



In the High Court of Punjab and Haryana, at Chandigarh

Second Appeal Order No. 88 of 2018 (O&M)

Date of Decision: 15.05.2025

Ram Khilari

... Appellant(s)

Versus

Smt. Krishna and Another

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Rakesh Dhiman, Advocate
for the appellant(s).

Mr. Vipin Pal Yadav and Mr. J.S.Sohal, Advocates
for respondent No.2.

Anil Kshetarpal, J.

I. Brief Facts of the Case

1. The defendant assails the correctness of the First Appellate Court's order remitting the matter back to the Trial Court for fresh decision in order to compensate the appellants in terms of money.

2. Originally, Krishna filed a suit, whereas her sister, namely Sarla became co-plaintiff. The suit was filed against their brother, namely Ram Khilari for the grant of decree of declaration that the judgment and decree suffered by their father, namely Tej Singh in favour of Ram Khilari is illegal, null and void. During the pendency of the aforesaid suit, the defendant, on 23.11.2010, suffered a statement that he will fulfill all the social obligations including making customary contribution in the marriage of the children of the sisters. On this statement, the plaintiffs withdrew the suit on the same day i.e. 23.11.2010. Subsequently, on 29.09.2011, the plaintiffs filed an

application for restoration of the suit on the ground that their brother has failed to fulfill the obligation. The suit was restored and ultimately dismissed on 21.08.2015. Krishna filed the first appeal which has been allowed by the First Appellate Court on account of the fact that the defendant has failed to honour his statement, hence, the same was required to be converted into a money decree.

II. Arguments Addressed

3. The learned counsel representing the appellant submits that the First Appellate Court has erred in remitting the matter back to the Trial Court in violation of the provisions of Order XLI Rule 23A of the Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”). He submits that the First Appellate Court has neither set aside the judgment of the Trial Court on merits nor came to a conclusion that retrial of the case is necessary.

4. Per contra, the learned counsel representing the respondent No.2 submits that on 28.02.2019, the appellant’s counsel undertook to discharge his duties as per the terms of settlement. He further submits that the appellant cannot go back from the same.

III. Analysis and Discussion

5. This Court has considered the submissions of the learned counsel representing the parties.

6. The enabling power of the Appellate Court to remit the matter back to the Trial Court is regulated by Order XLI Rule 23 and 23A CPC 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 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 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.”

7. It is evident that as per Order XLI Rule 23A CPC which shall be applicable in the present case, the Appellate Court can remit the matter back to the lower Court only after setting aside the judgment of the Trial Court on merits and after coming to a conclusion that retrial of the case is necessary. It is evident that the First Appellate Court has failed to fulfill both the requirements.

8. As far as the contention of the learned counsel representing the appellant on 28.02.2019 is concerned, the First Appellate Court will take that into consideration while disposing of the appeal.

IV. Decision

9. With the observations made above, the present appeal is allowed and the impugned order passed by the First Appellate Court is set aside. The parties, through their learned counsel, are directed to appear before the First Appellate Court on 29.05.2025.

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

(Anil Kshetarpal)
Judge

May 15, 2025
“DK”

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