



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

SAO-102-2018 (O&M)

Date of decision : 02.04.2025

Gurtej Singh and another

...Appellants

Vs.

Gurmail Singh and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. P.S. Dhaliwal, Advocate
for the appellants.

Mr. Munish Garg, Advocate
for respondents No. 1 to 16.

Service of respondents No. 17 to 23 already
dispensed with vide order dated 30.04.2019.

ANIL KSHETARPAL, J. (Oral)

1. Legal representatives of defendant No.1 assail the correctness of the First Appellate Court's order remitting the matter back to the trial Court for fresh decision.

2. The plaintiffs filed a suit for declaration and joint possession claiming that after the death of Sh. Saffa Singh @ Santa Singh his sons became the owner of his share. The plaintiffs' suit was dismissed by the trial Court. First appeal was filed by the plaintiffs. During the pendency of the appeal, it was noticed that proper opportunity to cross-examine PW-1 and PW-2, namely, Sh. Nirmal Singh and Sh. Lachman Singh has not been granted to the defendants. The First Appellate Court made the following observations:-

"9. Shri B.S. Maan, learned counsel for the appellant contended that the learned trial court has observed in



the judgment that Nirmal Singh and Lachhman Singh have been examined as PW-1 and PW-2 respectively but they have not come into the witness box to face cross-examination. The learned counsel for the appellants contended that the said observations of the learned trial court are against and fact as opportunities were given to the defendants to cross-examine the said witnesses and their cross-examination was treated as Nil. Therefore, he argued that the statements of Nirmal Singh and Lachhman Singh Pws be read against the defendants. On the other hand, Shri G.P. Singh, Advocate counsel for the contesting respondent has contended that the defendants were not afforded sufficient opportunity to cross-examine the witnesses of the plaintiff, therefore, they may be allowed to cross-examination of the above mentioned witnesses. The said request of the learned of the learned counsel for the contesting respondents is not opposed by Shri B.S. Maan, Advocate for the appellants at the bar. Therefore, in view of the circumstances narrated above, the present appeal is allowed. The case is remanded back to the learned trial court and the learned trial court is directed to call Nirmal Singh and Lachhman Singh witnesses again and to give opportunity to the defendants to cross-examine the said witnesses. The plaintiffs may also be allowed to lead fresh evidence. Both the parties through their counsel are directed to appear before the learned trial court on 20.10.2018 at 10.00 AM Sharp. The trial court record be remitted alongwith copy of this judgment and the appeal file be consigned to Record Room Barnala."

3. The scope and ambit of Order 41 Rule 23-A of the Code of Civil Procedure, 1908(CPC), permitting the Appellate Court to remand the case 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.”

4. In this case, the First Appellate Court has neither set aside the lower Court's judgment on merits nor concluded that the re-trial of the case is necessary. In absence thereof, it is not permissible for the First Appellate Court to remit the matter back to the lower Court.
5. Learned counsel representing the respondents submits that order has been passed with the consent of learned counsel representing the parties. This Court has carefully read the order. The request of contesting respondents for permitting them to cross-examine the witnesses was not opposed by the appellant's counsel. However, there was no consensus on remitting the matter back to the trial Court.
6. Keeping in view the aforesaid facts, the impugned order passed by the First Appellate Court only to the extent of remitting the matter back to the lower Court is set aside while restoring the first appeal to its original number.
7. The parties through their learned counsel are directed to appear before the First Appellate Court on 30.04.2025.
8. The appeal is disposed of.
9. All the pending miscellaneous applications, if any, are also disposed of.