

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

RSA No.3030 of 2014

Date of decision :14.3.2019

Sukhdev Singh and others

.....Appellants

Versus

Nirmal Kaur @ Nirmaljit Kaur and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.M.K.Dogra, Advocate for the appellants.
Mr.Manish Prabhakar, Advocate for respondent
No.1.

ANIL KSHETARPAL, J.

The defendant-appellants are in Regular Second Appeal against the judgment passed by the learned First Appellate Court.

The dispute in the present case is with regard to estates of Karam Singh as well as his widow Kashmir Kaur. The plaintiff and defendants are members of the same family from Karam Singh. Nirmal Kaur alias Nirmaljit Kaur-plaintiff filed this suit on 1.5.2009 claiming 1/3rd share in the property left behind by Karam Singh.

The defendant contested the suit and pleaded that Karam Singh had executed a Will dated 5.6.1997 and on the

death of Karam Singh, property was mutated in favour of son-Sukhdev Singh and widow-Kashmir Kaur. Karam Singh died on 2.8.1999. The plaintiff did not dispute about-change of entry in favour of her brother Sukhdev Singh and Kashmir Kaur during the life time of Kashmir Kaur who died on 11.11.2007. Kashmir Kaur executed a registered Will in favour of sons of Sukhdev Singh i.e. Jatinder Singh and Najot Singh dated 17.10.2017 registered on 22.10.2017.

On appreciation of evidence, the Courts below have found that the Will dated 17.10.2007 executed by Kashmir Kaur has been proved. However, the Will dated 5.6.1997 was not produced.

Before the learned First Appellate Court, the appellants filed an application under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (for short, 'the Code') for permission to produce on record the original Will dated 5.6.1997 as it was found from the record of the mutation proceedings. The learned First Appellate Court dismissed the application as well as the appeal. The application for additional evidence was dismissed by the learned First Appellate Court while recording as under:

"Simple stand has been taken on behalf of appellants that they were not having any knowledge that original "Will" dated 5.6.1997 was

lying attached in the mutation file, but it is the case of appellants that the mutation was sanctioned in their favour qua the estate of Karam Singh on the basis of that "Will" dated 5.6.1997. In such circumstances, it is very hard to believe that they were not in the notice of that fact that the "Will" was produced in that mutation file nor it can be said that despite due diligence, same could not be produced or proved during evidence before learned trial Court and therefore, no permission can be granted at the belated stage, during the proceedings of present appeal and application is accordingly dismissed being without merits."

It is apparent that the entire controversy which was required to be adjudicated upon was whether Karam Singh had executed a valid Will in favour of his son and widow on 5.6.1997.

The learned First Appellate Court took the narrow view of the matter and did not consider provision of Order XLI Rule 27(1)(b) of the Code. It is apparent that Order XLI Rule 27 of the Code has three parts. Once an application for additional evidence is filed, the Court must examine the same and see as to whether such additional evidence

would enable the Court to pronounce the judgment or for any other substantial cause, the document shall be necessary. Clause (b) is very much part of the Order XLI Rule 27 of the Code.

In the present case, the learned First Appellate Court failed to consider the request/prayer made for permission to lead additional evidence under sub-clause (b) of the clause (1) of Rule 27 of the Code.

In the considered view of this Court, the entire controversy could have been resolved if the application for additional evidence had been allowed by the learned First Appellate Court.

Keeping in view the aforesaid fact, the application for additional evidence is allowed. The learned First Appellate Court would grant opportunity to the appellants-defendants to prove the Will dated 5.6.1997. Corresponding opportunity shall also be granted to the plaintiff to lead counter evidence. Thereafter, the learned First Appellate Court would re-decide the appeal, in accordance with law.

Consequently, the judgment passed by the learned First Appellate Court is also set aside and the present appeal is allowed in the above terms.

The parties are directed to appear before the learned First Appellate Court on 5.4.2019.

March 14, 2019
KD

(ANIL KSHETARPAL)
JUDGE

Whether speaking / reasoned: Yes / No

Whether Reportable: Yes / No