



121 (3 cases)

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

(1) Civil Revision No. 3704 of 2024 (O&M)
Date of Decision: 19.07.2024

Gurjit Kaur and another Petitioners
Versus
Sardari Lal Respondent

(2) Civil Revision No. 3706 of 2024 (O&M)

Gurjit Kaur and another Petitioners
Versus
Sardari Lal Respondent

AND

(3) Civil Revision No. 3763 of 2024 (O&M)

Gurjit Kaur and another Petitioners
Versus
Sardari Lal Respondent

CORAM: HON'BLE MR. JUSTICE HARKESH MANUJA

Present: Mr. Amit Arora, Advocate
for the petitioners-defendants (in all cases).

HARKESH MANUJA, J. (ORAL)

This order of mine shall dispose of the above-mentioned three
(03) revision petitions, as the same have arisen out of common proceedings

in *Civil Appeal No. 53 of 2023*, titled “*Gurjit Kaur and another Versus Sadari Lal*”.

[2] In CR No. 3704 of 2024, prayer has been made for setting aside of an order dated 06.05.2024 passed by learned Additional District Judge, Tarn Taran (**hereinafter to be called as “First Appellate Court”**), whereby an application, filed at the instance of petitioners-defendants, under Order 41 Rule 27 of Civil Procedure Code (**for short “CPC”**), for seeking permission to lead additional evidence, stands dismissed.

[3] In CR No. 3706 of 2024, prayer has been made for setting aside of an order dated 06.05.2024 passed by the First Appellate Court, whereby an application, filed at the instance of petitioners-defendants, under Order 41 Rule 5 of CPC, for stay of the operation of execution of judgment and decree dated 17.08.2022 passed by learned Civil Judge (Junior Division), Tarn Taran (**hereinafter to be referred as “trial Court”**), stands dismissed.

[4] In CR No. 3763 of 2024, prayer has been made for setting aside of an order dated 06.05.2024 passed by the First Appellate Court, whereby an application, filed at the instance of petitioners-defendants, under Order 6 Rule 17 read with Section 151 of CPC, seeking amendment of written statement, stands dismissed.

[5] Briefly stating, based on agreement to sell dated 14.07.2011, respondent-plaintiff filed a suit for possession by way of specific performance against the petitioners-defendants. Upon their (petitioners) appearance followed by completion of pleadings, the issues were framed by the trial Court on 05.07.2018. The evidence of the plaintiff-respondent was

concluded on 25.11.2021 and the matter was posted for recording of evidence of the petitioners-defendants. Having availed few opportunities, on 21.03.2022, learned counsel appearing on behalf of the petitioners-defendants pleaded no instructions. Faced with this, the trial Court issued notice to them, wherein despite service, the petitioners-defendants chose not to appear on the dated fixed i.e. 08.04.2022. Finally, the trial Court vide judgment and decree dated 17.08.2022, decreed the suit in favour of respondent-plaintiff.

[6] Aggrieved thereof, on 12.10.2022, the petitioners-defendants filed Civil Appeal No. 53 of 2023 (supra) alongwith an application under Order 41 Rule 5 read with Section 151 of CPC seeking stay of execution of the judgment and decree dated 17.08.2022 (supra). During pendency of the appeal, on 07.12.2023, the petitioners-defendants filed an application under Order 6 Rule 17 read with Section 151 seeking amendment of their written statement, *inter alia*, to incorporate that the respondent-plaintiff was not ready and willing to get the sale deed executed and registered in their favour. Thereafter, the petitioners-defendants moved another application under Order 41 Rule 27 of CPC for seeking permission to lead additional evidence at the appellate stage, while submitting that the petitioners-defendants could not appear before the trial Court as witness on account of he (petitioner No.2-Baldev Singh) being unwell, whereas his evidence in order to support their defence was extremely essential.

[7] All the aforementioned three applications, filed at the instance of petitioners-defendants, were contested and opposed by the respondent-

plaintiff. The First Appellate Court, vide three separate orders passed on 06.05.2024, dismissed all the applications (supra).

[8] Impugning the aforementioned orders dated 06.05.2024, learned counsel for the petitioners submits that the amendment sought for in the written statement, so as to incorporate the plea of respondent-plaintiff not being ready and willing to execute and register the sale deed in their favour on the basis of agreement in question, was essential for complete and effective adjudication of the case in hand and thus, the First Appellate Court committed illegality while declining the said prayer.

[8.1] Learned counsel further submits that in the given facts, wherein petitioner No. 2-defendant No. 2 could not appear as a witness on account of his ill-health, the First Appellate Court committed an illegality while declining their prayer for permission to lead additional evidence as the petitioners-defendants were not afforded adequate opportunity to lead their evidence before the trial Court.

[8.2] Learned counsel also submits that the First Appellate Court committed a procedural error while dealing with the application under Order 41 Rule 27 of CPC separately, whereas in view of the settled law in case of ***State of Rajasthan Versus T. Sahani, 2001 (10) SCC 619***, the same was to be dealt with at the time of final disposal of the appeal. Relevant para-4 thereof is re-produced hereunder:-

“4. It may be pointed out that this Court as long back as in 1963 in ***K. Venkataramiah v. Seetharama Reddy, AIR 1963 SC 1526*** pointed out the scope of unamended provision of Order 41, Rule 27(c) that though there might well be cases where even though the Court found

that it was able to pronounce the judgment on the state of the record as it was, and so, it could not be required additional evidence to enable it to pronounce the judgment, it still considered that in the interest of justice something which remained obscure should be filled up so that it could pronounce its judgment in a more satisfactory manner. This is entirely for the Court to consider at the time of hearing of the appeal on merits whether looking into the documents which are sought to be filed as additional evidence, need be looked into to pronounce its judgment in a more satisfactory manner. If that be so, it is always open to the Court to look into the documents and for that purpose amended provision of Order 41 Rule 27(b), C.P.C. can be invoked. So the application under Order 41 Rule 27 should have been decided along with the appeal. Had the court found the documents necessary to pronounce the judgment in the appeal in a more satisfactory manner it would have allowed the same; if not, the same would have been dismissed at that stage. But taking a view on the application before hearing of the appeal, in our view, would be inappropriate. Further, the reason given for the dismissal of the applications is untenable. The order under challenge cannot, therefore, be sustained. It is accordingly set aside. The application is restored to its file. The High Court will now consider the appeal and the application and decide the matter afresh in accordance with law. ”

[8.3] Learned counsel further points out that the suit having been filed at the instance of respondent-plaintiff after a period of more than six (06) years from the date of execution of agreement and about four and half years (4½) after the target date, the petitioners-defendants were having more

than *prima facie* case in their favour, the application under Order 41 Rule 5 of CPC, wherein a prayer was made for stay of operation and execution of the judgment and decree dated 17.08.2022 passed by the trial Court, needed to succeed.

No other argument has been addressed on behalf of the petitioners.

[9] After hearing learned counsel for the petitioners and having gone through the paper-book, I am unable to find substance in the submissions made on behalf of the petitioners.

[10] In the given facts and circumstances, wherein the petitioners-defendants continued to appear throughout till the commencement of their evidence; even having availed few opportunities in this regard, chose not to pursue the litigation and failed to put in appearance despite been served again through the process of law for 08.04.2022, the filing of application under Order 6 Rule 17 CPC at the stage of first appeal, besides even filing of application under Order 41 Rule 27 of CPC, apparently lead to an irresistible conclusion that the only effort on the part of the petitioners-defendants was to delay the rights and benefits under the agreement to sell dated 14.07.2011 to be awarded in favour of respondent-plaintiff.

[11] As regards the application under Order 6 Rule 17 CPC, wherein the prayer was made for seeking amendment of written statement by the petitioners-defendants, it may be observed here that the suit was filed on 12.02.2018 and thereafter followed by appearance of the petitioners-defendants, written statement was filed on their behalf. Issues were framed

by the trial Court on 05.07.2018 and the petitioners-defendants continued to appear before the trial Court till 21.03.2022 i.e. for a long period of around four years after framing of the issues, however, no such prayer was ever made on their behalf. In such circumstances, the plea now sought to be introduced, cannot be permitted by way of amendment of written statement at the stage of first appeal, so as to fill-up a material lacking in the case as pleaded by the petitioners-defendants, especially when substantial rights accrued in favour of respondent-plaintiff with the passing of the judgment and decree dated 17.08.2022 (supra).

Resultantly, the order dated 06.05.2024 passed by the First Appellate Court, while declining the prayer made on behalf of the petitioners-defendants seeking amendment of written statement is, thus, upheld.

[12] Regarding application moved on behalf of the petitioners-defendants filed under Order 41 Rule 27 CPC for seeking permission to lead additional evidence at the appellate stage, the only reason put forth in the application is that petitioner No. 2-defendant No. 2 (Baldev Singh) could not appear before the trial Court as a witness on account of his health issues, relating to spine problem. However, neither it can be deciphered from the record that during this period between 25.11.2021 to 17.08.2022, petitioner No. 2 was bedridden nor it can be traced out that he was ever advised by the doctors not to move himself. Furthermore, no effort was ever made by the petitioners-defendants through their counsel to even enquire about the status of suit till 29.09.2022 nor even any application was made on their behalf for

permitting petitioner No. 2 to get his statement recorded through video-conferencing. Rather on the other hand, when the counsel appearing on their behalf before trial Court, pleaded no instructions on 21.03.2022, the trial Court as a matter of abundant caution again issued notice of appearance to the petitioners-defendants for 08.04.2022, yet despite service, neither they appeared in person nor instructed their counsel to do so; which could easily have been done even telephonically. In such circumstances, the conduct of petitioners-defendants in pursuing their suit before the trial Court is neither *bona fide* nor even diligent enough and the same needs to be looked into while considering their prayer for seeking permission to lead additional evidence at the appellate stage. As such, in view of the above discussion, the same needs to be declined.

[12.1] As regards the objections raised on behalf of the petitioners about adjudication of an application under Order 41 Rule 27 CPC alongwith the appeal only, it would be appropriate to recapitulate Order 41 Rule 27 CPC hereunder:-

“ 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) *Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission. ”*

[12.2] It may be pointed out here that in the most humble opinion of this Court, the proposition of law laid down by the Hon’ble Apex Court in ***T.Sahani’s case (supra)*** would not apply to the facts and circumstances of the present case as in the said case, the Hon’ble Apex Court was dealing with the provisions of Order 41 Rule 27 (b) CPC which relates to authority/ power vested with the Appellate Authority wherein it needs/ require any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, it may allow such evidence or document to be produced or witness to be examined. However, the present case relates to a case under Order 41 Rule 27 (i) (aa) CPC, wherein the power of allowing additional evidence in the shape of document or a witness by the Appellate Court is to be exercised on an application moved at the instance of either of the parties to the appeal and the exercise of due diligence or the evidence sought to be adduced by way of additional evidence not within the knowledge of that party needs to be *prima facie* established. On the contrary, no such exercise of due diligence or the evidence sought to be adduced not being in the knowledge of the party

concerned is required to be established in case of exercise of powers by the Appellate Court on its own under Order 41 Rule 27(b) of CPC. In case any document or witness is required by the First Appellate Court itself in order to enable it to pronounce a judgment or for any other substantial cause, it appeals to reasons that the Court can decide about its relevance and evidentiary value only at the time of final hearing and determination of the appeal. However, in case of an application filed by either of the parties seeking additional evidence at the appellate stage by invoking Order 41 Rule 27 (i) (aa) of CPC, the situation is totally different as in such case, it is the party which calls for exercise of discretion while seeking permission to lead additional evidence and has to show that the same could not be produced notwithstanding the exercise of due diligence or such evidence was not within its knowledge, whereas its relevance and the evidentiary value has to be seen only *prima facie*.

[12.3] In the given facts and circumstances, wherein the conduct of the petitioners is apparent that they did not act with due diligence as they never chose to lead any evidence before the trial Court despite having been granted sufficient and adequate opportunity in this regard, they were rightly declined by the First Appellate Court to fill-up the lacuna at the first appellate stage when the arguments in main appeal were already partly heard. Even this Court in case of “***Ved Bassi Versus Manjeet Kaur and others***”, 2005 (2) ***RCR (Civil) 844*** went on to record the following observations:-

6. *Learned Appellate Court has rightly over-ruled the objection that the defendant-respondents did not have any locus standi in filing the application for additional*

evidence by observing that a person may not be a party to the litigation, yet he may be entitled to produce a document as additional evidence. The aforementioned view taken by the learned Appellate Court is supported by a judgment of the Supreme Court in Jaipur Development Authority v. Smt. Kailashwati Devi, 1997(4) RCR (Civil) 97 (SC) : 1997(7) SCC 297. Dealing with the aforementioned contention and rejecting the same, the Supreme Court observed as under :-

"The intention of the sub-rule, in our view, is that a party who, for the reasons mentioned in the sub-clause, was unable to produce the evidence in the trial Court, should be enabled to produce the same in the appellate Court. The sub-rule mentions the conditions which must be complied with by the party producing the additional evidence, namely, 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" in the trial Court. It is not one of the conditions that the party seeking to introduce "additional" evidence must have also been one who has led some evidence in the trial Court. Such a view amounts to introducing an additional condition not contemplated by the sub-rule. No distinction was intended by the sub-rule between a party who has produced some evidence in the trial Court and one who has adduced no evidence in the trial Court. All that is required is that the conditions mentioned in the body of the sub-rule must be proved to exist. It is not permissible to restrict the sub-clause (aa) for the benefit of only those who have adduced some evidence in the trial Court."

The argument raised by learned counsel for the plaintiff-petitioner on the basis of the judgment of the Supreme Court in T. Sahani's case (supra) to the effect that the application ought to have been decided along with the appeal, would not require any detailed and serious consideration. The interlocutory orders produced by both the parties do indicate that the appeal was not listed along with the application under Order 41 Rule 27 of the Code for arguments. A perusal of the impugned order itself shows that the Appellate Court has taken notice of the judgment and decree which is under challenge before it and on that basis it has opined the relevancy and necessity of adducing additional evidence. Moreover, in cases where permission to adduce additional evidence is granted, the appeal could not be decided along with the application because the other party would be required to avail an opportunity to reply such evidence. However, in cases where the application for additional evidence is dismissed, their appeal could be decided which explains the reasons in the present case for keeping the appeal pending. Therefore, there is no merit in the contention raised and the same is rejected.

For the reasons aforementioned, this petition fails and the same is dismissed. Parties through their counsel are directed to appear before the learned Appellate Court on 2.5.2005. It is made clear that any observation made in this order shall not be construed as an expression of opinion on merits of the matter.

Petition dismissed. ”

Consequently, the order dated 06.05.2024 passed by the First Appellate Court in application filed under Order 41 Rule 27 CPC warrants no interference.

