

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CR-1625-2017 (O&M)

Date of decision: 20.02.2023

Suresh Kumar

...Petitioner(s)

Vs.

Vinay Kumar & Others

...Respondent(s)

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr. Ashok Khubhar, Advocate for the petitioner.

Mr. Keshav Partap Singh, Advocate for
respondent No.1.

NIDHI GUPTA, J.

Present Revision Petition has been filed by the defendant No. 2 seeking quashing of impugned order dated 31.01.2017 (Annexure P4) passed by learned lower Appellate Court vide which petitioner's application under Order 41 Rule 27 CPC for leading additional evidence has been dismissed.

2. Brief facts of the case are that respondent No.1/plaintiff had filed a Suit for declaration with consequential relief of permanent injunction, that plaintiffs and defendants are owners-in-possession in equal share of the suit property, and Will dated 21.08.2006 executed by late Sh. Madan Mohan in favour of defendants No.1 and 2 is illegal and not binding on rights of the plaintiff as suit property is ancestral in nature.

3. The petitioner along with other defendants/respondents No.2 to 4 herein filed written statement and contested the Suit and inter-alia, pleaded that there is no Joint Hindu Family with the plaintiff, as the same was severed after the plaintiff got separated from his father late Sh. Madan Mohan almost 30 years ago.

4. It was further pleaded that suit property was acquired by father of the parties late Sh. Madan Mohan, who had acquired the suit property by way of Civil Court decree dated 09.04.1970, and therefore, it was clear that suit property was not ancestral. It is further pleaded that Will dated 21.08.2006 was executed by late Sh. Madan Mohan in his good senses and of his own free will in favour of defendants No.1 and 2/proforma respondent No.2 and petitioner herein respectively.

5. Learned trial Court vide judgment and decree dated 01.09.2014 (Annexure P1) decreed the Suit in favour of plaintiff and held that plaintiff is entitled for declaration and injunction as prayed for. Against the said judgment and decree, the petitioner filed Civil Appeal No.455 of 2014. It is in the said appeal, that the petitioner has filed the present application under Order 41 Rule 27 CPC dated 30.09.2014 (Annexure P2) seeking permission to lead additional evidence to produce one of the attesting witnesses of the said Will dated 21.08.2006, as 'inadvertently' the said witness could not be produced before the learned trial Court. Plaintiff filed reply to said application; and vide order dated 31.01.2017, learned lower Appellate Court has

dismissed the said application of the petitioner seeking to lead additional evidence. Hence, present Revision Petition.

6. It is submitted by learned counsel for the petitioner that Will dated 21.08.2006 executed by late Sh. Madan Mohan father of the petitioner, is a legal document as it was duly registered. It is submitted that the said document has a great bearing on the issue in question and therefore, it is imperative that the petitioner be permitted to lead additional evidence by producing an attesting witness to the Will as doing so will establish the authenticity of the Will in question which is very necessary for proper adjudication of the matter. Learned counsel for the petitioner refers to application under Order 41 Rule 27 CPC filed by him to submit that it has been categorically stated by the petitioner that attesting witness of the Will dated 21.08.2006, could not earlier be examined by leading evidence before the learned trial Court, though the Will was duly accepted on file and registration of the Will was duly proved by summoning witness from Registering Authority. It is further submitted that this issue is of grave importance to the matter at hand, yet, the learned trial Court failed to frame a specific issue in this regard.

7. It is further submitted that the Will in question goes to the root of the cause/issue at hand, and it is clear from facts on record that petitioner was unable to produce the Will due to inadvertent omission despite exercise of due diligence.

8. Learned counsel for the petitioner further relies upon judgment of Hon'ble Supreme Court in ***Civil Appeal No.5863 of 2000***

titled as “State of Rajasthan Vs. T. Sahani” and of this Court in ***RSA No.1074 of 2011 titled as “Vikas Tushe Vs. Virender Kumar Bansal & Another”*** to submit that it is incumbent on learned First Appellate Court to decide application under Order 41 Rule 27 CPC along with main appeal. It is submitted that therefore, learned First Appellate Court could not have rendered a decision in the application prior to decision in the main appeal itself.

9. In response, it is submitted by learned counsel for respondent No.1/plaintiff that present application has been filed by the petitioner only to fill up lacuna in his case. It is submitted that the propounder has to prove the Will in terms of Section 68 of the Evidence Act and Section 63 of the Succession Act and further dispel all the suspicious circumstances. However, petitioner has failed to do so and as per established legal position, petitioner cannot now be allowed to lead additional evidence to fill lacuna in his case. Learned counsel relies upon judgment of Allahabad High Court in case of ***Misc. Single No.2692 of 2016 titled as “Firm Bal Govind Kishori Lal through partner & 6 Others Vs. Additional District Judge Court No.2 Faizabad & Others”*** to submit that Order 41 Rule 27 CPC clearly does not intend to allow litigant who had been unsuccessful in lower Court to patch up weak parts of his case and fill up omissions in appeal.

10. Learned counsel further relies upon judgment of Himachal Pradesh High Court in case of ***RSA No.42 of 2000 titled as “Anil Mahajan & Others Vs. Savitri Chaudhary & Others”*** wherein too, application under Order 41 Rule 27 CPC was not decided along with

main appeal, and therefore, submits that it is not always the case that such application has to be decided with the main appeal.

11. No other argument is raised on behalf of the parties.

12. I have heard learned counsel for the parties.

13. In the present case the evidence of the respondent No.1 was closed on 10.10.2013; and that of the defendants was closed on 02.04.2014. It is a matter of record that despite availing seven opportunities to lead evidence, defendants did not move an application/lead any evidence for proving the Will before the learned trial Court though the onus to prove the Will was on them. Clearly, the defendants had ample time to produce any/all evidence sought to be adduced by them by way of additional evidence.

14. For leading additional evidence before the Appellate Court, Order 41 Rule 27 (1) CPC, mandates as follows:

“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.”

15. A perusal of the above provision shows that the scope of Order 41 Rule 27(1) of the CPC is very clear. No doubt, the provision enables the party to file additional evidence at the first and second appellate stages. However, Rule 27(1)(aa) stipulates that such additional evidence can be permitted only if the party requesting it must be able to prove that, despite their best efforts, they were unable to introduce the additional evidence in the initial proceeding. Thus, the basic principle for admitting additional evidence is that the party appealing is able to establish that there was a valid reason for not submitting such evidence at the trial stage and that the additional evidence is relevant and material for deciding the rights of the parties to the lis.

16. In the present case however, a perusal of the petitioner's application under Order 41 Rule 27 CPC (Annexure P-2), shows that there is no averment whatsoever regarding 'due diligence' or 'knowledge' as required under Rule 27(1)(aa). In fact, the application makes no ground as to why the attesting witness to the Will was not examined earlier. All that has been stated is that:

"That inadvertently, one of the attesting witness of the Will dated 21.8.206 executed by Shri Madan Mohan, father of the appellant, could not be examined while leading evidence in the learned lower court, while registration of the Will was duly proved by way of summoning of witness from the Registration Authority and the Will was duly exhibited on the file."

17. In my view, the abovesaid averment does not satisfy the requirement of the provision, inasmuch as does not constitute 'due diligence' within the meaning of Rule 27(1)(aa). 'Inadvertence', on part of a party, cannot be construed as sufficient cause within the provision. Hon'ble

Supreme Court in **CA 16899 of 1996 “Karnataka Board of Wakf Vs. Government of India”** has categorically held that parties to an appeal shall not be entitled to produce additional evidence, unless they have shown that despite due diligence, they were unable to produce such evidence. In the present case, petitioner has admittedly, not shown due diligence.

18. Reference in this regard may also be made to judgment of the Hon’ble Supreme Court in **C.A. No.10195 of 2013 titled as “Govt. of Karnataka and Another Vs. K.C. Subramanya & Others”** wherein Their Lordships have held as follows:-

“6.On perusal of this provision, it is unambiguously clear that the party can seek liberty to produce additional evidence at the appellate stage, but the same can be permitted only if the evidence sought to be produced could not be produced at the stage of trial in spite of exercise of due diligence and that the evidence could not be produced as it was not within his knowledge and hence was fit to be produced by the appellant before the appellate forum.

7. It is thus clear that there are conditions precedent before allowing a party to adduce additional evidence at the stage of appeal, which specifically incorporates conditions to the effect that the party in spite of due diligence could not produce the evidence and the same cannot be allowed to be done at his leisure or sweet will.”

19. Further, a perusal of judgment and decree dated 01.09.2014 (Annexure P1) whereby Suit of the plaintiff was decreed, shows that though a specific issue in respect of the Will in question may not have been framed by the learned trial Court however, the learned trial Court had framed following two questions:-

“I) Whether the suit property is ancestral or not,

II) Whether the Will dated 21.8.2006 has been duly proved on the case file and thus the same is legal and valid in accordance with law.”

20. In respect of question No.2, learned trial Court had returned the finding which is as follows:-

“The defendants, in the present case, have failed to legally prove the Will dated 21.8.2006 as they have failed to examine any attesting witness to prove that their father Gian Singh had executed the Will in question in their presence and they have seen him sign the Will. Though, the defendants have examined Des Raj, registry clerk as DW2 who stepped into the witness box and proved the registration of the Will. In my opinion, the evidence of registry clerk could not be taken to be the attesting witness of the Will as he does not know the testator persons and mere registration of a document does not prove its execution. In terms of Section 68 of the Indian Evidence Act, it is mandatory to examine one witness, who must testify to prove valid execution and attestation of the Will i.e. both the witnesses have signed in the presence of the testator or the testator has either signed in presence of one or acknowledged his signature before the other.”

21. Learned trial Court thus, held that the defendants had failed to prove the Will in question in terms of Section 68 of the Evidence Act. The burden to prove the Will is on the propounder of the Will. The defendant, though the propounder of the Will, failed to examine any of the attesting witnesses and only examined DW-2-Desh Raj, Registry Clerk to prove the registration of the Will. However, it is not the case of the petitioner that the Will, or the attesting witness thereto, was not in the knowledge of the petitioner. It has just been stated that ‘inadvertently’ one of the witnesses to the Will could not be examined.

22. It is established legal position that provision of Order 41 Rule 27 CPC cannot be used to fill up lacuna in case. In this regard, reference may be made to pronouncement of the Hon’ble Supreme Court in ***N. Kamalam (dead) and another Vs. Ayyasamy and Another (2001) 7***

SCC 503, wherein it has been held that:

“the provisions of Order 41 Rule 27 has not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal – It does not authorize any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the Appellate Court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way.”

23. It is thus, clear that the intent of the said provision is not to permit party/applicant to patch up weak parts of his case and to fill up omissions in appeal. In the present case, it is the clear attempt of the petitioner to fill up gaps and lacunae in his evidence. As per law, petitioner cannot be permitted to do so.

24. As regards the argument of the petitioner that the application has to be heard with the main appeal, reference may be made to relied upon judgment of Himachal Pradesh High Court in case of **Anil Mahajan (supra) RSA No.42 of 2000** wherein application under Order 41 Rule 27 CPC was not considered by the Lower Appellate Court at the time of hearing of the appeal, it has been held that the same was a mere ‘*procedural error*’, and application for additional evidence was dismissed.

25. From the above facts, in my considered view, it is clear that defendants have not exercised due diligence, and cannot be permitted at this stage to improve their case or fill up lacunae in their case by leading additional evidence. It has been held to be against the spirit of the Code to allow a party to adduce additional evidence without the fulfillment of either of the three conditions contained in Rule 27.

26. Accordingly, I find no merit in the present Revision Petition, and the same is hereby, dismissed.

27. Pending application(s) if any also stand(s) disposed of.

20.02.2023

Sunena

(Nidhi Gupta)
Judge

Whether speaking/reasoned: Yes/No

Whether reportable: Yes/No