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Court : Himachal Pradesh

Decided On : Apr-04-2011

Judge : V.K. Ahuja, J.

Acts : [Constitution of India](#) - Article 227; Code of Civil Procedure (CPC) (C.P.C) - Order 41 Rule 27

Appeal No. : CMPMO No. 623 of 2009

Appellant : ishwar Dass Aggarwal and ors.

Respondent : Nirmala Devi and ors.

Advocate for Def. : Mr. Suneet Goel, Adv.

Advocate for Pet/Ap. : Mr. Bhupender Gupta, Adv.

Judgement :

1. This is a petition filed by the petitioners/plaintiffs under Article 227 of the [Constitution of India](#), against the order passed by the learned Additional District Judge (Fast Track Court), Hamirpur, dated 17.9.2009, allowing the application filed by the respondents for additional evidence under Rule 41 Rule 27 C.P.C.

2. Being aggrieved, the petitioner has filed the present petition. A notice of the petition was issued to the respondents.

3. I have heard the learned counsel for the parties and have gone through the record of the case.
4. A suit for declaration and permanent injunction was filed by the plaintiffs/present petitioners as against the respondents. The said suit was decreed by the learned trial Court holding that the plaintiffs are co-owners in possession of the suit land being the heirs of Manglan Devi. An appeal was preferred by the respondents and during the pendency of the appeal, an application under Order 41 Rule 27 C.P.C. was filed by the respondents/defendants for placing on record the said unregistered Will as well as copies of the judgment and decree passed by the learned Sub Judge, Hamirpur, in another case.
5. The learned trial Court observed that the mutation was sanctioned on the basis of the alleged oral Will allegedly executed by Parkash Chand, copy of which is Ext. P-5, which was sanctioned in favour of the appellants/defendants. It was observed that from the initial stage the appellants had set up this Will and even on the basis of it, mutation was sanctioned in favour of the appellants. There was a reference that there was "Basiyat Jabani" and the observations made whether wrongly or rightly is that this term is generally used by the Revenue Department when it is not a registered Will. It was also observed that the entire controversy between the parties revolves around the alleged Will which had been set up right from the stage of written statement. By the said application, the appellants/defendants alleged that the Will was misplaced and it was found in the brief of the counsel in the Supreme Court in an another connected case. Thus, it was observed that the production of the Will and its proof is warranted and as such, since the appellants were not able to prove the same inspite of due diligence, it is also required by the learned Appellate Court for pronouncement of the judgment, the application was allowed. The reasoning taken by the learned counsel for the petitioner in the present petition was that the mutation was sanctioned in favour of the defendants on the basis of oral Will and allowing the appellants to prove the said Will, will not be necessary. It was also submitted that the learned Appellate Court had committed grave error in appreciating that the mutation of inheritance was sanctioned in the year 1984 and since the same was in possession of defendants, the said Will should have been produced earlier, but it was never produced and

neither it is required for just decision of the case, nor the appellants had been able to make out a case that inspite of their best efforts, they could not produce the Will in question.

6. From a perusal of the record, it is clear that the dispute was in regard to the Will in question executed by Parkash Chand in favour of Nirmala Devi and Sunil Kumar, it cannot be said that there was no issue in this regard, the application should not have been allowed by the Court since a perusal of the record shows that Issue No. 11 was framed by the learned trial Court, which is as under:-

“Whether the Will has been executed by deceased Parkash Chand in favour of Smt. Nirmla Devi and Sunil Kumar qua suit land as claimed? OPD”

7. It is, therefore, clear that the defendants had set up the Will executed allegedly by deceased Parkash Chand and had also relied upon the mutation attested on the basis of the Will. Therefore, it cannot be said that it was a new case set up by the defendants or that since the Will was never produced earlier, it should not be allowed to be produced on record. The claim of the defendants was based upon the Will whether oral or otherwise and they set up their case accordingly and the question is as to whether there was such a Will executed by deceased Paraksh Chand in favour of the defendants. It is a material question and has to be decided only in these proceedings. The applicants/appellants had been able to make out a case that the record was traced by their counsel in the Supreme Court and the Will was found therein. The question in regard to the genuineness of the Will or validity of the Will or the fact that it was found in the brief of the counsel are such questions which can be considered by the Court after the parties had been permitted to lead evidence in regard to the Will and a question is raised in regard to its validity. All those pleas can be raised before the learned Appellate Court and these can be considered including the question as to whether the Will was lying in the brief of the counsel for the appellants or not, but these are such questions which pertain to the Will. It was set up by the appellants and, therefore, this question has to be determined in these proceedings only and not in other proceedings. Therefore, it can be said that the pleadings of the appellants are

there that the Will was misplaced, but it was traced by their counsel only in a connected matter filed in the Supreme Court and it may be necessary also for the just decision of the case.

8. In view of the above discussion, I accordingly hold that the production of the Will is necessary to decide the lis in between the parties and insofar as the copies of the judgment and decree of the Civil Court are concerned, these are certified copies and can be allowed to be tendered in evidence and the question as to whether they substantiate the case of the appellants or not, these can be considered by the learned appellate Court at the time of disposing of the appeal.

9. In view of the above discussion, I do not find any infirmity in the order passed by the learned Appellate Court and the petition filed by the petitioners is dismissed, so also the pending miscellaneous application(s), if any. The learned Appellate Court shall record the evidence itself by giving short dates and an opportunity shall be given to the appellants to lead their evidence and then to the respondents to rebut the same and the evidence shall be considered under Issue No. 11 and other connected issues. The learned Appellate Court shall decide the appeal in accordance with law. The petition filed by the petitioners is dismissed accordingly. The records be sent to the Court concerned.

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