

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

123

SAO-43-2024 (O&M)
Date of decision: 17.01.2025

KANTA DEVI

..Appellant

Versus

SHANTI DEVI (DECEASED) THROUGH LRS & ORS.

..Respondents

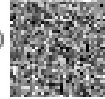
CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Vikram Singh, Advocate
Mr. Abhinav Sood, Advocate
for the appellant.

ANIL KSHETARPAL, J(Oral)

1. This second appeal has been filed against First Appellate Court's order remitting the matter back to the trial Court for fresh decision. The appellant herein is a defendant in plaintiffs suit for declaration and possession with consequential relief of permanent injunction. The trial Court dismissed the suit on the basis of non-joinder of necessary parties. Certain issues were decided in favour of the plaintiffs. The plaintiffs filed appeal, whereas, the appellant(defendant) filed cross-objections. During the pendency of the appeal, application under Order I Rule 10 of the Code of Civil Procedure, 1908 (in short 'CPC) filed by the plaintiff was allowed and daughters of defendant Smt. Neha and Smt. Aarti were permitted to be impleaded as defendant in the suit. Thus, the Court remitted the matter back to the trial Court.

2. Learned counsel appearing on behalf of the appellant contends that it was not appropriate for the First Appellate Court to remit the matter



back to the trial Court. He submits that the order passed by the First Appellate Court is in violation of Order XLI Rule 23A of the CPC.

3. This Court has considered the submissions of learned counsel for the appellant.

4. Order XLI Rule 23A of CPC reads as under:-

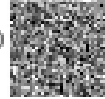
“ORDER XLI

23A. Remand in other cases.—Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.”

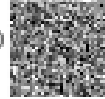
5. In SAO-57-2023, titled as “Abdul Quddoors Vs. Ajit Singh (since deceased) through legal representatives and another”, decided on 08.01.2024, this Court has examined the scope and enabling power of the Appellate Court to remand the case back to the trial Court, which reads as under:-

“3. From the reading of the order passed by the First Appellate Court, it is evident that the Court has found that in para Nos. 23 and 24 of the trial Court judgment, the onus was wrongly shifted on the defendants and the First Appellate Court allowed the application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”). In fact, the scope of Order XLI Rule 23 and 23A CPC 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.”

*4. The learned counsel representing the respondent No.1 submits that the Supreme Court, in **Shivakumar and Others v. Sharanabasappa and Others (2021) 11 SCC 277**, has held that in appropriate cases, it is permissible for the Appellate Court to remand the case back to the trial Court. In **Shivakumar’s case** (supra), the Court has held that the power of remanding the case back to the trial Court is required to be exercised sparingly and in the exceptional cases. It should not be exercised in routine. The Appellate Court can remand the case back to the trial Court either under Order XLI Rule 23 or 23A CPC. Order 23A provides that the Appellate Court can only remand the case back to the trial Court if the decree is reversed in appeal and retrial of the case is considered necessary. The First Appellate Court has all the powers to record additional evidence or seek report from the trial Court after framing an additional issue or allowing the application for additional evidence. Efforts should always be made by the Appellate Court to decide the case on merits, rather than remanding the case back to the trial Court because it entails delay and the decree, which has been passed, is set aside without going deep into the matter.”*

6. It is evident that Appellate Court has enabling power to remit the matter back to the lower Court if the decree is reversed in appeal and a re-trial is considered necessary. In this case, two daughters of the defendant were found to be necessary party. The trial Court dismissed the plaintiffs suit on their non joinder. Before the First Appellate Court, they were impleaded



as defendants. Hence, the re-trial of the case was necessary because they will have to be given opportunity to file their written statement, to cross-examine the witnesses produced by the plaintiffs and thereafter, the newly impleaded defendants shall be required to be given opportunity to lead defence evidence. Hence, re-trial of the case is necessary.

- 7. Consequently, finding no merit, the appeal is dismissed.
- 8. However, the trial Court is requested to make sincere endeavour for expeditious disposal of the suit.
- 9. All the pending miscellaneous applications, if any, are also disposed of.

January 17th, 2025

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(ANIL KSHETARPAL)
JUDGE

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