suit was withdrawn by Sh. Chaman Lal on 25.07.2009.

6. The present suit filed by Sh. Bharat Bhushan was contested by all the defendants except defendant No.1. The trial Court culled out the following issues:-

- “1. Whether the plaintiff is entitled for declaration and possession as prayed for OPP*
- 2. Whether the suit is not maintainable?OPP*
- 3. Whether the plaitniff has no locus standi to file the present suit?OPD*
- 4.Whether the suit is bad for non-joinder and misjoinder of the necessary parties?OPD*
- 5. Relief.”*

7. Subsequently, the following additional issues were culled out:-

- “1.4(a) Whether Veero Devi executed the valid registered Will dated 11.8.1997 in favour of plaintiff and defendant No.1?OPP*
- 4(b) Whether Veero Devi executed Wills dated 2.4.1997 and 22.08.1998 in favour of defendant No.2?OPD*
- 4(c) Whether the Sale deeds dated 8.5.2009 executed by defendant No.2 in favour of defendant No.9 & 10 are legal and valid?OPD”*



8. The trial Court held that the plaintiff-Sh. Bharat Bhushan has successfully proved the execution of the Will dated 11.08.1997. Thus, the suit filed by the plaintiff was decreed. Defendants No. 9 and 10 filed an appeal. During the pendency of the appeal, an application for permission to lead additional evidence was filed to prove two unregistered Wills allegedly executed by Smt. Veero Devi on 02.04.1997 and 22.08.1998. The First Appellate Court has allowed the application and remitted the matter back to the trial for fresh decision.

9. The scope and ambit of enabling powers of the First Appellate Court to remit the matter back to the Lower Court 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.”

10. As per Order 41 Rule 23-A of the Code of Civil Procedure, 1908, it is permissible to the Appellate Court to remit the matter back to the Lower Court only on reversing the decree passed by the trial Court on merits and after forming opinion that a re-trial is necessary. In absence of this, the Appellate Court does not ordinarily has power to remit the matter back to the Lower Court. In this case, the Appellate Court has failed to fulfill both the requirements.

11. Learned counsel representing the appellant submits that there was already a specific and distinct issue with regard to unregistered Wills dated 02.04.1997 and 22.08.1998. Hence, no application for additional evidence was



required to be filed. He submits that as many as 15 opportunities were given to the defendants to prove the Will.

12. *Per contra*, learned counsel representing the respondents submits that the Appellate Court has considered it appropriate to allow the application for additional evidence.

13. Keeping in view the aforesaid facts, the impugned order passed by the First Appellate Court is set aside. The First Appellate Court is directed to consider the application for additional evidence afresh. If the application is allowed, then it will be open to the First Appellate Court to either permit the defendants to lead evidence or seek report from the trial Court. However, this Court has not expressed any opinion on the merits of the case.

14. With these observations, the appeal is allowed. The order passed by the First Appellate Court is set aside. The first appeal is restored to its original number.

15. The parties through their learned counsel are directed to appear before the First Appellate Court on 10.03.2025.

COCP-3228-2017

1. The appellant claims that there has been infringement of interim order dated 20.07.2017 directing the parties to maintain *status quo*.

2. In the facts and circumstances of this case, this Court does not find it appropriate to keep the Civil Original Contempt Petition pending. However, the appellant will have liberty to file an appropriate application before the First Appellate Court, if so advised.

3. The First Appellate Court is requested to make sincere endeavors



for expeditious disposal of the first appeal preferably within a period of 09 months from today.

- 4. Till then the interim order passed on 20.07.2017 shall continue to operate.
- 5. The petition is disposed of.

11.02.2025
neeraj

(ANIL KSHETARPAL)
JUDGE

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