



In the High Court of Punjab and Haryana, at Chandigarh

Second Appeal Order No. 39 of 2017 (O&M)

Date of Decision: 20.01.2025

Balwinder Singh

... Appellant(s)

Versus

Tara Singh

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: None for the appellant.

Mr. Balbir Singh Jaswal, Advocate
for the respondent.

Anil Kshetarpal, J.

1. This Second Appeal has been filed against the First Appellate Court's order remitting the matter back to the Trial Court for fresh decision.
2. Originally, the Trial Court dismissed the appellant's suit for the grant of decree of permanent injunction restraining the defendant from recovering the amount of ₹1,50,000/-. The counter claim filed by the defendant was also dismissed. The defendant filed the first appeal in which the case was remitted back to the Trial Court for fresh decision after framing the additional issue to the following effect:-

*“(1-A) Whether the plaintiff has returned the whole amount of the earnest money to the defendant/counter claimant in accordance with cancellation deed dated 17.07.2010 ?
OPP”*

3. The enabling power of the Appellate Court to remit the matter

back to the Lower Court is regulated by Order XLI Rules 23 and 23A of the Code of Civil Procedure, 1908, 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 it

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 Trial Court has culled out the following issues:-

- “(I) Whether the plaintiff is entitled to permanent injunction restraining the defendant for ever from recovering the arbitrary amount of Rs.1,50,000/- from the plaintiff forcibly?OPP*
- (II) Whether the present suit is not maintainable?OPD*
- (III) Whether the plaintiff has not approached the court with clean hands? If so, its effect.*
- (IV) Whether the plaintiff has no locus standi to file the present suit? OPD*
- (V) Whether the plaintiff has no cause of action to file the present suit? OPD*
- (VI) Whether the suit is barred under section 41(h) of Specific Relief Act? OPD*
- (VII) Whether the suit is not properly valued for the purpose of jurisdiction and Court fee? OPP*

(VIII) Whether the plaintiff executed an agreement to sell dated 10.07.2010 in favour of counter claimant on payment of Rs.1,50,000/- as earnest money? OPD

(IX) Whether the plaintiff has not returned a single penny to the counter claimant and as such he is liable to pay the amount of Rs.3,00,000/- to the counter claimant? OPD

(X) Relief.”

5. Issues No.1A and 9 appear to be the same, though not identical. If the Appellate Court felt that the issue was required to be modified, still there is no occasion to remit the matter back to the Trial Court for fresh decision. This is the only ground on which the judgment of the Trial Court has been set aside.

6. Keeping in view the aforesaid facts, the present appeal is allowed while setting aside the impugned order. The First Appellate Court is directed to proceed in accordance with the law. The parties through their learned counsel are directed to appear before the First Appellate Court on 17.02.2025.

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

(Anil Kshetarpal)
Judge

January 20, 2025
“DK”

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No