

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

RSA No.519 of 2021 (O&M)

Date of decision: 2nd August, 2022

Kulwinder Singh

... Appellant

Versus

Harjinder Singh & others

... Respondents

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present: Mr. Gurtej S. Dhindsa, Advocate for the appellant.

MANJARI NEHRU KAUL, J.

By way of judgment and decree dated 19.05.2016, the suit filed by the plaintiff/respondent No.1 was decreed by the learned trial Court and the appeal preferred against the said decree was dismissed by the learned first appellate Court on 26.09.2019. One of the defendants is thus now in Regular Second Appeal before this Court challenging the concurrent findings of both the Courts below. The parties to the *lis* hereinafter shall be referred to by their original position in the suit.

Plaintiff Harjinder Singh filed a suit for declaration, joint possession and permanent injunction in respect of the property duly detailed and described in the head-note of the plaint (hereinafter referred to as, 'suit property'). As per the pleaded case, previously one Sukhdev Singh son of Sarwan Singh was a share-holder in the properties described at letters 'A' and 'B' of the plaint as per jamabandi for the years 2008-09

and 2009-10. The plaintiff claimed share of said Sukhdev Singh on the basis of a Will dated 27.05.2013 Ex.P2 which was executed in his favour by Sukhdev Singh. It was claimed that since the relationship of Sukhdev Singh with the defendants (defendant No.1 being mother, defendant No.2 widow, defendant No.3 son and defendant No.4 daughter of said Sukhdev Singh, defendants No.5 and 6 being widow and son respectively of the predeceased son of Sukhdev Singh) was not cordial, he had executed the Will in favour of the plaintiff in view of services rendered by him. It was further pleaded that during the lifetime of Sukhdev Singh, defendant No.1 had instituted a civil suit under Order 33 Rule 1 CPC titled as 'Gurdev Kaur vs. Sukhdev Singh', which was decided on 08.11.2013. Sukhdev Singh had disowned his wife defendant No.2, son defendant No.3 and his daughter-in-law from his entire movable and immovable properties and had even given an affidavit dated 26.05.2011 duly attested from the Executive Magistrate, Fatehgarh Sahib. However, after the death of Sukhdev Singh, mutation No.533 regarding the suit property had been sanctioned by the revenue authorities in favour of the defendants on the basis of natural succession after ignoring the Will dated 27.05.2013 which stood executed in favour of the plaintiff. As the defendants refused to admit the claim of the plaintiff to the suit property, the plaintiff instituted the suit in question.

In their written statement, the defendants questioned the legality of the Will dated 27.05.2013. It was claimed that Sukhdev Singh had been residing with his family i.e. the defendants. It was urged that in

fact the plaintiff was a total stranger to the family and hence there was no occasion for Sukhdev Singh to execute the alleged Will in favour of the plaintiff. The defendants asserted that mutation No.533 had rightly been sanctioned by the revenue authorities in their favour on the basis of natural succession. It was also claimed that the suit property was ancestral, coparcenary and Joint Hindu Family property of Sukhdev Singh as he had inherited the same from his father Sarwan Singh who in turn had inherited it from his father Kartar Singh. In the circumstances, Sukhdev Singh was not even competent to execute any Will regarding the suit property.

Both the Courts below, on the basis of material and other evidence led, concurrently concluded that the plaintiff Harjinder Singh had been able to successfully establish the due execution of Will in his favour.

Learned counsel appearing for the appellant/defendant has vehemently argued that the Courts below failed to appreciate that since the suit property was ancestral and Joint Hindu Family property, Sukhdev Singh was not competent to execute any Will with regard to the same. Still further, he has argued that the courts below also failed to take into account that mutation No.533 regarding the suit properties of Sukhdev Singh had been rightly sanctioned on the basis of natural succession in favour of the defendants vide order dated 27.08.2014 by the Assistant Collector (1st Grade), Fatehgarh Sahib. Since no appeal had been preferred against the said order, it had attained finality and hence the suit

instituted by the plaintiff was not maintainable. It was further argued that the Will in question was also shrouded in suspicious circumstances as the attesting witnesses of the Will did not belong to the village of the deceased and rather he belonged to the village of the plaintiff. Furthermore, the deceased had died within ten days of execution of the Will.

I have heard learned counsel for the appellant and perused the relevant material on record.

It transpires that after the written statement had been filed by the defendants and issues framed in their presence by the trial Court, the case was fixed for evidence of the plaintiff, however thereafter, none appeared on their behalf to contest the suit, as a result of which they were proceeded against ex-parte before the trial Court. While impugning the judgment and decree of the learned trial Court, the defendants alleged that the Will Ex.P2 executed by Sukhdev Singh was a forged and fabricated document. However, the least that the defendants could have done to substantiate their case of forgery and fabrication of Will was to lead some evidence in the said regard, which admittedly was not done. Even the property in dispute being ancestral and coparcenary property, was not proved by the defendants nor any evidence led in the said regard. The case of the defendants that Sukhdev Singh had cordial relations with them and hence there was no occasion for him to execute a Will in favour of the plaintiff stood demolished from the affidavit Ex.P1 dated 26.05.2011 executed by none other than Sukhdev Singh himself, wherein

he specifically stated that his relations with the defendants were strained as he was being abused and physically assaulted by them. Not only this, vide affidavit Ex.P1, he had disinherited the defendants from his properties. It may also be relevant to point out here that a suit by defendant Gurdev Kaur i.e. wife of Sukhdev Singh under Order 33 Rule 1 CPC claiming maintenance from Sukhdev Singh, was dismissed, due to her non-appearance vide order dated 08.11.2013 Ex.P4. It is discernible from the aforementioned facts and circumstances when seen in their totality, that the relations of Sukhdev Singh with the defendants were far from cordial and in fact seemingly strained. PW-4 Lachhman Singh, witness to the Will Ex.P2, while stepping into the witness box, categorically deposed that he and Sukhdev Singh were known to each other and the Will in question Ex.P2 qua the suit property was executed in favour of the plaintiff by the testator i.e. Sukhdev Singh in his sound disposing mind because of the services rendered by the plaintiff towards him. Still further, he categorically stated that Sukhdev Singh had signed the Will Ex.P2 in his presence and also in the presence of the other witnesses namely Gurmukh Singh and Paramjit Singh. It may also be noticed that the Will had been signed not only by Gurmukh Singh and Paramjit Singh, rather PW-4 Lachhman Singh had also identified his own signatures on the Will. Still further, the copy of the Will Ex.P2 stood duly proved on record by PW-3 Paramjit Singh (office kanungo). It would be most pertinent to point out here, as already observed in the preceding paragraphs, that the defendants after initially putting in an appearance

before the trial Court, chose not to appear thereafter and even after being proceeded against ex-parte on 20.11.2015, they did not even bother to move any application before the trial Court to set aside the ex-parte order much less seek permission to contest the suit on merits. The suit was finally decreed in favour of the plaintiff by the trial Court on 19.05.2016. Learned counsel appearing for the appellant, no doubt, vehemently argued that they were unable to pursue their case as their counsel had gone abroad, however, this Court does not find the said argument very convincing as nothing prevented the defendants from engaging another counsel.

The appellant has also moved an application under Order XLI Rule 27 CPC (CM No.2949-C of 2021) for leading additional evidence along with this Regular Second Appeal. Admittedly, no such application for leading additional evidence was moved before the lower appellate Court even though the documents sought to be placed on record were well within the knowledge and possession of the appellant, yet he chose to sit quiet about it.

The Hon'ble Supreme Court in '**Union of India vs. Ibrahim Uddin & another**' (2012) 8 SCC 148, while dealing with the scope of Order XLI Rule 27 CPC, held as under:-

“36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional

circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself.

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment.

38. Under Order XLI, Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for

removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence.

39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal.

<i>XXXX</i>	<i>XXXX</i>	<i>XXXX</i>
<i>XXXX</i>	<i>XXXX</i>	<i>XXXX</i>

48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence

may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.”

Adverting to the case in hand, even if the said application is allowed, the documents (Annexures A1 to A4) which the appellant now wants to adduce by way of evidence, would not in any way have any bearing on the outcome of this appeal. Still further, this Court is of the opinion that the appellant had alleged that the Will is a result of forgery and is thus, invalid. Hence, the onus to prove the same was on him but he failed to discharge the same and thus he is not entitled to do it at this stage. Accordingly, the prayer for leading additional evidence is hereby declined.

Reverting to the main appeal, on being pointedly asked, learned counsel has failed to bring to the notice of this Court any material on record from which it could be inferred that the conclusions drawn by both the courts below were either contrary to the record or suffered from any material illegality. In view thereof, the appeal being without any merit stands dismissed in limine.

(MANJARI NEHRU KAUL)
JUDGE

August 2, 2022

rps

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