Sukhwinder Kaur v. Hardev Kaur , 2018 PLRonline 1308

PUNJAB AND HARYANA HIGH COURT

Before:- Amol Rattan Singh, J.

Sukhwinder Kaur – Petitioner

Versus

Hardev Kaur and others – Respondents

CR No. 675 of 2015.

24.8.2018.

Due to the fault of counsel, litigant should not be made to suffer.

Civil Procedure Code, 1908, Order 18, Rule 13 – Additional evidence – Leading of additional evidence would also be essential to the just adjudication of the suit before the trial Court, as very obviously the petitioner has indeed based her claim before that Court, resisting partition of the suit property, on the basis of the will stated to have been executed by her mother in her favour, allegedly to the exclusion of her siblings / respondents. [Para 9]

Cases Referred :-

1. *Devinder Singh v. Harbhajan Singh, 2014 (Suppl.) Civil Court Cases 408 (P&H).*

2. *Dondapati Narayana Reddy v. Duggireddy Venkatanarayana Reddy, 2001 (4) RCR (Civil) 473*

For the Petitioner :- L.S. Mann, Advocate. For the Respondent :- Ex Parte.

JUDGMENT

Amol Rattan Singh, J. – This revision petition has been filed by the contesting defendant in a suit filed by the respondents-plaintiffs, seeking separate possession of the suit property, which is stated to be a residential house measuring 4 marlas in village Mehatpur, Tehsil Nakodar, District Jalandhar, by partition thereof.

The petitioner seeks setting aside of the order, Annexure P-6, passed by the learned Civil Judge (Junior Division), Nakodar, on 18.12.2014, by which an application filed by the petitioner-defendant, seeking to lead additional evidence, has been dismissed.

2. Notice having been issued in this petition on February 26, 2015, with the trial Court directed not to pass the final order at that stage (the said interim order still continuing), though the respondents are all seen to be finally served only on 26.05.2016, even thereafter they have not put in any appearance, either personally or through counsel.

Consequently, on the date that judgment was reserved in this petition (August 03, 2018), they were ordered to be proceeded against ex parte.

A perusal of the impugned order shows that in her application, the petitioner had contended that she could not prove a registered will dated 19.02.2010, executed by her mother, Pushpa Rani (also mother of respondents no.1 to 3 herein), in her affirmative evidence, because the original will was not traceable at that time. However, since it had been traced out, the petitioner-defendant sought that it be allowed to be led by way of additional evidence, in the interest of justice.

3. Notice having been issued by the learned trial Court in the said application, the respondents-plaintiffs had opposed it on the ground that with both parties already having led their evidence, with the evidence of the defendant (petitioner) already having been closed and she also having referred to the will in her affidavit tendered by way of her examination-in-chief, she should not be allowed to lead such additional evidence at that stage, as she very well knew of the existence of the document and therefore she could not allow to fill up lacuna later.

4. Having considered the pleadings and arguments of both parties, the learned trial Court recorded a finding that as regards the suit property which was sought to be partitioned by the plaintiffs, the petitioner herein had claimed her right to that property on the basis of the said will and in paragraph 2 of her written statement she had contended that a photocopy of the will was ‘attached with the written statement’, with her having referred to the said document as Ex.D1 in her affidavit tendered as her examination-in-chief.

She had also stated in paragraph 2 of the said affidavit that she had brought the original registered will to Court; but a perusal of the Court file showed that even the photocopy thereof was not actually on record, with there being no document exhibited as Ex.D1.

(This finding was recorded by the trial Court after having seen the original document produced in Court by the petitioner on the date that the impugned order was passed. Thereafter, it is recorded in the impugned order that there was no order of the Court to the effect that the original document had been seen and returned.)

5. It is next recorded in the impugned order that the defendant had closed her oral evidence on 18.07.2014, but even at that time she had not testified to the effect that the will had been either misplaced or was lost and was not traceable, nor had she made a prayer by proving any photocopy by way of secondary evidence.

Noticing as above, it was eventually held by that Court that the petitioner was trying to fill up a lacuna at the end of the trial and further, that she had abused the process of law by misrepresenting that she had brought the original registered will which had been seen and returned.

On the aforesaid grounds, the application was dismissed with costs of L 1000/- imposed upon the petitioner, to be paid in the Legal Aid Fund, with the trial Court further observing that the application had been filed as an after thought simply to prolong the suit and to fill up the lacuna.

6. Before this Court, with the respondents not having put in appearance in the past three and half years, learned counsel for the petitioner submitted that simply on account of the error of the petitioners' counsel before the trial Court, in not producing the original will at the time when the evidence of the petitioner (defendant) was being led, she should not be made to suffer in perpetuity, especially when her entire written statement was based on the will of her mother, Pushpa Rani.

He further submitted that as a matter of fact the petitioner had handed over the will to her counsel, who seemingly due to inadvertence, did not produce it in Court at the relevant time, thereby necessitating the filing of the application seeking to lead additional evidence, after the petitioners' evidence was closed and she had found out that her counsel had not actually produced the will by way of evidence.

7. In support of his contention that due to the fault of the counsel the litigant should not be made to suffer, Mr. Mann has relied upon various judgments of co-ordinate Benches of this Court as also one of the Supreme Court, in ***Dondapati Narayana Reddy v. Duggireddy Venkatanarayana Reddy 2001 (4) RCR (Civil) 473***. Of the judgments of this Court learned counsel specifically referred to ***Devinder Singh and others v. Harbhajan Singh and others 2014 (Suppl.) Civil Court Cases 408 (P&H).***

8. Having considered the aforesaid arguments as also the impugned order, though otherwise there would be no reason to allow this petition in view of what has been recorded by the learned Civil Judge, to the effect that the petitioner misrepresented before that Court that she had brought the original registered will which the Court had seen and returned; however, with learned counsel having submitted that actually it was not she but her counsel who had done so and that she having based her entire case against the respondents-plaintiffs on the basis of the said will, she would not deliberately withhold it, with none present for the respondents to refute that contention even though final proceedings before the trial Court remained stayed in the past three and half years, I am of the opinion that this petition deserves to be allowed, the contention that it was actually the fault of the counsel and not the petitioner, not having been refuted at all in any manner.

Just for the record, it needs to be mentioned here that the 4th respondent herein (proforma respondent-defendant) is stated to be residing with the petitioner in the suit property.

9. The leading of additional evidence would also be essential to the just adjudication of the suit before the trial Court, as very obviously the petitioner has indeed based her claim

before that Court, resisting partition of the suit property, on the basis of the will stated to have been executed by her mother in her favour, allegedly to the exclusion of her siblings, i.e. respondents no.1 to 3 herein (plaintiffs).

10. Other than the fact that the will had been relied upon in the written statement, as is also stated in the impugned order, a copy of the written statement has also been placed on record by the petitioner, as Annexure P-2 with the petition, in paragraph 2 of the preliminary objections of which the will dated 19.02.2010 has been specifically mentioned, with the document having been referred to time and again thereafter in the reply on merits also.

Still, since the trial is going to be obviously delayed with the application for additional evidence being allowed by this Court, such additional evidence can be allowed to be led only upon the petitioner paying costs to the respondents-plaintiffs to the tune of Rs. 10,000/-. She would also pay costs of Rs. 5000/- to the District Legal Services Authority.

11. This petition is thus allowed, with the impugned order set aside and the application of the petitioner before the trial Court, seeking to lead additional evidence also allowed, subject to her paying costs as aforesaid.

Needless to say, no observation made hereinabove shall be treated to be an observation on the merits of the validity of the will or otherwise, which naturally would have to be proved by the petitioner and adjudicated upon by the learned trial Court after appraising the evidence led by both sides on such validity.