

229

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-3951-2012 (O&M)
Date of decision : 09.08.2016

Om Parkash and others

... Appellants

Versus

Gopal Krishan and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Arun Jain, Senior Advocate with
Mr. Khushagra Mahajan, Advocate
for the appellants.

Mr. Arvind Bansal, Advocate
for respondent Nos.1 and 3.

Mr. Surinder Gandhi, Advocate
for respondent No.4.

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?

AMIT RAWAL, J. (ORAL)

The appellants-plaintiffs are aggrieved of the concurrent findings of fact, whereby the suit seeking declaration in setting aside of the Will dated 31.08.2001 of Baldev singh has been dismissed.

Mr. Arun Jain, learned Senior Counsel assisted by Mr. Khushagra Mahana, learned counsel appearing on behalf of the appellants-plaintiffs submits that the claim in the suit was that the plaintiffs and the defendants are co-parceners of the agricultural land and as well as the residential house. Baldev Singh according to the plaintiffs died intestate on

27.01.2005. The alleged Will was propounded by the defendants and the reliance on behalf of the defendants was basically based upon the forged and fabricated Will. In support of the case, many documents have been proved on record including the judgment and decree dated 23.08.2010 (Ex.P-28) and (Ex.P-29), but there is no reference of the same by the trial Court, much less, by the lower Appellate Court. Even along with appeal, an application under Order 41 Rule 27 CPC was moved seeking indulgence of the lower Appellate Court to place on record the judgment and decree by way of additional evidence for the reason, once the trial Court had escaped to notice, the lower Appellate Court may not also to follow the suit. He has drawn the attention of this Court to the interim order dated 23.12.2010 of the lower Appellate Court whereby the factum of the moving the application under Order 41 Rule 27 CPC is noticed. He further submits that the appeal has been decided without deciding the application under Order 41 Rule 27 CPC. In support of his contentions, he relies upon the judgment of the Hon'ble Supreme Court in **"Malayalam Plantations Ltd. V/s State of Kerala and another" 2011 AIR (SC) 559.**

In addition to the aforementioned arguments, he further submits that even the trial Court abdicated in not referring to the aforementioned documents. Having not pondered upon the evidence, the findings could have been in favour of his clients, thus, urges this Court for setting aside of the judgment and decree of the lower Appellate Court and prays for remanding back the matter to the lower Appellate Court to decide the appeal along with the application afresh.

Mr. Arvind Bansal, Advocate and Mr. Surinder Gandhi learned

counsel appearing on behalf of the respondents No.1 & 3 and 4, respectively submits that the moving of the application under Order 41 Rule 27 CPC was nothing, but adoption of delaying tactics in keeping the matter pending, for, the aforementioned judgment and decree had already been exhibited as Ex.P-28 and Ex.P-29. The suit was dismissed and therefore, there was no necessity of moving the application for additional evidence. Learned counsel for the respondent(s)-defendant(s) do not deny the factum of moving of the application, but submits that once the document has been exhibited, there is no need to place it same in the manner and mode as has been adopted.

I have heard the learned counsel for the parties and appraised the paper book.

The Hon'ble Supreme Court in **“Malayalam Plantations Ltd.'s case** (supra) has clearly laid down the law that when an application of such nature is filed along with the appeal, the lower Appellate Court was enjoined upon the obligation to decide the same. In the absence of the same, the matter is required to be remitted back. Be that as it may, even on going through the judgment and decree, there is no reference to Ex.P-28 and Ex.P-29. It itself is a ground for remanding back the matter as there is a gross misreading and mis-appreciation of the documentary evidence which itself entails into a perversity. The lower Appellate Court being the last Court of fact and law is enjoined upon the obligation to refer to all the documents, having failed to do so, I am of the view that it is a fit case where the matter is required to remand back to the lower Appellate Court to decide the controversy afresh.

For the foregoing reasons, the judgment and decree of the lower Appellate Court is hereby set aside and the matter is remitted back to the lower Appellate Court to decide the appeal afresh along with the application indicated above. It is expected that the lower Appellate Court shall decide the appeal and application as expeditiously as possible preferably within a period of six months from the receipt of the certified copy of this order.

Learned counsel for the parties and as well as the parties are directed to appear before the lower Appellate Court on 02.09.2016.

Liberty is granted to the appellants-plaintiffs to move any other application which has been sought indulgence of this Court along with the appeal.

With the aforesaid observations, the appeal stands disposed of.

09.08.2016
yogesh

(AMIT RAWAL)
JUDGE

✓

Whether speaking/reasoned

Yes/ No

Whether Reportable

Yes/ No