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

**SAO-23-2018 (O&M)
Date of decision : 25.03.2022**

Uma Parkash and Another

.....Petitioners

Versus

Chemali Devi @ Bhagoti and Others

.....Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Ajay Jain, Advocate for the petitioners.

Mr. P. R. Yadav, Advocate for the respondents.

ALKA SARIN, J.

Heard through video conferencing.

The present appeal has been filed challenging the order dated 30.01.2018 passed by the Additional District Judge, Narnaul, whereby it set aside the judgement and decree dated 23.01.2015 passed by the Trial Court and remanded the case back to the Trial Court for deciding the suit afresh. The plaintiff-respondents were permitted to lead additional evidence before Trial Court and the defendant-appellants were given liberty to rebut the said evidence and lead evidence with regard to the adoption of Amar Singh.

The facts in brief are that the plaintiffs filed a suit for declaration and permanent injunction inter-alia to the effect that they are owners in possession in equal shares of land measuring 27 Kanal 4 Marla

in Village Dharsu, Tehsil Narnaul, District Mahendergarh and that the defendants have got no right, title and interest in the same and Will dated 27.11.2006 allegedly executed by deceased Hanuman in favour of the defendants is absolutely wrong, against law and facts, based upon fraud and misrepresentation, is null and void and is not binding on the rights of the plaintiffs and is liable to be set aside and further restraining the defendants from interfering in the peaceful possession of the plaintiffs in the guise of the alleged Will and they be restrained from creating any third party interest thereon.

The suit was contested by the defendant-appellants. The Trial Court framed the following issues :

1. Whether plaintiffs are entitled to the relief of declaration as prayed for them ? OPP
2. Whether plaintiffs are entitled to the relief of permanent injunction as prayed for by them ? OPP
3. Whether Hanuman (deceased) has executed a legal and valid registered Will bearing vasika No.203 dated 27.11.2006 in favour of the defendants in his sound mind and of his own free will, if so, its effect ? OPD
4. Whether plaintiffs have no locus standi and cause of action to file and maintain the present suit ? OPD
5. Relief.

Both parties led their respective evidence and vide judgement and decree dated 23.01.2015 the Trial Court dismissed the suit of the plaintiff-respondents. Issue Nos.1 to 3 were decided against the plaintiff-

respondents.

The plaintiff-respondents filed an appeal against the dismissal of their suit. Before the lower Appellate Court the plaintiff-respondents urged that they had sought to produce a sale deed dated 27.12.2010 by way of additional evidence before Trial Court but the said application was declined by the Trial Court vide order dated 23.12.2014 and that this sale deed showed that Amar Singh was not the adopted son of Hanuman (Testator). Before the lower Appellate Court also the plaintiff-respondents filed an application for additional evidence to adduce a judgment dated 17.2.2017 whereby the said Amar Singh was found engaged in getting prepared forged certificate regarding his educational qualification and was convicted for offence under Sections 420, 465, 468, 471 IPC.

The lower Appellate Court vide impugned order dated 30.01.2018 *inter-alia* held that “*aforesaid documents sale deed dated 27.12.2010 and judgment/order of sentence dated 9.2.2017/17.2.2017 sought to be produced by plaintiffs in additional evidence are of material importance as they would have bearing upon the question whether or not Amar Singh is adopted son of Hanuman or had been residing with Hanuman which in turn would have material bearing upon the question as to whether the testator executed the Will in favour of defendants - sons of Amar Singh. The said documents are required for just and fair adjudication of the said question. Further the said question can very well be adjudicated under issue no.3 already framed by learned trial court and there is no need to frame fresh issue in that regard*”. The lower Appellate Court further set aside the judgement and decree dated

23.01.2015 passed by the Trial Court in entirety and remanded the case back to the Trial Court. The plaintiff-respondents were permitted to lead the said additional evidence before Trial Court and the defendant-appellants were given liberty to rebut the said evidence and lead evidence with regard to adoption of Amar Singh. The lower Appellate Court further held that *“After recording of said evidence the learned trial court shall decide the suit afresh and while deciding issue no.3 shall also consider whether the execution of the Will is proved in accordance with law”*. Hence, the present SAO by the defendant-appellants.

Learned counsel for the defendant-appellants has contended that the impugned order is illegal, arbitrary and erroneous inasmuch as the lower Appellate Court could not have remanded the matter without setting aside the findings returned by the Trial Court. Learned counsel for the defendant-appellants has further contended that as per the provisions of Order 41 Rule 28 CPC, if additional evidence is allowed to be produced, the lower Appellate Court may either take such evidence itself or direct the Trial Court from whose decree the appeal is preferred to record the evidence and send it when taken to the Appellate Court.

Per contra, learned counsel for the plaintiff-respondents has contended that there is no illegality in the impugned order passed by the lower Appellate Court. According to him, the findings of the Trial Court are deemed to having been set aside once the matter was being remanded back. He further contended that there is no ground for interference in the impugned order inasmuch as a fresh decision would be required on the merits of the case in view of additional evidence being allowed.

Heard.

Order 41 CPC pertains to appeals from original decrees and Rules 28 and 29 thereof read as under :

“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.

29. Points to be defined and recorded - Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.”

It is evident from a perusal of the aforesaid provisions that after allowing the production of additional evidence, the Appellate Court may either record the same of its own or direct the Trial Court to record it or send the same to it. Instead of following the procedure as laid down under Order 41 Rule 28 CPC, the lower Appellate Court adopted a shortcut method to dispose of the appeal by remanding the case. Once the lower Appellate Court had allowed the application of the plaintiff-respondents for producing additional evidence, during the pendency of the appeal, the lower Appellate Court was required to follow the procedure as laid down under Order 41 Rule 28 CPC instead of setting aside the judgment and decree of the Trial Court and directing the Trial Court to decide the suit afresh. During the pendency of an appeal an Appellate Court is empowered to allow the production of additional evidence under

Order 41 Rule 27 CPC and Order 41 Rule 28 CPC provides that wherever the additional evidence is allowed to be produced, the Appellate Court may either take such evidence itself or direct the Trial Court to take such evidence and to send it, when taken, to the Appellate Court. In the present case, instead of either taking the additional evidence itself or directing the Trial Court to take the additional evidence and thereafter to send the same to the Appellate Court, the lower Appellate Court has set aside the judgment and decree of the Trial Court and has remanded the case to the Trial Court for decision afresh. In the opinion of this Court, the procedure adopted by the lower Appellate Court was contrary to the specific provisions of Order 41 Rule 28 CPC.

In view of the discussion above, the impugned order passed by lower Appellate Court suffers from legal infirmity and is not legally sustainable. This appeal is allowed and the impugned order dated 30.01.2018 passed by the learned Additional District Judge, Narnaul is modified inasmuch as the order of the learned Additional District Judge, Narnaul allowing the additional evidence to be produced in appeal is upheld. However, the order of the learned Additional District Judge, Narnaul vide which the judgment and decree dated 23.01.2015 passed by the Trial Court were set aside and the Trial Court was directed to decide the suit afresh is set aside and it is directed that in view of the provisions of Order 41 Rule 28 CPC the learned Additional District Judge, Narnaul shall direct the Trial Court to take the additional evidence of the plaintiff-respondents and the rebuttal evidence that may be led by the defendant-appellants and thereafter to send the same to the lower Appellate Court.

After the additional evidence and the rebuttal evidence, if any, is sent by the Trial Court, the lower Appellate Court shall decide the appeal, in accordance with law, keeping in view the evidence already examined, the additional evidence and rebuttal evidence, if any.

The parties through their counsel are directed to appear before the learned Additional District Judge, Narnaul on 18.04.2022 on which date the learned Additional District Judge, Narnaul shall pass the necessary orders directing the Trial Court to record the additional evidence and the rebuttal evidence, if any. The learned Additional District Judge, Narnaul shall also fix a date for appearance of the parties before the Trial Court in this regard.

Pending applications, if any, also stand disposed off.

25.03.2022

Yogesh Sharma

**(ALKA SARIN)
JUDGE**

NOTE : Whether speaking/non-speaking : Speaking
Whether reportable : Yes/No