

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.4063 of 2016 (O&M)
Date of Decision: 23.02.2017

Raj Rani and others

.....Petitioners

Vs.

Rati Devi and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE RAMESHWAR SINGH MALIK

Present: Mr. S.K. Aggarwal, Advocate for the petitioners.

Mr.Suresh Kumar Kaushik, Advocate for
respondents No. 1 to 4 and 6.

RAMESHWAR SINGH MALIK J. (ORAL)

Present revision petition is directed against the order dated 09.05.2016 passed by learned Addl. District Judge, Kaithal in *Civil Appeal No. 143 of 2013*, whereby the application for leading additional evidence under order 41 Rule 27 of the Code of Civil Procedure ('CPC' for short) filed by the defendants-respondents, during pendency of their first appeal, was allowed.

Notice of motion was issued and passing of the final order was stayed.

It has gone undisputed before this Court that defendants-respondents were the propounder of the Will dated 21.04.1997, which was allegedly executed by late Shri Bhagat Ram. Not only that, they also filed their counter claim in spite of the fact that defendant No.1 was the propounder of the Will. Despite claiming to be the beneficiary thereof, no evidence whatsoever was produced, so as to bring the Will set up by

defendant No.1 before the learned trial Court. Further, no reasons whatsoever, has been shown, as to what was the difficulty with the defendants including defendant No.1 in producing cogent evidence, with a view to prove the Will dated 21.04.1997.

Once the defendants had an opportunity to prove the Will set up by them, but they did not prove it for no good reasons, they would not be permitted to lead additional evidence unless they furnish sufficient explanation, making out a case for additional evidence and that too, at the appellate stage. Having said that, this Court feels no hesitation to conclude that since the learned first appellate court failed to appreciate the abovesaid factual as well as legal aspect of the matter, while passing the impugned order, the same cannot be sustained.

It is also not in dispute that suit for partition filed by the plaintiff-petitioners was decreed by the learned trial Court, vide judgment and decree dated 09.09.2013. The relevant observations made by the learned trial Court in its judgment, which deserve to be noticed here, read as under:-

“In the present case although defendant No.1 is asserting the factum of family partition by her parents-in-law by way of execution of the above said wills but defendants have not adduced even a single evidence to prove the execution of the will as per requirements of the Evidence Act as stated above and it is also a settled law as clear from above referred authorities that onus to prove the will is upon the propounder and in the present case defendant No.1 who is propounding the execution of the will is failed to prove the same as neither she has got examined the attesting witnesses as provided in section 68 of the Evidence Act nor she has got examined any other witness as provided in Section 69 of the same act who could have proved that the attestation of one attesting witness at least is in his handwriting of the person. In this way defendant is miserably failed to prove her case.”

No doubt, first appeal was continuation of the civil suit. However, it is equally true that both the parties had been given sufficient opportunities to prove their respective pleaded case by the learned trial Court. It is neither pleaded nor argued case on behalf of the respondents-herein (appellants before the learned first appellate court) that they were not granted sufficient opportunity by the learned trial court to put up their best case before the Court.

On the other hand, plaintiffs have duly proved their case before the learned trial Court and after appreciation of the evidence brought on record, the learned trial Court had decreed the suit of the plaintiff-petitioners. Under these circumstances, it can be safely concluded that the learned first appellate court exceeded its jurisdiction, while passing the impugned order and the same cannot be upheld, for this reason also.

It goes without saying that although the Court had the power to allow the application filed under Order 41 Rule 27 CPC moved on behalf of either of the parties even at the appellate stage, yet the party seeking to lead additional evidence would be under legal obligation to make out a strong case, giving sufficient explanation that despite exercise of due diligence, it was unable to lead such evidence before the learned trial Court before decision of the suit.

Neither any difficulty which might have been faced by the defendants-respondents before the learned trial Court, has been pointed out, nor they were in a position to explain any justified ground to make out a case for leading additional evidence, at the appellate stage. In this view of the matter, it is unhesitatingly held that the learned trial Court committed serious error of law, while passing the impugned order and the same cannot

be sustained, for this reason as well.

It is also not an argued case on behalf of the respondents that the evidence sought to be produced by way of additional evidence was not in their knowledge during pendency of the civil suit before learned trial Court. In fact, the issue regarding the Will in question was made crystal clear by the plaintiffs-petitioners, while filing their replication. However, defendants-respondents, for the reason best known to them, did not lead any evidence with a view to prove the Will dated 21.04.1997 propounded by defendant No.1. Once the evidence regarding the Will dated 21.04.1997 was in the knowledge of the defendants-respondents right from day one, it was least expected from them that they would have produced the best evidence available. However, they did not do so and that too for not good reasons. Under such circumstances, the defendants-respondents were not entitled for leading additional evidence. However, since the learned Additional District Judge, has failed to appreciate the abovesaid factual as well as legal aspect of the matter, the impugned order has been found suffering from patent illegality and perversity, the same cannot be sustained.

The abovesaid view taken by this Court finds supports from the following judgements of this Court:-

1. ***Malook Singh Vs. Satnam Singh and others, 2006(4) R.C.R. (Civil) 92.***
2. ***Smt. Surjit Kaur and another Vs. Bhupinder Singh Waraich, 2009(4) R.C.R.(Civil) 563.***

No other argument was raised.

Considering the peculiar facts and circumstances of the case noted above, coupled with the reasons aforementioned, this Court is of the considered view that since the impugned order has been found to be

suffering from patent illegality and perversity, the same cannot be sustained.

Accordingly, impugned order is hereby set aside. The revision petition deserves to be accepted.

Resultantly, with the abovesaid observations made, instant revision petition stands allowed, however, with no order as to costs.

(RAMESHWAR SINGH MALIK)
JUDGE

23.02.2017
ANJAL

Whether speaking/reasoned? *Yes/No*

Whether reportable? *Yes/No*