

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

RSA No. 4204 of 2015(O&M)

Date of decision: 10.5.2018

Makhan Singh

....Appellant

VERSUS

Gurdeep Singh @ Deepa and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. A.K. Sama, Advocate for the appellant.

REKHA MITTAL, J.

CM No.10176-C of 2015

Prayer in this application is for condoning delay of 85 days in filing the appeal.

Heard.

In view of averments made in the application supported by an affidavit of Makhan Singh – appellant, the application is allowed. Delay of 85 days in filing the appeal stands condoned.

Disposed of accordingly.

RSA No.4204 of 2015

The present appeal directs challenge against concurrent findings recorded by the Courts whereby suit filed by Gurdeep Singh – respondent claiming inheritance to the estate of Smt. Gango Bai, mother of the parties on the basis of registered Will dated 23.04.2001 has been allowed and Will dated 26.08.2002 purported to be executed by the

deceased in favour of defendant No.8 and Will dated 12.05.2003 in favour of the appellant and his three brothers have been rejected.

The sole submission made by counsel for the appellant is that as the appellant did not get proper opportunity and enough time to adduce evidence to prove Will dated 12.05.2003 bearing Vasika No.457 dated 12.05.2003, the appellant is entitled to an opportunity to adduce his evidence after setting aside the judgments and decrees passed by the Courts. To bring home his contention, it is argued that counsel engaged by the appellant before the trial Court passed away during pendency of the proceedings and son of earlier counsel filed Vakalatnama on behalf of the appellant on 23.07.2010 and evidence of appellant was closed by order on 10.09.2010. The appellant filed an application for additional evidence by invoking Order 41 Rule 27 of the Code of Civil Procedure, 1908 (in short 'CPC') before the Court in appeal but the same was wrongly dismissed by the Appellate Court without appreciating that a serious prejudice shall be caused to the appellant/defendant No.1 in case he is not permitted to adduce evidence to prove the Will dated 12.05.2003 whereby earlier Will dated 23.04.2001 relied upon by Gurdeep Singh – respondent/plaintiff stands revoked.

I have heard counsel for the appellant, perused the paper-book and the records.

Gurdeep Singh, brother of the appellant instituted the suit on 30.04.2004. The issues were framed by the trial Court on 14.01.2006. Additional issue 6A was framed on 02.03.2007. The respondent/plaintiff concluded evidence on 18.11.2009. During the intervening period certain miscellaneous applications were disposed of. Case was adjourned to 21.12.2009 for evidence of defendants. The present appellant did not

adduce any evidence on 05.04.2010, 12.05.2010, 02.06.2010, 23.07.2010, 11.08.2010 and 10.09.2010 despite availing six opportunities including two last opportunities allowed vide order dated 23.07.2010 and 11.08.2010. On 23.07.2010, Sh. Sanjiv Pabbi, Advocate filed power of attorney on behalf of the appellant in place of earlier counsel. Since 18.11.2009 onwards till evidence of the appellant was closed on 10.09.2010, presence of counsel for the parties has been recorded in all the zimini orders. Meaning thereby that the appellant was being represented by a counsel on all the dates when the case remained pending for evidence of the appellant. Not only this, after evidence of the appellant was closed by the trial Court on 10.09.2010, the case remained pending before the trial Court till 11.12.2010. The appellant neither challenged the order dated 10.09.2010 before a higher Court nor filed an application before the trial Court with tangible explanation for providing him an opportunity to adduce evidence to prove the Will dated 12.05.2003. The appellant preferred appeal before the Court of District Judge and filed application for adducing additional evidence under Order 41 Rule 27 CPC. The application was disposed of by the Appellate Court while deciding the appeal finally. In the application, the appellant raised the plea that during pendency of suit, his earlier counsel passed away and deaths occurred in his family. A relevant extract from para 2 of the application reads as follows:-

“In the instant case though number of opportunities have been given to the appellant to lead the evidence but no evidence has come up on file on part of the appellant, the reason for the same is that counsel for the appellant Sh. Mohinder Pal died

during the pendency of the suit, also deaths occurred in the family of Makhan Singh.”

The application is not supported by an affidavit of the appellant. No date, month and year of death of Sh. Mohinder Pal, Advocate is mentioned. The plea with regard to deaths in the family of appellant is quite vague because nothing has been mentioned therein who died, when and what was the relationship of the appellant with the dead. Counsel for the appellant has not disputed correctness of zimini orders recorded by the trial Court wherein presence of counsel for the parties has been recorded. This apart, if previous counsel for the appellant has passed away and another counsel had appeared on his behalf on the adjourned date, appellant remained represented by a counsel throughout. There is no satisfactory much less convincing explanation by the appellant as to why he could not ensure his presence and presence of his witnesses on various dates fixed by the trial Court for evidence of the appellant. As per provisions of Code of Civil Procedure, a party is entitled to three opportunities for adducing evidence. In the instant case, the trial Court allowed six effective opportunities running over a period of about one year but neither the appellant caused appearance before the Court nor produced any evidence for proving the Will set up by him. In the given facts and circumstances, I do not find an error in order closing his evidence and that of the Appellate Court rejecting his application for additional evidence. In this view of the matter, contention raised by counsel for the appellant that he did not get sufficient time / opportunities to adduce evidence runs contrary to the facts on record, thus liable to be rejected.

No other point has been raised.

For the foregoing reasons, the appeal fails and is accordingly dismissed in limine. No order as to costs.

MAY 10, 2018 'D. Gulati'	(REKHA MITTAL) JUDGE
Whether speaking/reasoned	: yes/no
Whether reportable	: yes/no