

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

CR No.8393/2018(O&M)

Date of decision: November 24,2022.

Kaka Singh

.....Petitioner

Vs.

Pal Singh and others

.....Respondents

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr.SS Salar,Advocate for the petitioners.

Mr.Amarjit Markan, Advocate for the respondents.

Nidhi Gupta,J.

Prayer in the present revision petition is for quashing of the order dated 27.11.2018 (Annexure P-4) passed by learned lower Appellate Court whereby application moved by the plaintiff/respondent no.1 for additional evidence has been accepted allowing him to produce on record mutation no.1908 dated 5.3.2006 BK (Bikrami Samvat).

Brief facts of the case are that plaintiff/respondent no.1 filed civil suit for declaration and joint possession to the extent of 1/5th share out of total land measuring 145K-15M and land measuring 0K-07M (land in dispute). It was alleged that the suit property is ancestral joint Hindu property of the parties and they are coparceners. It was further alleged in the suit that Jangir Singh, father of the parties was Karta of the families and therefore, though Jangir Singh was not entitled to, yet had suffered a decree dated 3.5.1989 in favour of Kaka Singh, present petitioner/defendant no.1 to the extent of 1/3rd share of the land.

It was pleaded by Pal Singh plaintiff/respondent no.1 that the said judgment

dated 3.5.1989 is liable to be set aside qua his right as he came to know about the decree after the death of Jangir Singh only and the mutation was sanctioned illegally.

Notice of the suit was issued and defendant no.1/ petitioner filed written statement taking objection that suit property was not ancestral and was self-acquired property of Jangir Singh, who had given 1/3rd share of 145K to the petitioner/defendant in a family settlement and since then the defendant is in possession of the land as owner. It is stated that the property was given to the petitioner in the family settlement and this right was recognized in the decree in the aforementioned civil suit No.289 of 8.4.1982 decided on 3.5.1989 in favour of petitioner/defendant and that the said decree is in the knowledge of plaintiff/respondent.

On the basis of the above pleadings, material issue i.e. issue number 4 was framed to the effect that “Whether the suit property is ancestral joint Hindu coparcenary property of the parties and deceased Jangir Singh was Karta thereof? OPP.” Thereafter, the learned Sub Judge Ist Class, Dhuri vide judgment and decree dated 22.5.1990 (Annexure P-1) answered issue no.4 in affirmative and held that the property in dispute is Hindu family ancestral coparcenary property and plaintiff has right by birth and Jangir Singh was karta of the entire property and he could not have transferred the entire land in favour of petitioner/defendant no.1 and could only transfer his share. It is important to note that learned Trial Court came to this conclusion on the basis of mutation excerpt Ex. PX.

Aggrieved of the above said judgment and decree the present petitioner filed Appeal No.205 of 27.7.1990 which was partly accepted by the learned Additional District Judge, Sangrur vide judgment and decree dated

26.9.1994 in which it was held that the share of respondent/plaintiff Pal Singh would be 1/5th in the land measuring 48K13M which comes to 9K15M.

Aggrieved of this judgment dated 26.9.1994 both the parties herein preferred separate Regular Second Appeals before this Court, which were disposed of by this Court vide common order dated 24.4.2018 (Annexure P-3) remanding the matter back to the First Appellate Court to re-decide the entire matter in accordance with law. This Court observed that First Appellate Court had failed to decide whether the property is a coparcenary property or not.

It is during the pendency of this appeal before the First Appellate Court in the second round, that the plaintiff/respondent No. 1 moved the present application under Order 41 Rule 27 CPC to prove the mutation of inheritance of Chanan Singh (since deceased) bearing No.1908 dated 5.3.2006 BK and for producing certified copy of the abovesaid mutation as additional evidence. It was submitted that the suit land was in the name of Chanan Singh which was inherited by his sons Ganda Singh and Jangir Singh and grandson Mukhtiar Singh son of Bachan Singh. It is this application for producing certified copy of aforesaid mutation/ additional evidence which has been allowed by the learned First Appellate Court vide impugned order dated 27.11.2018 which is in challenge before this Court.

It has been vehemently submitted by the learned counsel for the petitioner/defendant no.1 that a perusal of the direction of this Court while remanding the matter back to the learned First Appellate Court is very specific - inasmuch as this Court had directed that - *“Keeping in view the aforesaid facts and after noticing that the plaintiff and defendant no.1, both are aggrieved of the judgment passed by the First Appellate Court and learned First Appellate court has failed to decide whether the property is a coparcenary property or not, this*

Court is of the considered opinion that the First Appellate Court should be directed to re-decide the appeal while adjudicating upon all the issues after re-appreciating the evidence available on the file”. It is accordingly submitted that in conformity with the above directions of this Court, it was incumbent upon the First Appellate Court to decide the remanded appeal *after re-appreciating the evidence available on file*; and therefore, the First Appellate Court could not have permitted leading of additional evidence vide order impugned, as it was required to give a decision on the basis of the material before it.

The second contention raised by the counsel for the petitioner is that an application for additional evidence can only be considered at the final stage of decision of the civil suit. In support of this argument, learned counsel has relied upon judgment of Hon’ble Supreme Court in **Union of India v Ibrahim Uddin and another (2012) 8 SCC 148** wherein their Lordships in paras 37 to 39, 49 and 52 have held as follows:-

“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. (Vide *Haji Mohammed Ishaq v. Mohd. Iqbal and Mohd. Ali and Co.* [(1978) 2 SCC 493 : AIR 1978 SC 798])

38. Under Order 41 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. (Vide *Lala Pancham* [AIR 1965 SC 1008] .)

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. (Vide *State of U.P. v. Manbodhan Lal Srivastava* [AIR 1957 SC 912] and *S. Rajagopal v. C.M. Armugam* [AIR 1969 SC 101] .)

49. An application under Order 41 Rule 27 CPC *is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved*. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the court. (Vide *Arjan Singh v. Kartar Singh* [1951 SCC 178 : AIR 1951 SC 193] and *Natha Singh v. Financial Commr., Taxation* [(1976) 3 SCC 28 : AIR 1976 SC 1053] .)

52. Thus, from the above, it is crystal clear that an application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of the final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored.”

Learned counsel for the petitioner further submits that even as per Rule (v) and (vi) of Chapter 9 of High Court Rules and Orders, Volume I, as to how an excerpt is to be proved, procedure is as follows:-

“(v) Excerpt should be a true copy and should be proved. Court must remember that unless proved the excerpt of the Special Kanungo or Patwari Muharrir is not evidence and must not be treated as such. The Special Kanungo or Patwari Muharrir must, when he goes to Court always bring with him the original records from which his excerpt has been compiled so that they may be available for comparison. He must always be put on oath, and be asked to say whether the excerpt is a true copy of a portion of the original records. The excerpts must be a correct copy of such portions of the records as are relevant and not merely a summary or paraphrase.

(vi) Comparison with original. The Court should, as a rule, compare, with the original records some of the entries in the abstract and initial and date those thus compared.”

It is further submitted that as per para 232 of the Mullah's Law it is provided that any person who asserts that the property at his hands was ancestral in nature, has to prove that it has devolved from three generations, in essence, he should be 4th generation; and in the present case nothing has been brought on record to show that the property at the hands of respondent/plaintiff is coparcenary or ancestral.

The last contention raised by the counsel for the petitioner is that property came to the parties' father Jangir Singh through Chanan Singh and therefore, it is not believable that the respondent/plaintiff did not have knowledge of the mutation and therefore, filing of the present application was a misuse of due process of law and same ought to have been dismissed. It is further submitted that the Regular Second Appeal was remanded back to be decided only on the basis of evidence on record, and the plaintiff/respondent cannot now be permitted to take advantage of his own wrong and ought to have produced the relied upon evidence/mutation, in proper form at the relevant time and not just

in the form of excerpt Ex.PX as he was well aware of the mutation the same having devolved upon Jangir Singh his father. It is further submitted that the appellate court has allowed this application in violation of High Court Rules and Orders, as reproduced above and entire mutation should have been produced should have been produced at the relevant time and cannot be permitted to be placed on record now in view of inter-alia, the above said submissions.

Per contra, learned counsel for the respondents takes me back to the order dated 24.4.2018 passed by this Court in the above-mentioned RSA No.2874/1994 and RSA 214/1995 wherein, it has further been directed that “*the judgment and decree passed by First Appellate Court is set aside and the case is remitted back to the learned First Appellate Court to re-decide the entire matter in accordance with law.*” It is accordingly submitted by Id. Counsel for the respondent-plaintiff that direction of this Court in above said RSAs was to decide the matter *in accordance with law*, which of necessity would imply and would not preclude the respondent/plaintiff from placing on record anything and everything that is necessary for proper adjudication of the matter. It is submitted that accordingly, there was no error in the impugned order dated 27.11.2018 passed by the First Appellate Court in allowing respondent’s application under Order 41 Rule 27 CPC seeking to produce additional evidence.

It is further submitted by the learned counsel for the respondent No. 1 that it has been noticed by the learned First Appellate Court that “*mutation no.1908 dated 5.3.2006 BK has probative value to arrive at just decision of the case as it throws light on the coparcenary nature of the property*” and accordingly, it is clear that the said evidence/ mutation is a necessary piece of evidence and therefore, there was no error in the impugned order.

It is further submitted by the learned counsel for the respondent/plaintiff that he was compelled to file entire mutation in view of the specific plea taken on behalf of the defendant/petitioner to the effect that excerpt Ex. PX produced by the plaintiff originally, is not proved on the Court file as the official who had prepared the excerpt was not examined and the excerpt be therefore rejected. Reference to this can be found in order dated 24.4.2018 passed by this Court in the above-mentioned RSA No.2874/1994 and RSA 214/1995. It is submitted that in this situation respondent/plaintiff was required to produce the complete mutation in original.

It is further submitted by the counsel for the respondent No. 1 that the present case being Civil Suit 1069 of 1982 relates to long back when it was common practice and permissible and acceptable for excerpts to be placed on record but over a period of time case law has evolved whereby this is no longer permitted and proving of excerpts is required.

It is further submitted that in **Gurdial Singh and others v Mam Chand and others**, Law Finder Doc Id # 232952, this Court while considering the scope of Order 41 Rule 27 CPC as well as Section 107 CPC, in Paras 12 to 14 of the judgment has held as follows: -

12. It is pertinent to mention that during the pendency of the first appeal before the First Appellate Court, the appellants had filed an application under Order 41 Rule 27 read with Section 151 of the Civil Procedure Code for permission to lead additional evidence for the purpose of producing jamabandis for the years 1963-64, 1969-70, 1974-75 and 1979-80, but the said application was dismissed by the learned District Judge, Kurukshetra on 14.02.2007 on the ground that the said documents were within the knowledge of the appellants earlier, therefore, in terms of Order 41 Rule 27 (1)(aa) of the Civil Procedure Code, they were not allowed to lead additional evidence in appeal. In this case, the appellants have also challenged the said order dated 14.02.2007 passed by the First Appellate Court by which their application for leading additional evidence was dismissed. It may also be

clarified that the application for leading additional evidence was dismissed on the same day when the main appeal was dismissed by the First Appellate Court. The first question, which is to be decided by this Court, is as to "whether the First Appellate Court should have or should not have allowed the application for additional evidence because learned counsel for the appellants has placed heavy reliance upon the jamabandis Annexures P-2 to P-5 in order to show that they were in possession of the land in dispute as tenants".

12A. Before appreciating the respective contentions, it would be worthwhile to peep into the relevant provisions of law, namely, Section 107 and Order 41 Rule 27 of the Civil Procedure Code, which are reproduced as under :-

Section 107 of the Civil Procedure Code

"107. Powers of appellate Court. -(1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power -

- (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require such evidence to be taken.
- (2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

Order 41 Rule 27 of the Civil Procedure Code

"27. Production of additional evidence in Appellate Court. -(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -

- (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
- [(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]
- (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the court shall record the reason for its admission."

13. Section 107 of the Civil Procedure Code empowers an Appellate Court to determine a case finally, to remand a case, to frame issues and refer them for trial and to take additional evidence or to require such evidence to be taken. With this substantive enabling power, Order 41 Rule 27 of the Civil Procedure Code came into being which lays down further conditions and circumstances in which the Appellate Court could take the additional evidence. Originally, there were two conditions in Order 41 Rule 27 of the Civil Procedure Code, i.e. (a) if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, and (b) if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. but in the year 1976, Rule (aa) was also inserted in Order 41 Rule 27 (1) of the Civil Procedure Code which provides that if the party seeking to produce additional evidence, establishes that despite exercise of due diligence, the evidence which is sought to be produced, was not within his knowledge or despite exercise of due diligence, the evidence could not be produced by him when the decree appealed against was passed, could be granted permission. Thus, Clause (aa) further enables the Court to give permission but Clause (b) of Order 41 Rule 27 (1) empowers the Appellate Court to give permission for additional evidence if the Court itself requires any document to be produced or any witness to be examined for the purpose of its assistance for coming to a just conclusion and for any other substantial cause. Substantial cause though has not been defined, therefore, it depends upon facts and circumstances of each case. In the light of the aforesaid provisions, the order passed by the learned First Appellate Court dismissing the application of the appellants for additional evidence is to be examined. Even if the documents, namely, jamabandis which are sought to be produced on record, were within knowledge of the appellants, the Court can always allow it in terms of Order 41 Rule 27(1) (b) of the Civil Procedure Code. To my mind, documentary evidence which cannot be created or manufactured for the first time after the decision of the suit i.e. any official document whose authenticity is not in dispute and is capable of assisting the Court to take final decision in respect of the dispute between the parties, such evidence should not normally be disallowed to be taken on record. In this regard, the judgments relied upon by learned counsel for the appellants in the case of North Eastern Railway Administration, Gorakhpur (supra) and Ram Kishan (supra) are fully applicable, whereas the judgment

relied upon by learned counsel for the respondents in the case of Smt. Krishana (supra) is not applicable as the facts of that case were altogether different because in that case, application under Order 41 Rule 27 of the Civil Procedure Code by which permission was sought to lead additional evidence to prove documents Mark-A to Mark-C, namely, lease deed, agreement and receipt respectively, were privately prepared documents regarding which this Court had held that those were within the knowledge of the party who could have produced those documents before the Trial Court but after the decision of the suit, in order to fill up the lacuna, the said documents cannot be allowed to be produced on record. Thus, on its own facts, there is no quarrel with the law laid down by this Court in the case of Smt. Krishana (supra).

14. In view of the aforesaid discussion, the question with regard to order passed by the First Appellate Court on 14.02.2007 by which application filed by the appellants for leading additional evidence to produce on record certified copies of jamabandis was dismissed, is decided in favour of the appellants and the said order is set aside much-less overruled and hence, the CM No. 4610-C of 2010 is allowed and the documents Annexures P-2 to P-5 are taken on record as additional evidence.” (Emphasis supplied)

Learned counsel has further relied upon judgment of the Hon’ble Supreme Court in **Arshnoor Singh v Harpal Kaur**, Law Finder Doc Id #1521418, and upon judgment of this Court in **Sanjay Kumar v Sita Devi**, Law Finder Doc Id #1740566. Learned counsel further states that Order 43 Rule 1A permits that all interim orders at this stage can be assailed.

In rebuttal, learned counsel for the petitioner submits that provisions of Order 43 Rule 1A are only enabling in nature; and that the direction of this Court to the First Appellate Court in above said RSAs to decide the appeal in accordance with law does not mean that the First Appellate Court can travel beyond the remand order; and that the plaintiff/respondent has been sleeping over the matter and the Court should not come to the rescue of such party to enable him to supplement his evidence.

I have heard learned counsel for the parties and perused the record in detail.

In my view there is merit in the submissions advanced on behalf of the counsel for the respondent/plaintiff. The argument of Id. Counsel for the petitioner to the effect that in allowing the respondent No. 1 to place on record additional evidence, the First Appellate Court travelled beyond the scope of remand by this Court as it could decide the matter only *after re-appreciating the evidence available on file*, is misplaced. Besides the fact that the above said direction is being read piecemeal, and not in its entirety, such a construction of the remand order would be too narrow, and not a correct appreciation of the direction of this Court. Accordingly, this argument of the Id. Counsel for the petitioner is rejected.

Ld. Counsel for the petitioner has relied upon judgment of the Hon'ble Supreme Court in case of **Ibrahim Uddin (supra)**. However, in my view the observations of the Hon'ble Supreme Court in above-cited case are also of no help to the petitioner as their Lordships have clearly permitted leading of additional evidence in the following terms:

38. Under Order 41 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. (Vide *Lala Pancham* [AIR 1965 SC 1008] .)

Accordingly, as per the above pronouncement, discretion has been granted to the Appellate Court to determine whether such evidence is

necessary to enable it to pronounce judgment. This view of the Hon'ble Supreme Court has been followed by this Court in **Gurdial Singh's case (supra)**. In the present case, as has been noticed above, the First Appellate Court has opined that the evidence has *probative value*, and therefore, has exercised its discretion as thought fit. As such, nothing more needs to be seen. Nonetheless, it cannot be disputed that the core issue requiring consideration in the present case is to determine whether the suit property is ancestral joint Hindu coparcenary property of the parties? Needless to say, in the determination of such an issue the mutation of inheritance of Chanan Singh ancestor of the present parties would have decisional bearing. The issue is intrinsic to the dispute in hand and the mutation is imperative for proper adjudication of this issue. In fact, perusal of the record shows that though the trial Court had decided this issue as noticed above, the matter was remanded back to the First Appellate Court only because it had failed to decide whether property is coparcenary property or not. In my view, this evidence in form of mutation is a valuable piece of evidence to arrive at a proper decision regarding the dispute and issues at hand. As such there is no error in the impugned order dated 27.11.2018 passed by the learned First Appellate Court in permitting the respondent/plaintiff in producing the mutation in question as additional evidence.

As regards the petitioner's contention that the excerpt Ex. PX was not proved in accordance with law as required under the aforementioned High Court Rules, and therefore, the respondent No. 1 can now not be permitted to improve/ substantiate his case especially as he is presumed to have knowledge of the mutation, this argument also deserves to be rejected. These are public documents and have permissible value in evidence and can be produced at any stage. I find the submission of petitioner/defendant that the mutation was not produced in Court in proper manner to be misplaced.

As noticed above, Rule 27(b) itself permits production of any document or any witness to enable the Court to pronounce the judgment; *or for any other substantial cause* the Appellate Court may allow such evidence or document to be produced, or witness to be examined. Accordingly, great scope is granted under this provision to ensure substantive justice amongst the parties.

In view of the above discussion, I find no merit in the present revision petition and the same is hereby dismissed. Order dated 27.11.2018 passed by the First Appellate Court whereby application of plaintiff/respondent no. 1 seeking to lead additional evidence was allowed, is hereby upheld.

Application(s), if any, also stand disposed of.

(Nidhi Gupta)
Judge

November 24,2022.
Joshi

Whether speaking/reasoned

Yes

Whether reportable

Yes/No