

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No. 7979 of 2017 (O&M)
Date of Decision:30.11.2017

Darbara Singh @ Dalbara Singh and another

...Petitioners

Vs.

Harjap Singh and others

...Respondents

CORAM:-HON'BLE MR. JUSTICE B. S. WALIA

Present: Mr. Naresh Kumar Kalia, Advocate,
for the petitioners.

Mr. Paras Talwar, Advocate for respondent No.1.

B. S. WALIA, J. (Oral)

1. Plaintiff respondent Harjap Singh filed a suit for declaration that the suit property was undivided Hindu family Co-parcenary property, that he was entitled to half share of the total land and that defendant/petitioner No.1 i.e his 96 years old father and defendant/petitioner No.2 i.e his sister had no legal right to dispose of the suit property in any manner i.e by way of sale, gift etc.

2. Plaintiff-respondent Harjap Singh was examined-in-chief on 10.05.2017, however, he was not cross-examined on the said date whereupon the case was adjourned for his cross examination to 31.05.2017, 05.07.2017, 19.07.2017 and 31.07.2017 and then to 18.08.2017. However, even on said dates PW2 was not cross examined either in pre lunch or post lunch session, instead request was made for adjournment whereupon the learned Civil Judge rejected the same by recording that in the circumstances,

no ground was made out for grant of adjournment for cross-examination of PW2 i.e Harjap Singh. Accordingly, cross-examination of PW2, Harjap Singh was stated as opportunity given, but not cross-examined and the case was adjourned to 21.08.2017 for remaining plaintiff evidence.

3. In the aforementioned background, defendant/petitioners filed an application dated 21.08.2017 praying for recalling PW2 Harjap Singh for cross-examination by stating that on 18.08.2017, their counsel was present in Court in the pre-lunch session but PW2 Harjap Singh failed to turn up for cross-examination on the pretext of calling his counsel and even after lunch at 2.00 P.M. he did the same thing and in the meanwhile their counsel got busy in action plan cases in other Courts, therefore, could not come for conducting the cross-examination of PW2, accordingly sent a request through his junior associate by bringing aforesaid inability to the notice of the learned Civil Judge. In the circumstances, plea was that non-appearance of the counsel for cross examining PW2 after lunch was not deliberate but for reasons beyond the control of the counsel. Reliance was also placed on photocopy of cause list of 18.08.2017 reflecting the counsel for the defendants/petitioners having a number of action plan cases listed in other Courts. No reply was filed to the aforesaid application. However, the same was dismissed by the learned Civil Judge (Junior Division), Ludhiana vide order dated 18.09.2017 by recording that PW2 Harjap Singh had come in the morning whereupon file was taken up before lunch but neither the defendants/petitioners nor their counsel was present, whereafter case was taken up after lunch when again PW2 was present for cross-examination but counsel of defendants/petitioners was not present and a request was made

for an adjournment. The learned Civil Judge by taking into account that four effective opportunities had already given to the defendants/petitioners for cross-examination of witness but PW2 had not been cross examined, passed an order that opportunity for cross-examination was given but witness had not been cross-examined and in the circumstances no ground was made out for recalling PW2 - Harjap Singh for cross-examination. Accordingly, the application for recalling PW2 for cross-examination was dismissed and the case adjourned to 29.09.2017 for remaining plaintiff evidence.

4. The only submission of learned counsel for the defendants/petitioners is that despite concession having been made by learned counsel for the plaintiff/respondent before the learned trial Court of his not opposing the prayer of the defendants/petitioners for granting one effective opportunity to the defendants/petitioners for cross examining PW2 by recalling him subject to payment of costs, the learned Civil Judge without noticing the stand of the counsel for the plaintiff/respondent dismissed the application for recalling PW2.

5. Learned counsel for the defendants/ petitioners states that the dispute is amongst the family members with one son fighting litigation against his 96 years old father and sister and that without entering into a controversy as to whether the counsel for the defendants/petitioners had put in appearance before the learned Civil Judge in the pre-lunch session on 18.08.2017 or not only prayer was that one opportunity be granted else great prejudice would be caused to the defendants/petitioners.

6. Learned counsel for the plaintiff/respondent has not disputed the position as noted above.

7. I have considered the submission made by counsel for the parties.

8. Admittedly PW2 Harjap Singh was not cross-examined on a number of dates. Even on 18.08.2017, PW2 was not cross-examined in the pre-lunch session, although the stand of defendant/petitioners is that their counsel had sought to cross-examine PW2 in the pre-lunch session but PW2 had avoided cross-examination on the pretext of calling his counsel and even in the post lunch session at 2.P.M. had done the same, whereafter the counsel for the defendants-petitioners became busy in action plan cases in other Courts and sent a request through his junior associate for an adjournment. The learned Civil Judge has observed in the order dated 18.08.2017 that counsel for the defendants-petitioners had not put in appearance in the pre-lunch session. In the circumstances, the stand of the defendants/petitioners that counsel had sought to cross-examine PW2 in the pre-lunch session is not believable. However, the fact remains that application for recalling of PW2 was not opposed, instead a statement was made by the counsel for the plaintiff/respondent that he was not averse to one opportunity being granted to the defendants/petitioners to cross-examine PW-2 subject to payment of costs. However, the aforementioned aspect of the matter was totally ignored by the learned Civil Judge.

9. Although the action of the defendants/petitioners in not cross examining PW2 despite grant of a number of opportunities is not appreciable, consequentially, the impugned orders cannot be said to be suffering from any infirmity, yet by taking into account all aspects of the matter, including that a party cannot be prejudiced due to absence of its counsel, I deem it appropriate to order grant of one effective opportunity to

the defendant/petitioners to cross-examine PW2 in order to prevent miscarriage of justice on account of the defendants / petitioners being prejudiced by being deprived of the right to cross examine PW2.

10. Accordingly, the revision petition is allowed. Impugned orders dated 18.08.2017 and 18.09.2017 are set aside. Learned Civil Judge (Junior Division), Ludhiana, is directed to recall PW2 for cross examination by defendant/petitioners on a date to be given by the learned Civil Judge (Junior Division), Ludhiana, subject to payment of Rs.5,000/- to said witness as costs.

11. Revision petition allowed in aforementioned terms.

(B. S. WALIA)
JUDGE

30.11.2017

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Whether speaking/reasoned *Yes/No*

Whether reportable *Yes/No*