



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

SAO-79-2017 (O&M)

Date of decision : 22.04.2025

Sheetal Bhandari and another

...Appellants

Vs.

Raghubir Singh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Amit Jain, Sr. Advocate with
Mr. Varun Parkash, Advocate
for the appellants.

Mr. Amandeep Singh Manaise, Advocate
for the respondents.

ANIL KSHETARPAL, J. (Oral)

1. The defendants assail the correctness of the First Appellate Court's order remitting the matter back to the trial Court for fresh decision. The First Appellate Court has also directed that a fresh Local Commissioner, not below the rank of Tehsildar alongwith other revenue officials should visit the spot and restore the passage.

2. The plaintiffs (respondents) filed a suit for grant of decree of permanent injunction restraining the defendants from blocking and encroaching upon passage of two karams in any manner. It appears that during the pendency of the suit, the plaintiffs filed an application for permission to amend the plaint, which was also dismissed. The plaintiffs then filed the first appeal. The First Appellate Court remitted the matter back to the trial Court by making the following observations:-



"25. *The trial Court has declined the claim of the appellants merely saying that since this rasta has been amalgamated by the land owners along side the rasta, so this relief cannot be granted, which is totally an irresponsible finding given by the trial Court without seeing that the case of the appellants is to get public street restored at its place by removing the encroachments by the defaulters, whose land adjoins this rasta, which is not tenable in the eyes of law. It is the prime duty of the Courts as well as revenue authorities and the Government to protect the passages, which are established in the lands of the villagers for access and re-access of the farmers and public persons to approach their properties and no body from the public or adjoining the said rasta can be allowed to amalgamate the same in their property, which is totally against the law. No interest has been shown by the trial Court to feel the depth of the case that what is the actual relief in the present case. But the trial Court has wrongly and in a hasty manner dismissed the suit of the appellants, without restoring the passage, which is otherwise established in the 'Maswai' Ex.P.1 and jamabandi Ex.P6 and Ex.P.7. This casual approach of the trial Court is not appreciable. As such, judgment and decree under appeal are set aside and the case is remanded back to the trial Court to appoint a fresh local commissioner, not below the rank of Tehsildar, along with other revenue officials to visit the spot and to restore the passage, which is in existence as per their revenue record, by removing all sort of obstructions and constructions raised on the same; and then to decide this case afresh.*"

3. Heard the learned counsel representing the parties at length and with their able assistance perused the paper-book.

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. As per Order 41 Rule 23-A of the Code of Civil Procedure, 1908, (CPC), the Appellate Court is required to set aside the finding of the lower Court on merits and remit the matter back to the lower Court only after coming to the conclusion that the re-trial of the case is necessary. It is evident that the First Appellate Court has failed to comply with the requirements of Order 41 Rule 23-A of the CPC.
6. Keeping in view the aforesaid discussions, the impugned order passed by the First Appellate Court is set aside only to the limited extent of remitting the matter back to the lower Court. It is also directed that the Local Commissioner will visit the spot, however, direction to restore the passage shall stand vacated. Once, the report is received, First Appellate Court will proceed with the matter.
7. The parties through their counsel are directed to appear before the First Appellate Court on 23.05.2025.
8. The appeal is disposed of.
9. All the pending miscellaneous applications, if any, are also disposed of.

22.04.2025 neeraj	(ANIL KSHETARPAL)	
	JUDGE	
	Whether speaking/reasoned :	Yes No
	Whether Reportable :	Yes No