

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

SAO No. 16 of 2018 (O&M)

Date of Decision: 28.05.2019

Narinder Singh and others

...Appellants

VERSUS

Jhirmil Singh and another

...Respondents

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. J.S. Lalli, Advocate
for the appellants.

Mr. Abhinav Sood, Advocate
for Mr. Vikram Singh, Advocate
for respondents no. 1 and 2.

SURINDER GUPTA, J. (Oral)

Heard.

Plaintiffs-appellants filed suit seeking declaration that they are joint owners in possession of 1/3rd share out of land measuring 89 *kanals* 14 *marlas* and challenged mutation nos. 588 and 574 sanctioned in favour of defendants no. 1 to 3 i.e. Jhirmil Singh, Manjeet Singh and Boota Singh on the basis of Will dated 02.08.1974. They also challenged Will dated 02.08.1974 as illegal, false, fabricated, null and void.

Defendants no. 1 to 3 based their claim on Will dated 02.08.1974, alleging the same as genuine document, validly executed by Diwan Singh in their favour.

Pleadings of parties led to framing of the issues as follows:-

1. Whether the plaintiff is entitled to relief of declaration as prayed for? OPP
2. Whether the plaintiff has not come to the court with clean hands? OPD.
3. Whether the plaintiff has no cause of action to file the

present suit? OPD

4. Relief.

While recording finding on issue no. 1, learned trial Court discussed in detail Will dated 02.08.1974 propounded by defendants no. 1 to 3 and discarded the same with observations that defendants have not examined any attesting witness of the Will and original Will has also not been produced on record. The suit was decreed by learned Additional Civil Judge (Sr. Division), Mukerian and against judgment and decree of lower Court, defendants, namely, Jhirmil Singh and Manjeet Singh, filed appeal before Additional District Judge, Hoshiarpur. Before learned Ist Appellate Court an application was moved by respondents under Order XLI Rule 27 read with Section 151 CPC for permission to examine legal heirs of marginal witnesses of the Will and scribe to identify their signatures as both the marginal witnesses have already died. Learned Ist Appellate Court while discussing that application took the view that learned trial Court has also not framed the issue “as to whether Will dated 02.08.1974 is genuine and valid document?” While allowing application filed by respondents under Order XLI Rule 27 CPC, it remanded the case with direction to learned trial Court to frame the issue “whether Will dated 02.08.1974 is genuine and valid document” and decide the case afresh.

Learned counsel for appellants has argued that learned trial Court has though not framed a specific issue with regard to Will but it has discussed the Will in detail and evidence produced by parties while recording finding on issue no. 1, as such, order passed by learned Ist Appellate Court framing the issue with regard to Will dated 02.08.1974 is not sustainable. He further argues that the evidence sought to be produced

respondents and their application to lead this evidence at appellate stage could not be allowed.

Learned counsel for the respondents has argued that Will dated 02.08.1974 executed by Diwan Singh was challenged by plaintiffs-appellants and propounded by defendants no. 1 to 3 (respondents), which is a registered document. Despite the fact that entire fate of the case hinges on the validity of the Will, learned trial Court did not frame any issue giving opportunity to defendants to produce evidence to prove the Will. Both the marginal witnesses of the Will have already died, as such, they could not be produced and the Will was discarded only on this sole ground. It is not a case where plaintiffs-appellants were not aware of the Will. They have specifically mentioned the Will in their plaint and challenged the same as false and fabricated document but have not produced any evidence in support of their contention. In these circumstances, allowing of additional evidence will not cause any prejudice to plaintiffs-appellants, rather it will help the Court below to reach an appropriate decision with regard to dispute raised in this case.

It is a settled principle of law that if parties are aware of the dispute and have led evidence, non-framing of issue regarding a particular aspect is not material. In this case, learned trial Court has framed issue no. 1 as follows:-

“1. Whether the plaintiff is entitled to relief of declaration as prayed for? OPP”

While deciding this issue, learned trial Court discussed in detail the legality and validity of Will dated 02.08.1974; evidence produced by parties and discarded the Will. The entire discussion on this issue was

almost devoted to this aspect. As learned trial Court has already recorded

findings regarding genuineness and validity of the Will, there was no purpose or reason before learned Ist Appellate Court to direct learned trial Court to frame the issue “as to whether Will dated 02.08.1974 is genuine and valid document?” Order of learned Ist Appellate Court to this extent is not sustainable, as such, is set aside.

Learned Ist appellate Court has allowed additional evidence as sought by defendants-respondents, which to my mind is most material piece of evidence, which they could produce before the Court below to support execution of Will dated 02.08.1974 by Diwan Singh. It is a registered Will and certified copy of the Will was proved by examining Registration Clerk. It is not disputed that marginal witnesses have already died. In that eventuality allowing of permission to defendants-respondents to examine legal heirs of marginal witnesses and scribe to identify their signatures, will help the Court below to arrive at the conclusion as to whether Will is genuine and valid document. On leading of such evidence, appellants will also have the opportunity to produce evidence that Will is a fake and forged document. Order passed by learned Ist Appellate Court allowing permission to respondents to lead additional evidence, as such, suffers from no legal infirmity calling for any interference in this appeal.

The next question, which arises for consideration in this appeal, is as to what procedure learned Ist Appellate Court has to follow after allowing of additional evidence? In this regard reference can be made to provisions of Order XLI Rule 28 CPC, which reads as follows:-

“28. Mode of taking additional evidence - Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is

preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.”

On perusal of above provision, it is evident that learned Ist Appellate Court could not order remand of case on the sole ground that it has allowed some additional evidence to be led by the parties to appeal. Instead, it has to proceed further as per provisions contained in Order XLI Rule 28 CPC to decide the appeal on merit.

As a sequel of my above discussion, this appeal is partly accepted, as follows:-

- (i) Order of learned Ist Appellate Court directing learned trial Court to frame issue “whether Will dated 02.08.1974 is genuine and valid document” is set aside.
- (ii) Order of learned Ist Appellate Court allowing application of respondents under Order XLI Rule 27 CPC is upheld.
- (iii) Order of learned Ist Appellate Court remanding the case to learned trial Court for fresh decision is set aside and it is directed to proceed further to decide the appeal on merit as per provisions of Order XLI Rule 28 CPC.

Parties are directed to appear before learned Ist Appellate Court/successor Court on 05.07.2019, on which date appeal file shall be taken on board and proceeded further to dispose of the same as per above observations.

May 28, 2019

jk

**(SURINDER GUPTA)
JUDGE**

Whether speaking/reasoned: ***Yes/No***

Whether Reportable: ***Yes/No***