

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

RSA No.1638 of 2018(O&M)
Decided on:19.09.2019

Suneel Verma

.....Appellant

versus

Ram Lal and others

....Respondents

CORAM : HON'BLE MR.JUSTICE DR.RAVI RANJAN

Present: Mr.M.K.Singla, Advocate,
for the appellant.

DR.RAVI RANJAN, J. (Oral Judgment)

CM-4435-C-2018

This application has been filed by the appellant seeking leave to lead additional evidence under Order XLI Rule 27 of the CPC.

It is contended that at the time of pendency of the suit, the witnesses could not be examined due to the negligence on the part of the counsel for defendant No.3. He requested his counsel to examine him and his witnesses but he did not pay any heed to his request, as such, the evidence of the appellant was closed by the trial Court.

It is urged that it is well settled principle of law that a party cannot be allowed to suffer due to the lapse and negligence on the part of the counsel and, as such, he should be allowed to lead additional evidence under Order XLI Rule 27 CPC. Such an application was filed by the appellant/defendant No.3 before the Ist Appellate Court also but the Ist Appellate Court vide its order dated 18.01.2018 had rejected the prayer.

Before proceeding to decide the matter it has to be noticed that infact it is not the case of leading additional evidence rather it is a case of no

evidence led by the appellant/defendant No.3. If any application to that sort is to be allowed then both the decisions, i.e., of the trial Court and the Ist Appellate Court would have to be set aside and a direction has to be given for recording the evidence of defendant No.3 after setting aside the order dated 16.01.2014 vide which the trial Court had ordered for closure of evidence of the defendants.

It has firstly been argued by learned counsel for the appellant/defendant No.3 that this omission, which has resulted in leading to no evidence by the defendant No.3, is the result of negligence on part of his counsel. However, in paragraph No.2 it is stated that the appellant/defendant No.3 requested his counsel to examine him and his witnesses but he did not pay any heed to his request and that had led to closure of his evidence by the trial Court.

In my view, by making such a sweeping allegation upon the counsel, the appellant/defendant No.3 wants to derive the benefit from the aforesaid statement made in paragraph No.2, it appears that the defendant No.3 was alive to the situation that the evidence on behalf of the plaintiffs has already been closed and now it is his turn to lead evidence. He has stated in his application that he had requested his counsel to examine him and his witnesses but his counsel did not pay any heed to his request. In such a situation, he could have taken steps to change his counsel and engage another counsel to lead evidence and, even after closure of evidence, he could have filed an application for recalling of that order through some other counsel and secondly, if the counsel was so negligent in conducting his case and despite his instruction, he was not appearing and that has resulted in decreeing the suit against him then some action ought to have

been taken by him against such counsel, however, even the name of such counsel has not been disclosed. It is nowhere disclosed what steps were taken by the appellant/defendant No.3 against such counsel.

In my view, such type of sweeping allegation made without impleading such counsel or without granting him opportunity to justify his error, no order to that extent can be passed. The issue of negligent act of a counsel does not stand proved only by making wild allegations against him.

Even if such request is accepted, then by bringing on record the municipal documents and the sale deed, etc., the appellant can only claim the transaction between him and defendants No.1 and 2. However, since it has been held that since defendants No.1 and 2 were not competent to alienate the property through a sale deed, even that would be a futile exercise.

I have perused the decision of the lower Appellate Court in this regard. It has been noticed that, since written statement was filed on 19.08.2004 and the Judgment was passed on 12.02.2014, i.e., after 10 years from the filing of the suit, the appellant must be aware of the facts but he did not lead any evidence and, secondly, when his evidence was closed, he did not opt for any legal recourse to challenge the order of the Trial Court. No ground can be set forth by the appellant before the lower Appellate Court so that the said order of closure of evidence passed by the trial Court could have been recalled at the appellate stage. The Ist Appellate Court has considered it as a dilatory tactics only by not examining the witnesses during trial and taking such steps at the appellate stage so that everything could be reopened again.

Having regarding to the aforesaid facts and circumstances, in

my considered view, no good ground could be raised by the appellant/defendant No.3 to show that, despite due diligence he could not lead evidence as the suit was adjourned thrice for leading evidence on the part of defendant No.3 or by bringing any cogent material on record which goes to show that actually he had been the victim of negligence on part of his counsel.

Even under Order XLI Rule 27(1)(b), it would not be proper for this Court to examine witness or take in record any document as requested by the appellant/defendant No.3 for the reason that in the opinion of this Court, the defendants No.1 and 2 did not have any competency to execute the sale deed in favour of defendant No.3.

In the result, this application is dismissed.

RSA-1638-2018

This appeal is directed against the Judgment and decree dated 18.01.2018 passed by the Additional District Judge, Fatehgarh Sahib in Civil Appeal No.164 of 2014, by which the Ist Appellate Court has dismissed the appeal filed by the defendant No.3/appellant and affirmed the Judgment and Decree dated 12.01.2014 passed by the Civil Judge (Jr.Divn.), Fatehgarh Sahib in Civil Suit No.791 of 2002.

1. The factual matrix of the case stands narrated as under:

The plaintiffs/respondents brought a suit for declaration that they are owners in possession of the House No.3463 situated in Mohalla Harlallpur, Nai Abadi, Sirhind Mandi, Tehsil and District Fatehgarh Sahib, fully described in the plaint under letter 'A'. They further sought permanent injunction restraining the defendants, their servants and agents from alienating the suit property fully described under letter 'A' and also for

mandatory injunction directing the defendants to hand over vacant possession of the house fully described in letter 'B' in the plaint.

As per plaintiffs No.1 and 2, Tej Ram was their father and grand-father respectively. Madan Lal (since deceased), who was also the son of Tej Ram, having died, his widow Bimla Devi and his son Dharambir were arrayed as defendants No.1 and 2 respectively in the suit.

The plaintiff No.1's claim is that his father Tej Ram, during his life time, executed his last and valid Will dated 08.11.1994 in favour of the plaintiffs. The original Will was not traceable and in that regarding FIR was lodged with the police. After the death of the testator, the plaintiffs being legatee/beneficiary became owners-in-possession of the house in question. Madan Lal filed a suit for declaration and permanent injunction which was dismissed. However, another suit was filed by the father and grand-father of the plaintiffs namely, Tej Ram, against the defendants in which a compromise was effected and the defendants were allowed to remain in possession of the suit property upon payment of certain amount and also payment of Rs.250 per month as future maintenance. It is contended that Rs.5,000/- was to be paid within one month and remaining amount within six months of the decision/compromise. However, the defendants did not pay such amount during the life time of Tej Ram and, thus, the said Tej Ram filed an application to set aside the compromise during his life time. It has been averred that the defendants were merely licensee under Tej Ram and, after his death, they became the licensees of the present plaintiffs and, since they stopped paying future maintenance, the compromise remained ineffective and, as such, the plaintiffs revoked the licence about a month ago from the date of filing of the suit. The plaintiffs came to know that the

defendants are intending or threatening to alienate the portion of the house as mentioned as letter 'B'. Hence, the suit was filed.

2. One Suneel Verma (defendant No.3) filed a petition under Order I Rule 10 of the CPC for impleadment as a defendant to contest the suit for the reason that he had got a sale deed executed by defendants No.1 and 2 regarding the part of the house which stands described in letter 'B' and possession was allegedly delivered by defendants No.1 and 2 in his favour and, as such, he became owner-in-possession of the house as described in letter 'B' attached with the plaint. Thus, he became the necessary party in the suit. Aforesaid application was allowed and Suneel Verma was impleaded as defendant No.3. He filed a written statement also.

3. Upon consideration of the pleadings of the parties, the trial Court formulated following issues:

1. Whether the plaintiffs are entitled for declaration as prayed for?OPP

2. Whether the plaintiffs are entitled to permanent injunction as prayed for?OPP

2A. Whether the plaintiffs are entitled to the relief of mandatory injunction or in alternative possession as prayed for?OPP (framed vide order dated 12.02.2014)

3. Whether the suit is not maintainable in the present form?OPD

4. Whether the court has no jurisdiction to try the present suit?OPD

5. Whether the plaintiffs have no cause of action to file the present suit?OPD

5A. Whether the suit is undervalued for want of proper court fee?OPD (framed vide order dated 10.09.2012)

6. Relief.

4. The plaintiffs, in order to prove their case, examined himself as PW2 and again as PW5, Ram Dayal as PW1, Mohinder Lal as PW3 and Sukhwinder Singh as PW4 and, by way of documentary evidence, the certified copy of the Will dated 08.04.1994 as Ex.P1 and entry made in

registration book of the Sub-Registrar as Ex.P2 were brought on record.

On the other hand no DW was produced by defendant No.3.

5. The trial Court returned the findings with respect to all these issues in favour of the plaintiffs.

The defendant No.3/appellant preferred appeal before the Ist Appellate Court, however, by the impugned Judgement the same was also dismissed. Hence, this Second Appeal has been preferred by the defendant No.3-Appellant.

6. In the aforesaid background, I have heard learned counsel for the appellant and have perused the records of this Court.

Learned counsel for the appellant has submitted that the appellant/defendant No.3 was the *bona fide* purchaser having purchased the part of the suit property described in letter 'B' attached with the plaint through a registered sale deed, after payment of valuable sale consideration, from defendants No.1 and 2 and, as such, the plaintiffs were not at all competent to dislodge him from the aforesaid part of the suit property.

However, before coming to the question, it has to be considered as to whether the vendor of defendant No.3/appellant was competent to execute the sale deed or not. The plaintiffs derived their ownership through a testamentary disposition by the admitted owner of the suit property, v.i.z., Tej Ram, who is the father of plaintiff No.1 and grand-father of plaintiff No.2 and father-in-law of defendant No.1 as well as grand-father of defendant No.2, as defendant No.1 is the widow of brother of plaintiff No.1, namely, Madan Lal.

It is contended that the aforesaid Tej Ram executed the Will dated 08.11.1994, which was scribed by PW1 Ram Dayal Saddi at the

instance of Tej Ram. He has deposed that after scribing the Will, it was read over to Tej Ram by him in the presence of the witnesses and Tej Ram signed the Will in his presence as also in the presence of Baldeep Singh as well as the attesting witnesses Mohinder Lal and Atma Singh, who also signed on the Will in his presence. The plaintiffs have also examined one of the attesting witnesses namely Mohinder Pal as PW3, who has testified that Tej Ram executed the Will in favour of the plaintiffs on 08.11.1994 which was registered on 22.11.1994 and the Will was scribed by Ram Dayal Saddi in his presence at the instance of Tej Ram and after scribing it, the same was read over to Tej Ram in his presence and in the presence of Baldeep Singh and Atma Singh, i.e., the witnesses who signed the Will after admitting the same to be correct. Sukhwinder Singh son of another witness late Baldeep Singh has been examined as PW4. He has deposed that he is conversant with his father's writing and signing as having observed the same numerous times and had identified his father's signature on the Will dated 08.11.1994 (Ex.P1). Obviously, he was examined only for the reason that Baldeep Singh, one of the attesting witnesses to the Will, had died and, as such, he could not have been examined. On account of the testimony of the aforesaid witnesses, who were examined and cross-examined at length and after finding that they have withstood the test of cross-examination, the trial Court came to the conclusion that the Will is genuine and, as such, the beneficiaries, i.e., the plaintiffs No.1 and 2, after the death of the testator, became owner-in- possession of the suit property.

At this juncture it has been urged on behalf of learned counsel for the appellant/defendant No.3 that due to the negligence on part of his counsel, no evidence could be led on his part to rebut the evidence led by

the plaintiffs, as such, he should be granted opportunity to lead evidence at this stage, or the matter should be remanded to the trial Court for recording his evidence and for passing the Judgement afresh on its basis. He has also filed an application being CM No.4435-C of 2018 to allow the appellant/defendant No.3 to lead additional evidence in the aforesaid facts and circumstances. This issue has separately been considered by this Court as a part of present order itself and such relief sought by the appellant/defendant No.3 under Order XLI Rule 27 of the CPC has been rejected for the reasons mentioned in that part of the order.

7. It appears from the perusal of the order sheet of the lower Court that despite indulgence granted thrice, no evidence could be led by appellant/defendant No.3 and the same was closed. Though it was well known to defendant No.3 that he had filed a petition in the year 2004 itself under Order I Rule 10 of the CPC for his impleadment as defendant and that was allowed also and, thereafter, a written statement was also filed by him, he neither took any step to lead evidence to rebut the testimony of the plaintiffs or even to challenge the order of closure of his evidence on 16.01.2014. The final decision in the suit came about a month thereafter, i.e., on 12.02.2014 but no legal recourse was taken by defendant No.3 to assail such order at the relevant point of time. Though there was no evidence on record and even though plenty of witnesses were examined on behalf of the plaintiffs, the defendant No.3 waited for disposal of the suit and then filed a petition for leading additional evidence under Order XLI Rule 27 of the CPC before the Ist Appellate Court which was rejected.

In such a situation, there would be no impediment in holding that the plaintiffs have been able to prove that the Will executed by Tej Ram

in their favour was a valid and genuine document.

8. Of Course, this is also an admitted position that said Tej Ram filed a suit against the defendants in which a compromise was filed by the parties and, according to which, upon payment on account of maintenance of Rs.300 per month for last six years prior to 05.04.1997 and further payment of Rs.250 per month as future maintenance, and further payment of Rs.5,000/-, the defendants were allowed to retain possession of the portion of house as mentioned in letter 'B' attached with the plaint. However, the plaintiffs' case is that they failed to pay such amount, as such, said Tej Ram, during his life time, filed an application to set aside such compromise. If for a moment it is accepted that on payment of such maintenance amount for the house, as has been discussed above, defendants No.1 and 2 were allowed to retain the possession of the suit property as described in letter 'B', whether this could have entitled them to transfer the property? There is nothing on record to show that in the compromise decree, the defendants No.1 and 2 were given ownership of the property rather the claim of the plaintiffs is that Tej Ram allowed them to retain the possession of the property as licensee. Thus, in that event also, the property having been given for limited enjoyment, could not have been sold out by the said defendants in favour of defendant No.3. However, this is another aspect of the case that even such sale has not been proved by bringing on record the concerned sale deed and by taking steps to prove that by leading evidence after granting opportunity to the plaintiffs to cross-examine the witnesses and to assail the said document. In the absence of the above, the moment it is held that the Will executed by Tej Ram was valid, genuine and legal document, the defendants being heirs in line of succession of Tej Ram,

having been deprived from the property by testamentary disposition, cannot have any right of possession or ownership of the property.

9. At the time of hearing, it is urged that there is nothing written in the Will as to why one of the sons, v.i.z, Madan Lal was being deprived by his father by executing the same. However, that has already been answered by the Courts below that it is written in the Will that the said son of Tej Ram, Madan Lal, was not looking after him and he was disobedient son of the testator and, as such, the testator was annoyed with him. Regarding his wife, i.e., mother of the plaintiff No.1, Madan Lal, there is also a clear recital in the Will that his wife was being looked after and served by the plaintiffs who will continue to serve her which shows that the testator was quite alive to the entire situation that his wife was being well served and looked after by the plaintiffs.

10. This is further to be taken in notice that Will is not a document which can be said to be a vehicle of transfer rather it is a mode of succession known as testamentary succession, as such, Will is not necessarily required to be even registered and even an unregistered Will can also be proved by examining the marginal attesting witnesses as well as the scribe.

11. The plaintiffs have further alleged that defendant No.3 entered the house by breaking wall and forcibly took possession, whereas the case of the defendant No.3/appellant is that, after the sale deed, the possession of the house was given to him by defendants No.1 and 2.

In such a situation, when admittedly defendant No.3 is in possession but his possession could not be proved by him to be legal one, the decree passed by the trial Court directing him to deliver the vacant property of that part of the suit property cannot be faulted with.

In the result this appeal, being devoid of any merit, is dismissed.

September 19, 2019
dharamvir

(DR. RAVI RANJAN)
JUDGE

Whether speaking/reasoned:	Yes
Whether Reportable :	Yes