IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Sr. No.216

C.R. No.6828 of 2013 (O&M)
Date of decision: 18.07.2018

Sheela Devi ....Petitioner

versus

Harun and others ....Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr. Ashwani Chopra, Senior Advocate with
Mr. Ankit Midha, Advocate
for the petitioner.

Mr. Rajpal Singh, Advocate for
Mr. R.S. Chauhan, Advocate
for respondent No.1.

Mr. Akshay Bhan, Senior Advocate with
Mr. Santosh Sharma, Advocate
Mr. Johan Kumar, Advocate
for respondents No.5 to 7.

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DEEPAK SIBAL, J. (Oral)

The present petition is directed against the order dated 24.01.2013 through which the Additional District Judge, Nuh (for short – 'the Appellate Court') dismissed the application filed by the petitioner under Order 41 Rule 27 CPC read with Section 151 CPC seeking therein to produce additional evidence.

The facts in brief which need to be noticed for adjudicating upon the present petition are that in the year 2008, the petitioner filed a suit seeking therein to be declared owner in possession of the property which was detailed and described in the plaint (for short – the suit property).

According to the petitioner, she had purchased the suit property from one Amarjit Kaushal and Priya Vert Kaushal who in turn had purchased the same from respondent No.1-Harun son of Isab Khan. The petitioner claimed to be in possession of the suit property and on coming to know that respondents No.1 to 4 were intending to alienate the suit property, had instituted the afore-referred suit.

On being put to notice, respondents No.1 to 4 appeared before the Trial Court and filed their written statement in which several objections were taken not only with regard to the maintainability of the suit but also on merits. In addition, respondents No1. to 4 filed a counter claim. While maintaining that it was they who were the owners in possession of the suit property the case set up by respondents No.1 to 4 was that since they were being threatened to be dispossessed by the petitioner, injunction be granted in their favour. The petitioner filed a reply to the counter claim refuting the pleas taken therein. After framing issues, the Trial Court granted several opportunities to the petitioner/plaintiff to lead her evidence but she failed to produce even an iota of evidence to prove the facts pleaded by her.

In the absence of any documentary or oral evidence led by the petitioner/plaintiff, through judgment and decree dated 06.10.2009, her suit was dismissed. However, the counter claim filed by respondents No.1 to 4 was kept pending for being adjudicated upon. In the counter claim also, the petitioner led no evidence and accordingly, through judgment and decree dated 03.08.2011, the Trial Court allowed the counter claim. On respondents No.1 to 4's counter claim having been decreed, after about two years of the dismissal of the petitioner's suit, two appeals were filed by the petitioner before the Appellate Court to challenge therein both the dismissal of her suit as also the judgment and decree passed in the counter claim. Alongwith the appeal the petitioner filed an application under Order 41 Rule 27 CPC to lead additional evidence in the form of certified copies of five sale deeds allegedly executed by the petitioner on one hand and Amarjit Kaushal/Priya Vert Kaushal on the other. Two of the sale deeds were dated 21.09.1994, one was dated 31.03.1997 and two of them were dated 21.04.1997. Since certified copies of the sale deeds had been filed, a prayer was made that the petitioner be allowed to produce and prove the sale deeds by way of secondary evidence. However, no separate application under Section 65 of the Indian Evidence Act, 1872 (for short – 'the 1872 Act') was filed.

In the petitioner's appeal respondents No.5 to 7 filed an application to be impleaded as parties on the ground that they had went stepped into the shoes of respondents No.1 to 4 having purchased the suit property from them. Through order dated 27.08.2012, the Appellate Court allowed the aforesaid impleadment application. Such order was not challenged. It, thus, attained finality.

The Appellate Court allowed both the appeals filed by the petitioner. However, the petitioner's plea for leading of additional evidence was rejected. Such rejection by the Appellate Court for not permitting the petitioner to lead additional evidence is the subject matter of challenge in the present petition. The orders of the Appellate Court allowing the petitioner's appeal were challenged before this Court by respondents No.5 to 7 through **SAO No.29 of 2013** - **Somnath and others vs. Sheela Devi and others** and **SAO No.30 of 2013** - **Somnath and others vs. Sheela Devi and others,** which appeals have been allowed through order dated 18.07.2018.

Mr. Ashwani Chopra, learned Senior counsel appearing for the petitioner submitted that the Appellate Court had erred in dismissing the petitioner's application as the same should have been allowed to do substantial justice between the parties; at least one opportunity should have been granted to the petitioner to lead additional evidence as denying of such opportunity would be squarely hit by the principles of natural justice; an opportunity should have been granted to the petitioner to adduce additional evidence subject to payment of heavy costs and that the evidence sought to be produced as additional evidence could not be produced by the petitioner before the Trial Court on account of negligence and illness of the petitioner's counsel for which she may not be prejudiced.

Mr. Akshay Bhan, learned Senior counsel appearing on behalf of the respondents controverted the submissions raised on behalf of the petitioner by contending that the Appellate Court rightly rejected the petitioner's application as the same was beyond the parameters prescribed under Order 41 Rule 27 CPC; the plea of negligence by her counsel or illness of her counsel was vague as neither any medical certificate in this regard nor any complaint against the counsel was produced and that certified copies of the sale deeds could not be read into evidence as their loss had not been proved.

Before proceedings further with the matter, it would be appropriate to refer to Order 41 Rule 27 CPC, which reads as under:-

> *"**ORDER 41***
>
> ***27. Production of additional evidence in Appellate Court**.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -*

> *(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or*
>
> *(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or*
>
> *(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,*
>
> *the Appellate Court may allow such evidence or document to be produced or witness to be examined.*
>
> *(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."*

As per the afore-quoted provision, a party is entitled to produce additional evidence at the appellate stage only if the Court from whose decree the appeal is preferred has refused to admit such evidence which ought to have been admitted or the party seeking to produce additional evidence, establishes before the Appellate Court that in spite of exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed or the Appellate Court required any documents to be produced, or any witness to be examined to enable it to pronounce a judgment, or for any other substantial cause.

It was in the year 2008 that the petitioner had filed her suit seeking therein declaration and permanent injunction. Certified copies of the sale deeds which are now sought to be produced by her at the appellate stage as additional evidence were as per her own admission within her knowledge even before she filed her suit but the same were not produced by her before the Trial Court and this was in spite of the fact that the Trial Court had granted her numerous opportunities to lead her evidence. The plea taken by the petitioner that she had handed over certified copies of the sale deeds in question to her counsel, who did not produce them is a plea which is found to be absolutely vague as no details are forthcoming as to when, where and to whom, the certified copies of the sale deeds in question had been handed over by her. Further, for the alleged negligence on the part of her counsel, admittedly the petitioner took no action against him.

As observed earlier, the petitioner's suit was filed by her in the year 2008. The same was dismissed on 06.10.2009. The application under Order 41 Rule 27 CPC was filed at the appellate stage in August 2011. On a reading of the application, no worthwhile explanation is found for the delay in seeking to produce additional evidence. When the contents of the petitioner's application for producing additional evidence are compared with the contents of her application seeking condonation of delay in the filing of her appeal, a contradiction is found therein. In her application for producing additional evidence, it is stated that her counsel was negligent in not producing the certified copies of the sale deeds in question and in the application seeking condonation of delay, she says that her counsel, in addition to being negligent, was injured in an accident and was thus, precluded from attending to the petitioner's case. In addition to the afore contradiction, the plea regarding the petitioner's counsel having met with an accident is found to be absolutely vague as no details of the accident or the extent of injuries suffered by him have been disclosed.

The certified copies of the sale deeds which are sought to be produced as additional evidence were allegedly entered into between Amarjit Kaushal and Priya Vert Kaushal on one hand and the petitioner on the other. It is the petitioner's case that the suit property was originally owned by respondent No.1-Harun who had sold the same to Amarjit Kaushal and Priya Vert Kaushal, who in turn had sold it to the petitioner. No evidence whatsoever has been produced by the petitioner to show the basis of conferment of title of the suit property upon the aforesaid Amarjit Kaushal and Priya Vert Kaushal. On what basis Amarjit Kaushal and Priya Vert Kaushal were conferred ownership of the suit property has not even been disclosed. Only if Amarjit Kaushal and Priya Vert Kaushal were having title of the suit property, could they confer on the petitioner a valid title. The missing link makes the additional evidence sought to be produced by the petitioner completely worthless and irrelevant.

According to the petitioner, the original sale deeds, the certified copies of which are sought to be produced, are not traceable as in or about the year 1999 she was raided by the Income Tax department and during the course of such raid the originals of the sale deeds in question may have been taken away by the Income Tax authorities. Therefore, she prayed that she be allowed to produce certified copies of the original sale deeds.

The above stand is found to be vague. If the original sale deeds in question had been taken by the Income Tax authorities, the same would have been done only after making an inventory of the seized documents. In that eventuality, the petitioner would have made a definite averment in that regard. However, that is not so. What is even more strange is that the petitioner does not even know as to when the income tax raid took place and on whom and where. As per her application, in or around the year 1999 an income tax raid had taken place. Who was the assessee and what was the outcome of such proceedings is something which still remains a mystery.

Section 65 of the 1872 Act reads as under:-

> *"**65. Cases in which secondary evidence relating to documents may be given**.- Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-*
>
> *(a) When the original is shown or appears to be in the possession or power-*
>
> *of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or*
>
> *of any personal legally bound to produce it,*
>
> *and when, after the notice mentioned in section 66, such person does not produce it;*
>
> *(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*
>
> *(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reasoned not arising from his own default or neglect, produce it in reasonable time;*
>
> *(d) when the original is of such a nature as not to be easily movable;*
>
> *(e) when the original is a public document within the meaning of section 74;*
>
> *(f) when the original is a document of which a certified copy of permitted by this Act, or by any other law in force in [India] to be given in evidence;*
>
> *(g) when the originals consists of numerous accounts or*

> *other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.*
>
> *In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.*
>
> *In case (b), the written admission is admissible.*
>
> *In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is a admissible.*
>
> *In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."*

As per the parameters laid down in the afore-quoted provision, the petitioner failed to establish as to in whose possession the documents in question actually were or that they were lost. In fact, a reading of her application reveals that she does not know as to where the documents in question are as she has made absolutely vague and unsubstantiated averments in this regard. Even no separate application under Section 65 of the 1872 Act was filed by her. Thus, the certified copies of the sale deeds cannot be allowed to be produced and proved as secondary evidence.

In view of the above, no error is found in the order passed by the Appellate Court rejecting the application filed by the petitioner to place on record additional evidence.

Dismissed.

(DEEPAK SIBAL)
JUDGE

July 18, 2018
Jyoti 1

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No