

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

235

CR-7571 of 2014

Date of Decision:25.07.2017

Sucha Singh

.....Petitioner

Versus

Bakhshish Singh and another

.....Respondents

CORAM: HON'BLE MR.JUSTICE RAMESHWAR SINGH MALIK.

Present: Mr.H.K.Brinda, Advocate,
for the petitioner.

Mr.Manoj K.Tanwar, Advocate,
for respondent No.1.

RAMESHWAR SINGH MALIK, J.(Oral)

Feeling aggrieved against the order dated 31.10.2014 (Annexure P-4), whereby application of the plaintiff for leading secondary evidence during the pendency of his first appeal was allowed, defendant has approached this Court by way of present revision petition, filed under Article 227 of the Constitution of India, for setting aside the impugned order.

Notice of motion was issued.

Heard learned counsel for the parties.

It has gone undisputed before this Court that respondent No.1 was plaintiff. He filed his suit for declaration on the basis of Will dated 28.12.1990. On the strength of this Will allegedly executed in his favour by his father Late Shri Paras Ram, plaintiff was claiming ½ share in the property left behind by his father. Defendants are brothers and sisters of the

plaintiff. Issue No.1 was framed by the learned trial court as to whether Shri Paras Ram executed a valid Will dated 28.12.1990 in favour of the plaintiff and onus to prove this issue was on the plaintiff. However, plaintiff failed to prove the Will before the learned trial court. Accordingly, his suit for declaration was dismissed by the learned trial court vide its judgment and decree dated 07.11.2013.

Relevant findings recorded by the learned trial court in para 14 and 15 of its judgment at pages 16 and 17 of the paper-book, which deserve to be noticed here, read as under:-

“Now in the present case, the original Will was not produced in the Court by the plaintiff during his evidence and he has merely produced on record the certified copy of alleged Will dated 28.12.1990 as EX.P1 without seeking permission from this Court to lead secondary evidence and on his own, he has produced on record certified copy of the alleged Will dated 28.12.1990 and as per Section 64 of the Indian Evidence Act, document must be proved by primary evidence except in cases referred to in Section 65 of the Indian Evidence Act and the plaintiff in the present case has not sought the permission from this Court to lead secondary evidence in order to prove the Will dated 28.12.1990 as per the grounds mentioned in Section 65 of the Indian Evidence Act. The learned counsel for the plaintiff has argued that application to lead secondary evidence as well as to produce the original Will dated 28.12.1990 was moved by the plaintiff, but the said application was dismissed by the Court vide order dated 04.03.2013, but in that eventuality, the proper remedy for the plaintiff was to file revision against the said order dated 04.03.2013 and as learned Court of Civil Judge (Jr.Divn.) Anandpur Sahib vide its order dated 04.03.2013 has dismissed the application of the plaintiff to lead

secondary evidence in order to prove alleged Will dated 28.12.1990 and the evidence led by the plaintiff to prove the certified copy of Will dated 28.12.1990 is of no use as the plaintiff was not given the permission by the Court to lead secondary evidence in order to prove alleged Will dated 28.12.1990 and in the absence of the same whatever evidence has been led by the plaintiff to prove the alleged Will dated 28.12.1990 cannot be taken into consideration as the original Will was never produced in the Court as required under Section 64 of the Indian Evidence Act.

Further the plaintiff has also challenged the mutation No.1910 sanctioned on the basis of natural succession by Assistant Collector IInd Grade but as the plaintiff has failed to prove that deceased Paras Ram has executed any valid Will dated 28.12.1990, the mutation sanctioned on the basis of natural succession cannot be set aside. Further the plaintiff has also challenged the mutation No.1911 sanctioned in favour of defendant No.1 on the basis of sale deed executed by defendant No.2, but as already discussed above, the mutation No.1910 was rightly sanctioned on the basis of natural succession, the defendant No.2 was fully competent to execute sale deed in favour of any person. As such there is no illegality in mutation No.1911 which has been sanctioned on the basis of sale deed executed by defendant No.2 in favour of defendant No.1.”

Feeling aggrieved against the abovesaid judgment and decree of the learned trial court, plaintiff filed his first appeal. It was during the pendency of his first appeal that he filed the application seeking permission of the Court to lead secondary evidence with a view to prove the abovesaid Will dated 28.12.1990. It was this application of the plaintiff which was allowed by the learned first appellate court by passing the impugned order.

A bare perusal of the abovesaid observations made by the

learned trial court in para 14 and 15 of its judgment would make it crystal clear that similar application was moved by the plaintiff before the learned trial court seeking the permission of the Court to lead secondary evidence regarding the abovesaid Will. Said application moved by the plaintiff was dismissed by the learned trial court vide its order dated 04.03.2013. Although suit of the plaintiff came to be dismissed on 07.11.2013 but immediately after dismissal of his application for leading secondary evidence vide order dated 04.03.2013, plaintiff did not challenge the said order by way of revision petition.

Thus, it would become clear that the plaintiff accepted the order dated 04.03.2013 passed by the learned trial court declining his prayer for leading secondary evidence qua the Will dated 28.12.1990. Having said that, this Court feels no hesitation to conclude that the learned first appellate court exceeded its jurisdiction while passing the impugned order, permitting the plaintiff to lead secondary evidence qua the abovesaid Will dated 28.12.1990. It is so said because plaintiff had already lost his right of leading secondary evidence before the learned trial court itself because he did not challenge the order dated 04.03.2013 passed by the learned trial court.

It has gone undisputed before this Court that the plaintiff had an opportunity to challenge the order dated 04.03.2013 passed by the learned trial court, whereby his application for secondary evidence was dismissed. Once the plaintiff has accepted that order and his suit was dismissed, he would not be entitled to turn around to move another similar application seeking permission of the court to lead secondary evidence so as to prove the Will dated 28.12.1990. Since the learned first appellate court

failed to appreciate this crucial aspect of the matter and committed a serious error of law, while passing the impugned order, it cannot be sustained.

During the course of hearing, learned counsel for the respondent No.1-plaintiff could not raise any meaningful argument in support of impugned order passed by the learned first appellate court and rightly so, as no such argument is available in view of the abovesaid peculiar fact situation obtaining on record of the case in hand. Under these facts and circumstances of the case, the learned first appellate court proceeded on a wholly misconceived approach, while passing the impugned order and the same cannot be sustained.

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 suffering from patent illegality and perversity, the same cannot be sustained. Accordingly, impugned order dated 31.10.2014 (Annexure P-4) passed by the learned District Judge, is hereby set aside.

Resultantly, with the above-said observations made and directions issued, instant revision petition stands allowed, however, with no order as to costs.

July 25, 2017
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(RAMESHWAR SINGH MALIK)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No