

RSA No.575 of 2014 (O&M)

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.575 of 2014 (O&M)

Date of Decision: March 02, 2016

Krishan Kumar

...Appellant

Versus

Roshan Lal & others

...Respondents

CORAM: HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Mr. Ashish Aggarwal, Senior Advocate with
Mr. Vijay S. Kajla, Advocate
for the appellant.

Mr. K.S. Kang, Advocate
for the caveator-respondents.

AUGUSTINE GEORGE MASIH, J. (Oral):

Challenge in this appeal is to the judgment and decree passed by the Civil Judge (Junior Division), Phul, dated 04.10.2011, whereby, the suit for declaration to the effect that the appellant-plaintiff is owner to the extent of one fourth share of the shop and Ahata, alongwith the covered door measuring 103 feet X 32 feet, as detailed in the head note of the suit, situated in the Abadi Court Bazar Rampura Phul, Tehsil Phul, District Bathinda, as shown in the site plan and suit for possession of the shop and Ahata, by way of partition of the suit land, has been dismissed, appeal against which preferred by the appellant-plaintiff stands dismissed by the Additional

District Judge (Fast Track Court), Bathinda, on 30.10.2013. Challenge has also been posed in the present appeal to the order dated 30.10.2013 passed by the Additional District Judge (Fast Track Court), Bathinda, whereby, application under Order 41 Rule 27 of the Civil Procedure Code (hereinafter referred to as 'the CPC') read with Section 151 of the CPC, filed by the applicant-appellant seeking permission to adduce additional evidence has been dismissed.

2. Notice of motion.

3. Mr. K.S. Kang, Advocate, accepts notice on behalf of the respondents. Caveat stands discharged.

4. It is the contention of the learned Senior Counsel for the appellant that the property in dispute was purchased by Budh Ram with half share, Ram Nath with one fourth share and Sukhdevi with one fourth share vide sale deed Wasika No.907 dated 18.03.1963 and they came in possession of the said property. Budh Ram died and his property was inherited by respondents-defendants No.1, 2 and 7. On death of Ram Nath, respondent-defendant No.3 Parshotam Lal inherited the property. Sukhdevi, wife of Ram Nath, was the grand-mother of the appellant-plaintiff and during her lifetime, she bequeathed her entire estate in his favour vide registered Will Wasika No.20 dated 23.05.1977, registered with the Sub-Registrar, Fazilka. On the death of Sukhdevi, as per the Will, the appellant-plaintiff has become exclusive owner of one fourth

share of Sukhdevi in the suit property. On this basis, the appellant-plaintiff claim himself to be the co-sharer alongwith respondents-defendants No.1 to 3 and 7 in the suit property.

5. Respondent-defendants Roshan Lal and Amrit Lal, both sons of Budh Ram as also Parshotam Lal, adopted son of Ram Nath (defendants 1 to 3) sold some prime portion of the suit property without getting it partitioned. This was done with a *mala fide* intention to defeat the interest of the plaintiff in the prime portion of the suit property. He, thus, contends that the appellant-plaintiff being a co-sharer in the property on the basis of the registered Will dated 23.05.1977 executed by Sukhdevi, is entitled to the claim as made in the suit. He contends that the due execution of the registered Will has been proved as the son of the scribe and attesting witness of the Will, Shri Prem Nath Bansal has been examined as PW-1, who has identified the signatures of his father Des Raj. The mandate of Section 68 of the Indian Evidence Act, 1872, (hereinafter referred to as 'Evidence Act') stood complied with. His further contention is that the Lower Appellate Court has wrongly proceeded to dismiss the application preferred by the appellant-plaintiff for leading additional evidence, whereby, he had sought to prove the death certificates of the attesting witnesses and scribe of the registered Will dated 23.05.1977 alongwith the supplementary statement of the appellant-plaintiff as he had under a *bona fide* belief that a person who had

himself seen the due execution of the Will and has also identified the signatures of the attesting witnesses and of the executant Smt. Sukhdevi wife of Ram Nath, the requirement of the statute stood fulfilled. In any case, the Lower Appellate Court should have allowed the said application as this would go to the very root and basis of the case and to do justice, the said application should have been allowed especially when the Will was a registered Will. He, thus, contends that the judgments and decree passed by the Courts below cannot sustain and suit deserves to be decreed.

6. On the other hand, learned counsel for the respondents submits that the appellant-plaintiff was all through being assisted before the trial Court through a senior counsel not only in an application under Order 39 Rule 1 and 2 of the CPC which was dismissed by the trial Court, but in an appeal which was preferred before the District Judge, Bathinda, which was also dismissed and thereafter, a revision petition which was preferred in the High Court and a senior counsel had appeared on his behalf. It cannot be, therefore, said that he was not properly guided or that he did not have the knowledge as to how the Will was to be proved. Various opportunities were availed of by the appellant-plaintiff before the trial Court for leading evidence which ultimately was closed at his own statement, therefore, it cannot be said that despite due diligence, he could not lead evidence as is being sought to be so done and

projected at the stage of the first appeal. He, therefore, prays that the application for leading additional evidence has rightly been dismissed by the Lower Appellate Court. He contends that the suit of the appellant-plaintiff hinges upon the Will dated 23.05.1977, which the appellant-plaintiff has not been able to prove to have been duly executed as per the provision of Section 68 of the Evidence Act and the Courts below have rightly held that the appellant-plaintiff has not been able to prove the Will and thus, the suit has been correctly dismissed and the present appeal does not call for any interference. Prayer has, thus, been made for dismissal of the same.

7. I have considered the submissions made by the learned counsel for the parties and with their able assistance have gone through the impugned judgments as well as the order dated 30.10.2013 passed by the Lower Appellate Court, dismissing the application under Order 41 Rule 27 of the CPC.

8. Firstly, dealing with the application under Order 41 Rule 27 of the CPC, which was preferred by the appellant-plaintiff before the Lower Appellate Court, suffice it to say that the reasons as assigned by the Court below cannot be faulted with as it is by now settled that lapses and lacunae in the pleadings and the loopholes in the evidence led, cannot be permitted to be filled-up by the party at a later stage to the prejudice of the other party to the suit. The plea of the appellant-plaintiff that he could not produce the evidence with

regard to the death of the attesting witnesses and the scribe of the Will to take the benefit of Section 69 of the Evidence Act, cannot be accepted. Despite due diligence, he could not lead evidence as was sought to be led in the application. It is apparent that he had various opportunities during the trial to make good the discrepancies, if any, by leading cogent and required evidence as mandated under the statute. More than enough opportunities were availed of by the appellant-plaintiff in the trial Court but he failed to lead sufficient evidence to prove the Will in dispute. He had the assistance of senior lawyers at different levels i.e. the District Courts and even the High Court as he had preferred an appeal against the order passed by the trial Court dismissing his application under Order 39 Rule 1 and 2 of the CPC. The appellant had full knowledge about the addressees of the witnesses and other facts and he was also aware of the fact that the witnesses had died but still, he did not take appropriate steps to prove the due execution of the Will as mandated under the statute. If he was unable to prove the Will as required under Section 68 of the Evidence Act, the assistance of Section 69 of the Evidence Act could have been taken which the applicant-appellant failed to do. It would not be out of way to mention here that the evidence before the trial Court was closed by the appellant himself and it is not the case where the evidence has been closed by the order of the Court, therefore, it is apparent that the appellant had been proceeding with

the case in a most casual and routine manner and therefore, cannot be allowed to take the benefit of his own wrongs at a later stage.

9. As regards the Will dated 23.05.1977, admittedly, none of the attesting witnesses or even the scribe has been produced to prove the Will as mandated under Section 68 of the Evidence Act. Necessary steps required for taking the benefit of Section 69 of the Evidence Act have also not been taken by the appellant. The assertion of the counsel for the appellant that Prem Nath Bansal (PW-1) has categorically stated that the Will in question was executed in his presence and that the attesting witnesses Hari Chand Gupta, M.C., Kashmiri Lal Tank, M.C. as well as his father Des Raj were present and signed when Sukhdevi had put her thumb impression on the same in their presence prior to their signing the Will and he has also identified the signatures of his father Des Raj on the Will Ex.P-1 and therefore, the said evidence should have been taken into consideration by the Courts below as the Will has been duly proved but this contention cannot be accepted in the light of the fact that admittedly, Prem Nath Bansal (PW-1) has not put his signatures on the Will as an attester. The findings as recorded by the Courts below that the Will dated 23.05.1977 (Ex.P-1) has not been proved as per law and, thus, cannot be taken into consideration for the purpose of consideration of the claim of the appellant-plaintiff, cannot be faulted with.

RSA No.575 of 2014 (O&M)

10 No other point has been raised or argued by the learned counsel for the parties.

11. A perusal of the impugned judgments would show that the concurrent findings returned by both the Courts below are based on proper appreciation of the pleadings and the evidence brought on record which do not call for any interference by this Court as there is no misreading or non-consideration of the material on record nor is there any perversity or illegality in the same.

12. No substantial question of law arises in the present appeal which requires consideration of this Court. Therefore, finding no merit in the appeal, the same stands dismissed.

CM No.1362-C of 2014

In view of the order passed in the main appeal, no order is required to be passed in the present application as the same has been rendered infructuous.

Disposed of as such.

**(AUGUSTINE GEORGE MASIH)
JUDGE**

March 02, 2016

Harish