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

**CR-1102-2023 (O&M)**
**Date of Decision: 17.02.2023**

Romesh Lal (Since Deceased) Through LRs.
....Petitioner(s)

Versus

Devki Devi (Since Deceased) Through LRs. and others
....Respondents

**CORAM: HON'BLE MR. JUSTICE ARUN MONGA**

**Present:** Mr. Sanjeev Kumar Arora, Advocate
for the petitioner(s).

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**ARUN MONGA, J. (ORAL)**

Petition herein, *inter alia,* is for setting aside order dated 25.01.2023 (Annexure P-1) passed by learned Additional Civil Judge (Senior Division), Faridkot, whereby affidavit tendered by petitioner in his evidence as Ex.RW1/A on 21.12.2022 has been discarded.

2. Succinct facts first, as pleaded in the revision petition.

2.1. Contesting respondents/plaintiffs filed a suit for possession by redemption of the house in dispute. The said suit was dismissed by Sh. Manmohan Singh, then Sub-Judge First Class, Faridkot on 22.12.1979. Specific issue No.8 was framed by the Ld. Trial Court "*Whether defendant No.1 Amar Nath reconstructed the house by spending Rs.50,000/- and is entitled to claim the same on redemption?'.* The onus to prove this issue was upon defendants in the suit. The said issue was decided in favour of



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predecessor-in-interest of present petitioner. The findings on issue No.8 are as under:

> *"xxxx xxxx xxxx xxxx*
>
> *Issue No. 8*
>
> *33. Amar Nath defendant No. 1 stated that he constructed the site in dispute in 1934 at a cost of Rs.12000/-. He further stated that after decision of civil suit No. 3 of 1971, he reconstructed the house in 1976 and while a part of the existing construction was retained and was remodeled, the remaining portion has been newly constructed. He stated that the present construction in the three stories and that the cost of fresh construction is Rs. 50,000/-. He stated that money for construction in 1976 was taken by him from his account of M/S Amar Nath Jain and sons, of which he is a partner. He proved Ex. D.W.4/1 and D.W.4/2 which are the copies of ledger for the year 1976-77 and 1977-78, respectively. Similarly, he has proved copies Ex. D4/3 and Ex. D4/4 which are the copies of cash books for the year 1976-77 and 1977-78, respectively. He stated that these account books are regularly maintained by the said firm. The total amount withdrawn by Amar Nath from his family firm for construction of the house in 1976-77 is Rs. 38121/-. Amar Nath proved consolidated statement of expenses Ex. D.W.4/x. By this statement, total expenditure is Rs. 44388.75 paise out of which Rs. 38121/- are shown to have been spent by Amar Nath, Rs. 3267.01 paise by his wife and Rs. 3000.64 paise by his son Ramesh Lat. Amar Nath tendered bills of purchase and receipts of labour charges Ex. D.W.4/5 to Ex. D.W.4/74. It is from these bills and receipts that consolidated statement Ex. D.W.4/X purports to have been prepared by Amar Nath.*
>
> *34. Amar Nath defendant examined Mehar Singh D. W.2, aged 70 years, an Engineer and Registered valuer of Delhi. He stated that he inspected the premises in dispute on 17.4.79 and prepared plan Ex. D.W.2/2 and his report Ex. D.W.2/1. According to him, the cost of construction of 1934 is Rs. 12023/- and that the costs of construction of 1976-77 is Rs. 49711/-. Plaintiffs examined Shri. P.N. Sharma P.W 24, a retired S.D.O. Irrigation. He prepared plan Ex. P.W.24/1 of the existing construction and construction plans Ex. PW.24/2 and Ex. P.W.24/3. According to him, the total cost of construction of the*



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*premises at present is Rs. 37200/-. He proved his report Ex. P.W.24/5, and abstract of quantities Ex. P.W.24/6. One thing which is common in both the Experts is that they agree about the extent of construction and the material used therein in 1934 and then in 1976-77. Difference of assessment is on account of the variance in rates which each one of them has taken into consideration on the basis of practical experience. Therefore, the value of construction has to be assessed with reference to what Amar Nath himself has to say in this respect. He has given gross estimate of Rs.50000/-. He took out Rs. 38121/- from his firm vide Exs.D.W.4/1 to D. W. 4/4 during 1976-77 for the construction of house and this is the amount which he has shown in statement Ex. D. W. 4/x to have been spent by him. He has not pleaded in the written statement that any amount towards the construction was contributed either by his wife or by his son. He has not stated by word of mouth that his wife and son had also contributed any amount and with out of such a statement, part of Ex.D.W.4/x which pertains to contribution of Rs. 6267.65 paise by the wife and son of Amar Nath, does not become substantive evidence. The wife and son of Amar Nath have not been examined to depose that they had cash of Rs.3267.01 Paisa and Rs. 3000.64 Paise, respectively, much less that they have spent any amount on the construction raised by Amar Nath in 1976-77. Taking into consideration the statement of Amar Nath and reports Ex.PW.24/4 and 5 of Shri P.N. Sharma and Ex. D. W. 2/1 of Shri Mehar Singh D.W., I find that the amount spent by Amar Nath defendant on the construction raised by him in 1976-77, is Rs. 38121/-.*

35. *The question that now arises is as to whether Amar Nath defendant had spent any amount on the construction of 1934 and he is entitled to the same. He stated that he spent Rs. 12000/-, but has not kept any record. He has not led any evidence to prove the amount of construction spent by him on the construction in 1934. The previous suit, the finding was that he had spent Rs. 3374/- on the construction of 1934. In the present suit, the plea taken by him is that construction raised in 1934 as demolished as it had not stood the test of time and that after decision of suit No. 3 of 1971, he has remodeled the whole building. It means that the building raised by him in 1934 was demolished after decision of the previous suit and that fresh construction has been made on new modal. Even otherwise, the re-construction made by Amar Nath in*



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> *1976-77 is of such a nature that no separate estimate of old construction, retained in 1976-77 at the time of remodeling of the house, is possible. I, therefore, find that Amar Nath defendant is not entitled to any amount on account of construction made by him in 1934.*
>
> 36. *Though defendants 2 to 6 and 8 had pleaded that they had raised construction of the disputed property, yet no evidence has been led by them and they have not staked their claim for this account.*
>
> 37. *It is, therefore, found that Amar Nath spent Rs. 38121/- on the construction of the disputed property and as per terms of the mortgage deed Ex. P21, he is entitled to this amount on redemption. In these terms, issue No. 8 is decided in favour of defendant No. 1."*

2.2. Aggrieved against judgment and decree dated 22.12.1979, the contesting respondents/plaintiffs filed an appeal before Ld. District Judge, Faridkot which was dismissed by Ld. Additional District Judge, Faridkot on 10.01.1983.

2.3. Contesting respondents/plaintiffs challenged the aforesaid judgments and decrees dated 22.12.1979 and 10.01.1983 before this Court by way of RSA No.1014 of 1983 titled *Devki Devi and others vs. Romesh Lal (Deceased) through LRs and others*. The said appeal was finally allowed by this Court vide judgment dated 08.11.2011 (Annexure P-2). It was held by this Court that mortgagors/decree holders were entitled to move Ld. Trial Court for passing of final decree by depositing the principal amounts due under the respective mortgages and secure possession in accordance with law. It was further held that wherever the mortgage amounts have been deposited in Court, the mortgagors shall also be entitled to claim mesne profits from the mortgagees in final decree proceedings from the date of such



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deposit. It is evident from the perusal of judgment dated 08.11.2011 passed by this Court that the findings recorded by Ld. Trial Court on issue No.8 in judgment dated 22.12.1979 passed by Sh. Manmohan Singh, then Sub Judge First Class, Faridkot were never set aside by this Court.

2.4. On 3.11.2014, plaintiffs filed an application (Annexure P-3) for passing the final decree. Petitioner along with other legal heirs of Romesh Lal filed reply/objections to application dated 3.11.2014. By way of application, plaintiffs were claiming mesne profits to the tune of Rs.20,000/- per month and petitioner along with other legal heirs of Romesh Lal had taken the plea that they have carried out improvements in the property and the amount spent on said improvements is also required to be adjusted. Keeping in view these two factors, Ld. Trial Court vide order dated 31.5.2022 framed two issues and the parties were given opportunity to lead evidence on the said two issues. Perusal of order dated 31.5.2022 (Annexure P-5) reveals that the onus to prove issue No.1 was upon applicants, whereas the onus to prove issue No.2 was upon respondents (petitioner herein). Applicants (contesting respondents herein) closed their evidence on 14.12.2022 and the case was adjourned to 15.12.2022 for evidence of respondents (petitioners herein). On 21.12.2022, petitioner appeared in the witness box as RWI and tendered his affidavit (Annexure P-6) in examination-in-chief as Ex.RWI/A in his evidence and his further examination-in-chief was deferred for want of certain documents. It is evident from the perusal of para No.7 of affidavit that therein it has been categorically stated that applicant/plaintiff has concealed the findings in respect of the amount spent on construction etc. by defendant No.1, to which



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he was held to be entitled along with interest as well. In para No.8 of the affidavit, the reference of the judgment passed by Sh. Manmohan Singh, then Sub-Judge First Class, Faridkot was also given. Thereafter the matter was adjourned from time to time. However, on 25.01.2023, when petitioner appeared in the witness box as RW1 and tendered his evidence, Ld. Trial Court passed the order impugned herein.

3. Given the nature of order being passed, there is no necessity to issue notice to respondents as no prejudice would be caused to them. Notice to respondents is thus dispensed with.

4. Having perused the impugned order, I am of the view that not only the same is self-contradictory but it is not known under which provision of law/procedure the affidavit tendered in examination-in-chief by defense witness has been discarded. No doubt, if certain contents of affidavit tendered are found to be either unnecessary, scandalous, frivolous or vexatious or otherwise not admissible, that part may be struck off to that extent. Ld. Trial Court has not given any finding *qua* the same and yet simply stated that since the affidavit does not contain any averments/evidence *qua* the improvement of property, therefore, it is taken off the record. Assuming, there is no such averment, what is disputed by learned counsel for petitioners, the same in any case would be fatal to the own interest of the deponent, if he chooses not to do so. Furthermore, the self-contradiction of the impugned order is borne out from the fact that on one hand the affidavit tendered in examination-in-chief has been discarded, and on the other hand, further opportunity has been given to respondent/petitioner(s) herein to lead their evidence. One does not know

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on his own affidavit having been discarded, what better evidence can the respondents lead?

5. As regards admissibility and/or discarding of the evidence, Sections 136 & 151 of the Indian Evidence Act, 1872, no doubt, empowers the Court to take a decision but only after reasons thereof are recorded. In the present case, clearly the discarding of the examination-in-chief is not on the ground of being indecent or scandalous, as is envisaged under Section 151 *ibid* and *qua* Section 136 *ibid,* Ld. Trial Court is firstly supposed to give its decision as to why the evidence is not admissible as against merely giving a passing reference that affidavit in question does not have any deposition *qua* the particulars of improvement carried out in the property in question. As already observed, in case there is no such averment/deposition in the affidavit, the same is at the risk and consequences of the deponent.

6. In the premise, the impugned order is set aside and one opportunity is granted to petitioner(s) herein to tender and rely on affidavit Ex.RW1/A subject of course to the just exceptions and Ld. Trial Court proceeds further with the case in accordance with law including giving its findings qua the contents of the petitioner's affidavit after examination of the same is carried out.

7. Allowed in above terms.

8. Pending civil miscellaneous application(s), if any, shall also stand disposed of.

**( ARUN MONGA )**
**JUDGE**

**February 17, 2023**
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|---|---|
| Whether speaking/reasoned: | Yes/No |
| Whether reportable: | Yes/No |



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