

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

Regular Second Appeal No.178 of 2015 (O & M)

Date of Decision: *December 08, 2015*

Gurdeep

..... APPELLANT

VERSUS

Satpal

..... RESPONDENT

...

CORAM: **HON'BLE MR. JUSTICE JASPAL SINGH**

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1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

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PRESENT: - Ms. Sonia G. Singh, Advocate, for the appellant.

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Jaspal Singh, J

CM Nos.488-C & 489-C of 2015

For reasons mentioned in the applications, delay in filing and refiling the appeal is condoned.

Applications stand allowed.

RSA No.178 of 2015

1. The instant appeal has been preferred by plaintiff – Gurdeep, challenging judgment and decree dated August 24, 2012 passed by the trial court as well as judgment & decree dated April 30, 2014 passed by the lower appellate court whereby the findings recorded by the trial court have been upheld and appeal filed by the plaintiff against the judgment & decree

passed by the trial court has been dismissed. Accordingly, the suit filed by plaintiff for mandatory injunction with consequential relief of permanent injunction, has been dismissed.

2. While assailing the judgment & decree rendered by the trial court and upheld by the lower appellate court, it has been argued with vehemence by learned counsel for the appellant that the same are absolutely against the settled canons of law. Moreover, an application under order XLI Rule 27 CPC was moved by the appellant – plaintiff while filing an appeal challenging the judgment & decree passed by the trial court but that application has been dismissed without assigning any cogent reason vide judgment & decree dated April 30, 2014, which has resulted into miscarriage of justice. It is well settled that the appellate court is empowered to allow additional evidence at any stage when it is required for any substantial cause. To buttress this contention, learned counsel has placed reliance upon Ashok Kumar vs. Aman Kumar & others, 2010(1) RCR (Civil) 937. Similarly, while placing reliance upon another judgment delivered in case Jeeto @ Smt. Manjeet Kaur vs. Union of India, 2007(4) RCR (Civil) 408, it has been submitted by learned counsel for the appellant that where document(s) sought to be produced by way of additional evidence is crucial to the proper adjudication and decision of the controversy between the parties, there delay does not acquire significance. In the instant case, registered Will dated January 30, 2009, which has been sought to be produced by way of additional evidence, is the basic document to decide the controversy involved in this case but learned lower appellate court has failed to appreciate the same. Thus, dismissal of the application moved by the appellant – plaintiff under Order XLI Rule 27 CPC by the appellate court is

3. It has been next argued by learned counsel for the appellant that Satbir Singh was owner in possession of the property in dispute on the basis of a family settlement arrived at amongst him as well as his brothers who bequeathed the same by way of a registered Will datd January 30, 2009 (Mark 'A'). The Will also stands proved from the testimony of a PW-3 Jyoti Rani, Registration Clerk, Nilokheri as well as PW-2 Krishna Devi (mother of appellant – plaintiff). Moreover, the case set up by the defendant is that he has brought the property in suit from Satbir Singh vide receipt, for sale consideration of ₹ 2,000/- but he has failed to prove the same. Thus, the defendant has no right, title or interest in the suit property and in such a situation, the trial court as well as lower appellate court were bound to decree the suit of appellant – plaintiff. Both the courts below have erred in non-suiting the appellant – plaintiff, firstly by way of dismissing the application under Order XLI Rule 27 CPC; and secondly, by observing that attesting witness of the Will, Mark 'A' has not been produced; and thirdly, that even if defendant has failed to prove his right in the property in suit, plaintiff cannot take the advantage of his weaknesses. Thus, impugned judgments & decrees are not sustainable in the eyes of law, deserve to be set aside and suit of the plaintiff merits decretal in toto.

4. This Court has given deep thought to the aforesaid submissions made by learned counsel for the appellant and has scrutinized the judgments delivered by both the courts below.

5. As far as dismissal of application under Order XLI Rule 27 CPC by lower appellate court is concerned, it does not call for any interference by this Court for the simple reason that after framing of issues by the trial court on December 9, 2009, appellant – plaintiff availed 16

conclude the same. As such, trial court was constrained to close his evidence by order of the Court. The appellant – plaintiff did not also avail any remedy against the said order and subsequently, before the lower appellate court, moved an application under Order XLI Rule 27 CPC seeking production of original registered Will. But, to the utter surprise, even the original registered Will dated January 30, 2009 alleged to have been executed by Satbir Singh was not annexed with the application.

6. In case N. Kamalam vs. Ayyaswami, *AIR 2001 SC 2802*, Hon'ble Supreme Court held that it is trite to observe that order XLI Rule 27 CPC, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial court has illegally refused the evidence although it ought to have been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable the appellate court to pronounce the judgment or any other substantial cause of similar nature. It was further observed that it is equally well settled that the additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case. Similar observation was made by this Court while relying upon judgment of Apex Court [N. Kamalam's case (supra)] in case Siri Kishan vs. Sanwal, *AIR 2005 P & H 42*.

7. Adverting to the facts of the case in hand, no doubt an application under Order XLI Rule 27 CPC was moved by the plaintiff before lower appellate court, the said application being devoid of merits, has been rightly dismissed as has been observed above. The original registered Will has not been annexed with the application, rather, it can be said that it has

was nothing but to delay the disposal of the appeal. Moreover, the application does not fall within the four corners of the principles enunciated above.

8. Now, coming to the execution and registration of the Will and its proof. It is well settled proposition of law that plaintiff has to stand on his own legs to establish his case independently and he could not take the benefit of weaknesses of the defence. If any authority is needed on this point, we can have the reference of pronouncement captioned as Pal Singh & others vs. Uma Mehta & others, 1997(1) PLR 80. For the sake of repetition, it is mentioned that original Will dated January 30, 2009 has not seen the light of the day. Similarly, there is not an iota of evidence adduced by the appellant – plaintiff that Satbir Singh son of Bhor Singh was the owner of property in suit or that it fell on the basis of same family settlement alleged to have been arrived at amongst the brothers. Moreover, Will propounded by the appellant – plaintiff has not been proved in accordance with the mandatory provisions contained in the Indian Evidence Act, 1872 (for short, ‘Evidence Act’). Since, appellant – plaintiff is himself deriving on the basis of Will dated January 30, 2009 (Mark ‘A’), he is obliged to prove the due execution and registration of the Will before it can be said that he is owner of the property on the basis thereof.

9. In the case in hand, appellant – plaintiff has failed to adhere the requirements to prove the due execution of the Will. Section 68 of the Evidence Act makes it mandatory that the Will shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution, whereas Section 63 of the Indian Succession Act, 1925 (for short, ‘Succession Act’) provides that it shall be attested by two or more

signatures or thumb impression. It would be appropriate to reproduce the aforesaid provisions for ready reference:-

“Section 68 of the Evidence Act:

“Proof of execution of document required by law to be attested:- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.”

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“Section 63 of the Indian Succession Act:

“Execution of unprivileged wills: Every testator, not being a soldier employed in an expedition or engaged in actual warfare (or an airman so employed or engaged) or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) the signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) the will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

10. Adverting to the facts of the case, none of the attesting witnesses has been examined by the appellant – plaintiff for the reasons best known to his chest. He has only examined PW-3 Jyoti Rani, Registration Clerk, of the office of Sub Registrar but she cannot be equated with the

attesting witnesses so as to satisfy the requirement of Section 68 of the Evidence Act. In case Nachhattar Singh & another vs. Jangir Singh & others, 2005(1) RCR (Civil) 776, it has been observed that mere examination of the clerk of the office of Sub – Registrar and scribe of the Will is of no consequence and atleast one of the attesting witnesses is to be examined to prove the execution of Will. Moreover, in the case in hand, even scribe of the Will has also not been examined by the appellant – plaintiff. Similarly, In case of Jamuna Devi vs. Sarbati Devi (died) through LRs, 2004(3) RCR (Civil) 497, it was observed that the person who had put his signatures on the document to certify that he is the scribe or identifier or the registering officer, he cannot be treated as an attesting witness and the requirement of Section 63 of the Succession Act and Section 68 of the Evidence Act is not fulfilled. Similarly, we can draw assistance from the judgments captioned as Charan Singh & another vs. Amar Singh & others, 2012(1) RCR (Civil) 311 and Rani Purnima Debi & another vs. Kumar Khagendra Narayan Dev & another, AIR 1962 Supreme Court 567, in which the mode of proof of the Will has been elaborately discussed.

11. In the facts and circumstances narrated above, it can be safely concluded that the appellant – plaintiff has miserably failed to establish the execution of Will dated January 30, 2009 (Mark ‘A’) and both the courts below have rightly observed in this regard. The findings recorded by the courts below do not call for any interference by this Court so far as non-suiting of Will dated January 30, 2009 is concerned. During the course of arguments, learned counsel for the appellant has failed to point out any question of law, much less, substantial question.

12. In the light of what has been discussed above, there is no infirmity, illegality and impropriety in the findings returned by the courts

below. Consequently, impugned judgments & decrees passed by both the courts are upheld. Accordingly, the appeal is dismissed. However, the parties are left to bear their own costs.

December 08, 2015
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(Jaspal Singh)
Judge