

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

CR No.185 of 2017

Date of decision: 03.02.2017

Rakesh Kumar

..Petitioner

Versus

Shubham and others

..Respondents

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present: Mr. Parminder Singh, Advocate
for the petitioner.

Ms. Sandeepa Mehta, Advocate
for respondent No.1.

Daya Chaudhary, J.

The present revision petition has been filed under Article 227 of the Constitution of India for setting aside order dated 02.01.2017 (Annexure P-4) passed by Civil Judge (Junior Division), Karnal, whereby, the application filed under Order 6 Rule 17 CPC for amendment of cause of action and prayer clause of the suit to avoid multiplicity of the litigation has been dismissed.

Briefly, the facts of the case as made out in the present revision petition are that the petitioner-plaintiff filed a suit for declaration stating therein that defendant No.2 is his mother and the property was inherited by natural legal heirs after the death of their father. Other legal heirs suffered decree dated 15.04.1990 of their share and defendant No.2 became owner in possession of her share as well as the share of other co-sharers. As per case of the petitioner, defendant No.2 (mother) executed a registered Will dated

10.02.2011 in favour of the petitioner-plaintiff and he became owner of the movable and immovable properties. Thereafter, defendant No.1 took defendant No.2 in his house on some excuse and got suffered collusive decree dated 19.05.2012 in his favour. Defendant No.1 is co-sharer of the property in dispute being brother of the petitioner. The petitioner-plaintiff on the basis of averments in the suit proved on record Will dated 10.02.2011 in his favour by way of examination of attesting witnesses. Meantime, defendant No.2 i.e., mother of the petitioner had expired and the petitioner-plaintiff had also brought on record her legal heirs. In order to avoid multiplicity of the litigation, the petitioner-plaintiff moved an application under Order 6 Rule 17 CPC for declaring himself to be owner of the property in dispute on the basis of Will executed by defendant No.2 (his mother). It was mentioned in the application that at the time of filing of the suit, the mother, who was executant of the Will was alive. The fact regarding Will was pleaded but no declaration to this respect was sought. Reply to the application was filed and said application was dismissed vide order dated 02.01.2017, which has been challenged in the present revision petition on the ground that the trial had already commenced and the application has been moved at a belated stage and if allowed, nature of suit will be changed.

Learned counsel for the petitioner submits that the suit was filed when the executant of the Will was alive and the suffering of collusive decree by defendant No.2 in favour of defendant No.1 was under challenge. The Will has duly been pleaded in the plaint and the attesting witnesses have also been proved. The Will has also been exhibited and proved on

record. Learned counsel also submits that in case, the judgment and decree in favour of defendant No.1 is set-aside, the right and title of the petitioner-plaintiff would be on the basis of Will executed by defendant No.2 in his favour and as such, in order to avoid multiplicity of the litigation, the petitioner-plaintiff has sought change of cause of action as well as prayer clause of the suit. At the end, learned counsel for the petitioner submits that the petitioner does not want to lead any evidence and only the formal amendment may not prejudice the right of the respondent.

Learned counsel for respondent No.1 submits that the impugned order has been passed with detailed finding. The purpose of moving application is to delay the proceedings of the case and to change the nature of the suit. Learned counsel further submits that the mother of the petitioner and respondent No.1, had expired on 10.12.2012 and after her death, the amended title has also been filed and her legal heirs have been brought on record. Even the written statement has also been filed and entire evidence on behalf of petitioner-plaintiff and respondents has also been produced on record and they have been cross-examined. Learned counsel also submits that no interference is required at this stage as nothing is mentioned in the application as to how the amendment in the suit is necessary for just decision of the case.

Heard arguments of learned counsel for the parties and have also perused the impugned order as well as other documents available on the file.

Admittedly, the suit filed by the petitioner-plaintiff is pending as also the application for amendment of the pleadings, which has been

opposed by filing reply to the application. It is not disputed that at the time of filing of the suit, Smt. Sita Rani, the mother of the petitioner-plaintiff and respondent was alive but at that time, no relief was sought on the basis of said Will. The mother of petitioner expired on 10.12.2012 and thereafter, her legal heirs were also brought on record. The issues were also framed on 27.11.2014 and thereafter, entire evidence of petitioner-plaintiff and respondents has been produced on record. All the witnesses have also been cross-examined. Nowhere it has been mentioned in the application as well as in the arguments that the factum of Will was not in the knowledge of the petitioner. The suit was filed on 09.06.2012 and the application has been moved on 26.05.2016 i.e., after a delay of approximately four years. Nothing has been mentioned as to how the delay was there and why subsequently, the application has been moved. Simply it has been stated that an inadvertent mistake had occurred due to lack of legal advice. Moreover, Sita Rani was one of the defendants in the case and after her death, the present application has been filed.

As per settled position of law, the amendment can be made in case, the amendment is necessary for the just decision of the case or Court comes to the conclusion that in spite of due diligence, the party, who sought amendment, could not have raised the issue of amendment for the reasons beyond his control or the same was not in his knowledge.

In the present case, it is not the case of the petitioner that he was not aware about the Will executed by his mother. Nothing has been mentioned in the application or in the arguments that earlier the amendment could not be sought even after due diligence or the same was not in his

knowledge. Not only the nature of the suit is going to be changed but serious prejudice is going to be caused to the respondents.

In view of the facts and law position as discussed above, there is no merit in the contentions raised by learned counsel for the petitioner and the present revision petition being devoid of any merit is dismissed.

03.02.2017
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(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned	√ Yes/No
Whether Reportable	√ Yes/No