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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR-8109-2015

Date of Decision : January 21st, 2016

Bira alias Biru [Deceased] through LRs

.... Petitioners

Versus

Chander and others

.... Respondents

CORAM : HON'BLE MR. JUSTICE SHEKHER DHAWAN.

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?

Present Mr. Anurag Jain, Advocate,
for the petitioners.

Mr. Madan Pal, Advocate,
for respondents No.1 and 2.

SHEKHER DHAWAN, J.

Present petition under Article 227 of the Constitution of India for setting aside order dated 9.10.2015 [Annexure P/6] passed by Additional District Judge, Jind whereby, application filed by the petitioners under Order XXXXI Rule 27 read with Section 151 CPC for leading additional evidence was dismissed.

2. Relevant facts for the purpose of decision of the present petition; that defendants filed an application under Order XXXXI Rule 27 read with Section 151 CPC for leading additional evidence during the pendency of the appeal before learned Additional District Judge, Jind. The plaintiffs filed a suit for declaration claiming themselves to be daughters of Moji Ram son

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of Lakhia, who died prior to 1960. However, the date of death of said Moji Ram was not mentioned. In fact, said Moji Ram had died prior to the commencement of Hindu Succession Act, 1956 [for short, "the Act"] and if a person had died leaving daughters alone prior to coming into operation of the Act, then only collaterals/brothers were entitled to succession and not his daughters. Later on, one of the applicants visited Ganga Mandir Thakur Dwara, Garh Mukteshwa, District Hapur where he met his *Purohit*, Lokesh Kumar Sharma who used to maintain the birth and death records of the family and at that point, he came to know from the said *Purohit* that Moji Ram had died on 13.12.1954 and his wife also died on 1.11.1954. Lokesh Kumar Sharma had sworn an affidavit in that respect and also handed over photocopy of his *bahi* entry which is admissible evidence and for that purpose, application for additional evidence was filed before the Court below.

3. The said application was contested on the ground that the same was not maintainable as the same was filed at a belated stage. More so, the applicants were fully aware about their case right from the beginning. Plea was also taken that at the time of death of their father, the plaintiffs were minors and as such, they were having no knowledge about the death of their father as they were six years and 2 years old respectively and mutation Nos. 403 and 404 were attested on 25.6.1961. More so, the additional evidence which the applicants wanted to lead was not relevant and allowing the same shall give rise to *de novo* trial and the same is not permissible as per law and prayed that the application be dismissed.

4. On these facts, learned Additional District Judge, Jind dismissed the application for additional evidence vide order dated 9.10.2014 and the

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present revision petition before this Court.

5. Learned counsel for the petitioners submitted that such an application for additional evidence should have been decided alongwith the decision of the main appeal itself, whereas learned Additional District Judge decided the application for additional evidence alone without deciding the main appeal which is not permissible as per law. On this point, reliance has been placed on the judgment from a Coordinate Bench of this Court **Smt. Surjit Kaur and another Vs. Bhupinder Singh Waraich, 2009 (4) RCR [Civil] 563**, wherein such a view as taken by this Court.

6. Learned counsel for the petitioners also submitted that additional evidence should be allowed if the same is for the just decision of the case. On this point, reliance was placed upon judgment from a Co-ordinate Bench of this Court in **Gurdial Singh and others Vs. Mam Chand and others, 2011(1) RCR [Civil] 690**, wherein such a view as taken.

7. Learned counsel for the petitioners also submitted that in the case in hand, prayer was made to lead additional evidence so as to prove the death of Moji Ram and for that purpose, record relating to birth and death was to be produced by examining the *Purohit*. The application was filed from the date of knowledge, but the Court below declined the said prayer and as such the present petition be accepted.

8. Learned counsel for the respondents submitted that by way of present application, the applicants-defendants wanted to change the nature of litigation altogether which is not permissible. The date of death of Moji Ram was well within the knowledge of the applicants at the time of filing of the suit as well. Such a plea was in their knowledge and should have been

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taken at the initial stage. However, now the applicants just wanted to fabricate the evidence and change the nature of the litigation altogether which is not permissible under the law. As such, the Court below has passed the order which does not call for any interference by this Court and the present petition be dismissed.

9. Having considered the submissions made by learned counsel for the parties, this Court is of the considered view that the application for additional evidence was filed before the first Appellate Court. The plea taken in the application for leading additional evidence is of such a nature which was well within the knowledge of the applicants on the date of filing of written statement and continuously thereafter. Such a plea should have been taken at the initial stage. After decision of the civil suit, merely taking such a plea is legally not permissible. Such a view was taken by Hon`ble Supreme Court of India in **Malayalam Plantations Ltd. Vs. State of Kerala and another** 2011 AIR [SC] 559. Hon`ble Apex Court also observed that while dealing with application under Order 41 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 and 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. The Court is also to see whether adducing of additional evidence is in the interest of justice. It is not open to any party, at the stage of appeal, to make fresh allegation and call upon the other party to admit or deny the same. Any such attempt is contrary to

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the requirements of Order 41 Rule 27 CPC. Additional evidence cannot be permitted at the Appellate stage in order to enable other party to remove certain lacunae present in that case.

10. Applying the above mentioned three principles laid down by Hon`ble Supreme Court and considering the facts of the case in hand, this Court is of the considered view that learned Additional District Judge, Jind has rightly declined the application because reply to all the above mentioned three principles is in the negative in the present case. Firstly, the application for additional evidence was never filed before the trial Court in the case in hand; secondly the evidence which applicants wanted to adduce by way of additional evidence was available with the party with exercise of due diligence and thirdly, there is no finding of the Court below that leading of additional evidence was necessary for the just decision of the case. Law on the point is settled that a party cannot be allowed to make fresh allegations and *de novo* trial cannot be initiated.

11. Identical matter was also before the Hon`ble Apex Court in **Lekhraj Bansal Vs. State of Rajasthan and another, 2014 (104) ALR 756**, wherein Hon`ble Supreme Court observed that if additional evidence was not sought before the trial Court and same was not refused by trial Court and the said evidence was within the knowledge of the applicant after exercise of due diligence, such an evidence should be led at the initial stage and not by way of additional evidence and not at the appellate stage.

12. As regard to the stage of decision of application for additional evidence by appellate Court, it is not mandatory that such application should be decided first and appeal thereafter. This aspect is to be decided

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by the Court concerned keeping in view the nature of litigation and additional evidence to be adduced by the parties. Merely decision of application for additional evidence before deciding the main appeal is not an illegality.

13. In view of the above, no illegality can be found in the order dated 9.10.2015 passed by Additional District Judge, Jind whereby application for additional evidence was dismissed. There are no grounds for setting aside the impugned order by invoking the jurisdiction of the Court and the present revision petition stands dismissed.

(SHEKHER DHAWAN)
JUDGE

January 21st, 2016
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