

In the High Court of Punjab and Haryana at Chandigarh

Civil Revision No.6987 of 2014

Date of Decision:18.2.2016

Sanjay and another

---Petitioners

vs.

Balbir Singh and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Ms. H.K.Dhillon, Advocate
for the petitioners

Mr. Tarunveer Vashisht, Advocate
for respondent No. 1

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

Rekha Mittal, J.

The present petition lays challenge to order dated 18.9.2014 passed by the Civil Judge (Junior Division), Gohana, Dismissing application of the petitioners for recalling witnesses namely Tara Chand son of Mange Ram, an attesting witness of the Will dated 5.10.2007, Yash Malhotra (scribe of the Will) and Pale Ram, guardian of minors

(petitioners).

Counsel for the petitioners contends that Balbir Singh, respondent No. 1 has filed a suit for declaration claiming ownership to the suit property on the basis of natural succession to the estate left behind by Smt. Chameli Devi, grand mother of the petitioners (defendants). The petitioners, who have been sued through their father and natural guardian Sh. Pale Ram contested claim of the plaintiff on the plea that Smt. Chameli Devi executed a registered Will dated 5.10.2007 in their favour and Smt. Chameli Devi passed away on 3.2.2009. The mutation on the basis of registered Will was sanctioned in favour of the petitioners despite contest by respondent No.1/plaintiff.

The petitioners examined Tara Chand son of Mange Ram, an attesting witness of the Will, Rajiv Malhotra (wrongly typed as Yash Malhotra in the application) scribe of the Will. It is argued that examination and cross examination of Rajiv Malhotra was concluded and examination in chief of Tara Chand was recorded prior to the petitioners' were allowed to prove registered Will by way of secondary evidence vide order dated 3.12.2013. It is argued that the original Will was not available at the time of examination in chief of Tara Chand and evidence of Rajiv Malhotra and permission to prove the Will by way of secondary evidence has been allowed later, a serious prejudice would be caused to the petitioners in case they are not allowed to recall Tara Chand and Rajiv Malhotra for proving the Will in question.

Another submission made by counsel is that Pale Ram was examined in Chief but counsel for the petitioners closed their evidence

without bothering that his cross examination has not been conducted by the contesting party. It is prayed that keeping in view the principle of natural justice coupled with the fact that interest of minors is involved in the litigation, the impugned order may be set aside and the petitioners may be permitted to recall the aforesaid witnesses.

Counsel for respondent No. 1 has supported the impugned order with the submissions that the present application for recalling the witnesses is not covered within the purview of Order XVIII Rule 17 of the Code of Civil Procedure (for short "CPC"), therefore, the petitioners cannot be allowed to invoke 151 CPC for exercise of inherent jurisdiction in the circumstances. It is argued with vehemence that the present application is nothing but an attempt to fill up the gaps and lacuna left in the case. The learned trial court has rightly held that Pale Ram did not tender himself in the witness box for the purpose of cross examination by counsel opposite. The application makes reference to Yash Malhotra, scribe of the Will but one Rajiv Malhotra stated to be scribe of the Will has already been examined.

In reply, counsel for the petitioners would urge that in the application, name of the scribe has been wrongly typed as Yash Malhotra instead of Rajiv Mahotra, already examined in the case and sought to be recalled.

I have heard counsel for the parties and perused the records.

It is an admitted position of the case that Rajiv Malhotra was examined and cross examined whereas Tara Chand was examined in chief before application of the petitioners to prove Will dated 5.10.2007 by way

of secondary evidence was allowed. It appears that counsel representing the petitioners before the trial court did not bother to wait for examination of Tara Chand and Rajiv Malhotra until the application for secondary evidence is disposed of by the trial court. It further appears that failure of counsel to give proper advise has led to the mess created in the case.

As per settled position in law, no party should be allowed to suffer for want of proper legal advise. In the case at hand, interest of two minors is involved who are being represented by their father. The petitioners, from the very inception, has set up a registered Will dated 5.10.2007 in their favour. The mutation in regard to inheritance of Smt. Chameli Devi was contested and decided in favour of the petitioners on the basis of registered Will. In case the petitioners are not permitted to examine Tara Chand, an attesting witness of the Will and Rajiv Malhotra, scribe of the Will after permission was granted by the Court to prove the Will by way of secondary evidence, the petitioners would be denied their right to prove the Will in accordance with the provisions of Section 68 of the Indian Evidence Act and the Will may be rejected for want of proof. Rules of procedure are handmaid of administration of justice, procedural delays and technicalities cannot be allowed to stand in the way of substantial justice. That being so, I am of the considered opinion that even though the application filed by the petitioners may not strictly fall within the purview of Order XVIII Rule 17 CPC but in the given circumstances, the Court should have exercised its discretion in favour of the petitioners permitting them to recall Tara Chand and Rajiv Malhotra for proving the Will in dispute.

Pale Ram, father of the petitioners tendered into evidence his affidavit by way of examination in chief. Counsel for the petitioners closed evidence of the petitioners/defendants without ensuring that examination of the witnesses is complete in all respects. Pale Ram may be remiss in his obligation to appear on each and every date of hearing for cross examination but that fact should not be allowed to stand as an obstacle to get his cross examination completed so that his testimony on behalf of the minors can be read into evidence.

For the reasons aforesaid, the petition is allowed, the impugned order is set aside. Tara Chand and Rajiv Malhotra are allowed to be recalled for their further examination whereas Pale Ram is allowed to tender himself in the witness box for the purpose of cross examination. The petitioners shall ensure presence of Tara Chand, Rajiv Malhotra and Pale Ram on two effective dates to be fixed by the trial court for examination/ cross examination of the witnesses, in the aforesaid terms.

(Rekha Mittal)
Judge

18.2.2016
paramjit