

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT
CHANDIGARH

C.R. No.1365 of 2016 (O&M)

Date of Decision.23.02.2016

Manjinder Singh

.....Petitioner

Vs.

Jatinder Singh

.....Respondent

Present: Mr. Narinder Kumar Vadehra, Advocate
for the petitioner.

CORAM:HON'BLE MR. JUSTICE K. KANNAN

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

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K. KANNAN J. (ORAL)

1. The revision petition is against the order passed by the Appellate Court. While disposing of an application under Order 41 Rule 27 CPC, it has directed for the additional evidence to be given and since it was of the view that there had been a wrong issue framed by the trial Court, it has directed the parties for staying focussed to what was relevant, directed evidence to be taken and submit the report afresh to the Appellate Court.

2. The plaintiff is aggrieved against this order on a plea that the parties knew what they were contending for. Although the Court framed an issue of whether the plaintiff was correct in contending that the Will was forged instead of framing the correct issue of whether the Will as propounded by the defendant was genuine, the parties knew that the defendant alone had to prove the genuineness of the Will. The defendant failed to avail to himself the opportunity of producing

evidence in that he had stated even in the written statement that Section 71 of the Evidence Act made possible proof of Will if witnesses could not be produced and he was literally giving out as explanation as to why he could not bring any witnesses. If the defendant did not tender any evidence regarding the genuineness of the Will, he cannot be favoured with yet another opportunity to collect that evidence through the trial Court by directions from the Appellate Court. The other objection raised by the counsel is that the Court cannot direct additional issue to be framed and evidence to be collected without actually setting aside the finding already rendered by the Court below holding that the Will propounded by the defendant was not true and the plaintiff had established that it was not true. The finding called for by the Appellate Court without setting aside the decision already made is improper. The third objection taken by the counsel is that the Court could not have disposed of application under Order 41 Rule 27 CPC by treating it independently of the appeal itself. Such a procedure is incorrect.

3. I will have no difficulty in acceding to the propositions made by the counsel. It will be wrong procedure for the Appellate Court to direct arguments to be made from the counsel on the application for reception of additional evidence without actually taking up the appeal itself. In this case, the situation is however different. There is nothing for me to see from the file that the Court was hearing the application independently of the appeal itself. There had been an application for additional evidence under Order 41 Rule 27 CPC which could have been heard under normal circumstances only along with the appeal. The appeal was with reference to a decree that had been granted to the

plaintiff making assertion to a share to the property that belonged to the estate of the father. Admittedly, the defendant-appellant was the other half sharer but for the Will. However, he was contending for a position that the father had executed a Will in his favour bequeathing whole of the property to him and consequently, the plaintiff was not entitled to any share in the property. The defendant in his written statement had also set out the fact that there had been proceedings before the revenue officials for mutation of entries after the death of the father and the Will had been referred to even before the revenue authorities. It has also been contended that there is no requirement of having to examine an attester by making a reference to Section 71 of the Indian Evidence Act that sets out an exception when procedure under Section 68 of the Indian Evidence Act cannot be followed.

4. The Court that hears the appeal along with the application under Order 41 Rule 27 CPC could have the following options. One, it can dismiss the application for additional evidence if it did not find any of the justifications under Order 41 Rule 27 CPC for reception of additional evidence and proceed to dispose of the appeal. Two, if the appeal itself is not disposed of and the Court was also finding a justification for reception of additional evidence, it can take the additional evidence itself and dispose of the appeal or if it is of the view that the additional evidence would require to be collected by taking evidence through a subordinate court, it will have an option to do so. The mode of taking additional evidence is set out under Order 41 Rule 28 CPC which is as under:-

“28.Mode of taking additional evidence. Wherever

additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.”

5. This Section will make it clear that the Appellate Court may itself take such evidence or it can direct the Court from whose decree, the appeal is preferred to take such evidence and send it to the Appellate Court. This is another way of saying that the Appellate Court while examining the appeal along with the application may instead of disposing of the appeal may take the additional evidence by directing the subordinate court to collect such evidence and send it to the appellate court. This procedure mentioned under Order 41 Rule 28 CPC makes implicit that whenever the Appellate Court is calling for evidence from the subordinate court, it need not dispose of the appeal. It is bound to keep the appeal pending till such time as the report is brought to itself. That is precisely what has happened in this case.

7. The argument that it was the defendant who was pressing for issue to be framed against the plaintiff is neither here nor there. It is primarily Court's duty to frame issue correctly on the basis of pleadings to help parties to stay focussed on what is relevant to be stated at the evidence and to inform them about respective onus of proof that is placed on the respective parties. If the plaintiff had knowledge about the fact that the defendant was setting up a Will through the pleadings which had happened before the revenue authorities and making a plea that the Will as propounded by the defendant was forged, the Court could not have framed the issue of whether the Will was forged and placed burden of proof on the plaintiff. In the light of Section 68 of the

Indian Evidence Act requiring the proof to be tendered at all times by the person that propounds it, the Court is bound to have framed the issue in the manner that the Appellate Court has done, namely, whether the Will propounded by the defendant was true and cast the burden on the defendant. The defendant's plea that there was an exception under Section 68 Indian Evidence Act by resort to Section 71 ought not to be taken as a confession by the defendant that he will not be required to produce any attestor. If the Court had framed the correct issue placing the burden of proof on the defendant and the defendant was still not producing the evidence then he could not have been granted an additional opportunity at the Appellate Court. If the Court had failed to frame the correct issue, I cannot assume that the parties knew what they were litigating for and that the defendant waived his right to prove the Will by producing evidence.

8. The counsel appearing on behalf of the petitioner relies on a judgment of the Supreme Court in *Shri Gangai Vinyagar Temple and others Vs. Meenakshi Ammal and others (2015) 2 SCC (Civil) 350* that dealt with, inter alia, framing of issues and the obligation and duty to frame the issue to reside solely on the Court. The Court, however, was stating at the same time that where the parties were aware of their rival cases, the failure to formulate the issue correctly will fade into insignificance. The counsel would read to me this reference for underscoring the defendant's own unwillingness to produce evidence through an attestor and his plea made referring to Section 71 of the Indian Evidence Act. This, according to him, literally gave the respective stand of the parties viz; of the plaintiff denying that there was a Will and

the defendant saying that there is no requirement for proving the Will by calling any attester. Unlike any other issue which the parties may or may not understand, a Will that has to be proved would require a special focus by framing an appropriate issue. It cannot be left to any chance to keep the court guessing whether the parties understood what the respective case was, even when there was a clear faulty drafting of issue. If in this case, the lower Appellate Court was finding that it cannot deliver a judgment to prejudice any one party, when there had been a serious miscarriage at the trial by the Court's failure to frame an appropriate issue and it framed the issue and allowed for evidence to be given and provided for opportunities to the parties to give such evidence and proof given to the Court to record the proceedings and sign the same, I would take it as an exercise of discretion which the lower Appellate Court was making by virtue of clear mandate of Order 41 Rule 28 CPC.

9. The Appellate Court has done what was appropriate in the situation and I do not find that the discretion has been wrongly exercised for interference in revision petition. All is not lost to the plaintiff-petitioner. The decree could not have been set aside by the Appellate Court even without recording a finding on whether the defendant has literally not chosen to give evidence with reference to proof of the Will or not till the proper issue was framed. The Court will be doing gross injustice if the doors of the Court are closed for a party when the trial Court had committed an egregious error in assuming that every issue will have to be placed only on the plaintiff because the plaintiff's assertions could be on even a negative fact.

10. The interventions under Article 227 will be restricted only to situations where there is a serious prejudice caused to the party or when there is an illegality in the order. I will find no illegality or prejudice to the plaintiff, for he can always ride on the inability or otherwise of the defendant to prove what he is required to prove. If he cannot bring any evidence or attester to support the Will or any of the witnesses that are examined are exposed at the time of cross-examination to be speaking untruth and that the Will propounded by the defendant could not be true, the plaintiff will have an appropriate adjudication affirming the decision already taken by the Appellate Court. That is all that he can bargain for.

11. There is no error for interference under the circumstances. The revision petition is dismissed.

(K. KANNAN)
JUDGE

February 23, 2016
Pankaj*