

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CR No.2382 of 2011(O&M)

Reserved on:18.12.2014

Date of decision:14.01.2015

Belo Devi

.....Petitioner

Versus

Urmila Devi & others

.....Respondents

CORAM : HON'BLE MR.JUSTICE G.S.SANDHAWALIA

Present: Mr.Harkesh Manuja, Advocate, for the petitioner.

Mr.Ajay Ghangas, Advocate, for the respondents.

G.S.Sandhawalia J.

Challenge in the present revision petition, filed under Article 227 of the Constitution of India, by the petitioner-plaintiff, is to the order dated 03.03.2011, whereby the Civil Judge(Jr.Divn), Panipat has dismissed the application to lead evidence on issues No.2 & 2-A, in rebuttal, in the suit instituted on 03.01.2004 or in the alternative, as additional evidence. The reasoning given by the Trial Court is that since the onus of issue No.2-A was on the plaintiff, he could not lead evidence in rebuttal. Reliance was placed upon the judgments of this Court in **Surjit Singh Vs. Jagtar Singh 2007 (1) RCR (Civil) 537** and **Jagdev Singh & others Vs. Darshan Singh & others 2007 (1) RCR (Civil) 794.**

In order to decide whether the said order is justified or not, it would necessarily entail delving into the facts as to what was the dispute between the parties before coming to the finding whether the Trial Court was right in placing reliance upon the Division Bench judgments of this

Court, referred above.

The petitioner-plaintiff filed the suit, being daughter of Chandro Devi against Raj Kumar, defendant No.1, son of sister, namely, Barfi Devi, who is now represented by the LRs. The other children of her sister were arrayed as defendants No.2 & 3. The dispute pertains to the estate owned by Chandro Devi since she had no male issue. It was alleged the elder sister, Barfi Devi was treated as a mother after the death of Chandro Devi in 1980, in whom the plaintiff had full confidence. Barfi Devi had been always giving her half share of income after every 6 months and after her death in 1998 and the defendants succeeded to her estate who also continued to give half share but after Rabi, 2003, have stopped giving the said share. It was averred that a gift deed dated 16.02.1968 had been got executed in favour of Barfi Devi from her mother, Chandro Devi by playing fraud and even the revenue entries had been recorded. The mother never intended to gift her entire property to one daughter and the witnesses would have been of the Village Sanoli Khurd. The gift deed allegedly contain the thumb impression of the plaintiff herself and she had never put any such thumb impression and the gift deed was a result of fraud and collusion. The factum of Chandro Devi having executed the gift deed had also been disputed and that she had not thumb marked the said gift deed and it had no legal value and the same was only a paper transaction as the petitioner-plaintiff continued to get her share from the said land. It was further alleged that some other person had stood in place of Chandro Devi and necessary revenue entries had also been made on the basis of this fraudulent gift deed and the plaintiff being illiterate lady, had never doubted the integrity of her elder sister and cause of action arose only in the year 2003. Resultantly,

the suit was filed on 03.01.2004.

The defendants resisted the suit by taking various pleas that the suit was time-barred and the plaintiff herself was a witness to the said gift deed and had knowledge from the very beginning of the fact of Barfi Devi coming into the possession of the property and the suit had only been filed with *mala fide* intention and the plaintiff was estopped by her own act and conduct. Barfi Devi had resided with her mother, Chandro Devi along with her son and served her in the old age and she had died on 10.04.1997 and not in 1998, as alleged. No particulars of fraud and collusion had been given and it was wrong that Chandro Devi, the mother intended to gift the entire property in favour of Barfi Devi. The plaintiff had lived with her in-laws and never served her mother and due to the service of Barfi Devi, the gift deed had been executed in the presence of the witnesses including the plaintiff and mutation had also been entered and sanctioned in her favour on that basis and Barfi Devi had come in possession of the suit property. The plaintiff was a witness to the registration of the gift deed and had put her thumb impression and the registration of the gift deed was done in the presence of the witnesses. It was denied that some other person had executed the gift deed in place of Chandro Devi and the gift deed was registered with her own accord and without any pressure.

In replication, it was pleaded that the gift deed was never acted upon and Chandro Devi had been cultivating the land with her husband in husband like manner over 87 kanals 7 marlas and the plaintiff had never become the witness and had no knowledge about the gift deed.

The following issues were framed by the Trial Court on 05.04.2004:

1. Whether plaintiffs and defendants are joint owners in possession of land measuring 87 K 7 M which is left by Smt. Chandro Devi? OPP
2. Whether Smt. Chandro executed gift deed dated 16.02.1968? If so, its effect? OPD
3. Whether suit is not maintainable? OPD
4. Whether suit is barred by time? OPD
5. Whether plaint is liable to be rejected for non-payment of proper court fee? OPD
6. Whether plaintiffs have not come to the court with clean hands and if so its effect? OPD
7. Relief.

Thereafter, additional issue no.2-A was framed on 16.02.2008 at the instance of the plaintiff/petitioner whereby the factum of the gift deed being liable to be set aside on the ground of fraud and collusion was the subject matter and the onus fell upon her. The said issue reads as under:

“Whether gift deed dated 16.2.1968 is illegal, null and void on the grounds of fraud, collusion and on the ground that the same was never accepted by the donee? OPP”

The plaintiff led his evidence and in view of the onus of issue No.2 being on defendants, they got examined a handwriting expert to prove the thumb impression on the alleged gift deed. The plaintiff-petitioner, thereafter, filed an application dated 14.05.2010 to place and prove the report dated 06.03.2010 and the affidavit of handwriting and finger-print expert on the ground that since the onus of issue No.2 was on the defendants, he was entitled to lead evidence in rebuttal. In the alternative, it was pleaded that the said evidence be taken as just and necessary for the correct decision, as additional evidence.

The application was objected to on the ground that the onus of issues No.2 & 2-A was upon the plaintiff and therefore, the validity was to be adjudicated on that basis and the plaintiff could not lead evidence in

rebuttal on this point. The applicant being aware that she had to lead evidence in affirmative, was thus, seeking the alternative prayer of additional evidence. The report and affidavits could not be filed without seeking permission from the Court and directly submitting the report was not permissible. Thus, in such circumstances, the application had been rejected.

Counsel for the petitioner has vehemently submitted that on 24.02.2010, the Court had permitted the expert to examine the disputed thumb impressions of the plaintiff and on this basis, the application had been filed. The defendants had examined the expert themselves and the report had been prepared, thereafter, on 06.03.2010, which now has not been permitted to be placed on record. He, accordingly, submits that the evidence could be led in rebuttal in view of the fact that the onus of issue No.2 was upon the defendants and thus, the plaintiff had a right to rebut and the Court was not justified in rejecting the application on the ground that the onus was upon the plaintiff. It was submitted that the onus of issue No.2-A was on the plaintiff of proving fraud and collusion and under issue No.2, the defendants had to prove the fact that Chandro Devi had executed the gift deed or not.

Counsel for the respondents, on the other hand, has submitted that it was an admitted fact that the plaintiff was aware of the gift deed and the thumb impressions were there of the plaintiff herself, on account of her being a witness. The registered document was more than 30 years old and issue No.2-A had been framed at the instance of the plaintiffs themselves. It was submitted that the respondent-defendants had examined the thumb impressions of the plaintiff on the gift deed, admittedly, to prove that the

gift deed had been executed. The plea taken was that the gift deed was by fraud and collusion and once the onus was upon the plaintiff on issue No.2-A as they were specifically setting up the ground of fraud, it would not lie in their mouth to lead evidence in rebuttal and the onus was upon them.

As noticed above, the pleadings have been discussed in detail. The plaintiff's specific case is that neither she had affixed the thumb impressions on the gift deed and that a third person had been asked to appear on behalf of Chandro Devi. Specific issue No.2-A had been got framed by her, alleging fraud and collusion whereas it was the specific case of the defendants that Chandro Devi had executed the gift deed. In order to prove their case, the defendants had examined the expert to prove the execution of the gift deed. The plaintiff-petitioner was well aware of her case and the pleadings put up by them that the plaintiff herself had never thumb marked the said gift deed and the onus was also, as noticed, upon the plaintiff. Once that was so, when the expert was not examined in affirmative since they had right to lead evidence on the said issue, they could not take the benefit of leading evidence in rebuttal merely on the ground that under issue No.2, they had a right to rebut the evidence led by the defendants.

The Trial Court has rightly relied upon the binding precedents of the two Division Bench judgments in Surjit Singh (supra) and Jagdev Singh (supra) under Order 18, Rule 3 CPC, wherein it has been held that the scope and ambit of the provisions to lead evidence in rebuttal on issues, the onus to prove of which is on the plaintiff, would not give a right to the plaintiffs to produce another handwriting expert, at that stage. It was noticed that though liberal consideration is to be given to procedural

provisions but by interpretation, it cannot be amended. The rule concisely provides the parties with an option to produce evidence in support of the issues or to reserve it by making a statement to that effect and in the absence of the same, they could not lead evidence in rebuttal, as a matter of right.

The said view has now been again reiterated by another Division Bench of this Court on a fresh reference in CR No.2203 of 2010 titled *Avtar Singh & another Vs. Baldev Singh & others* decided on 21.11.2014, wherein it has been held that the provisions of Order 18 Rule 3 CPC is not to be construed that it means that the plaintiff has a right to lead evidence in rebuttal after the defendant had rendered his response to the whole case. Relevant observations read as under:

“Firstly, the difference one needs to bear in mind is that the provisions of Order 18 Rule 2 CPC do not contemplate a situation where there are several issues involved and the burden of proof some of which lies on the defendant. Rather, what the provision takes within its sweep is a situation where on the date fixed for hearing of the suit, the party having the right to begin shall state his case and lead evidence on the issues he is bound to prove. Ex facie, the provision only caters to a situation where the burden of proof of all the issues is upon the party beginning. Thereafter, the other party i.e. defendant shall state his case and produce his evidence (if any). Meaning thereby, the provision of Order 18 Rule 2(2) only postulates a right to the defendant to lead evidence in rebuttal to the evidence led by the plaintiff. The expression “if any” denotes rebuttal evidence by the defendant. The afore-reproduced provision does not contemplate a situation, where the burden of proof of some of the issues lies upon the defendant, and after he leads evidence on said issues, plaintiff would lead evidence in rebuttal. Therefore, the expression, “and may then address the Court generally on the whole case.” and the expression occurring in Order 18 Rule 2(3), “the party beginning may then reply generally on the whole case.” only

signify that after the defendant has led evidence (if any), he has a right to address and advance submissions on the whole case and likewise, the party beginning i.e. generally the plaintiff, would also have a right to advance submissions and respond to the case on the whole. Provisions of Order 18 Rule 2(3) cannot be construed or constructed to mean that after defendant had rendered his response to the whole case, plaintiff could still have a right to lead evidence in rebuttal. Such an interpretation or construction of the provision would be distorting the provision beyond its content. This perception and understanding further finds complete resonance in the provision of Order 18 Rule 3 CPC, as only the said provision deals with a situation where there are several issues and the burden of proof some of which lies upon the defendant. That is how, Division Bench in Surjit Singh's case (supra) interpreted Order 18 Rule 3, to determine the scope and ambit of the right of the plaintiff to lead evidence in rebuttal, on issues the onus of proof of which is on the plaintiff. Thus, both the aforesaid provisions cannot be read in conjunction but independently and in isolation, as regards the right of the party beginning to lead rebuttal evidence.

In the wake of the position that has been sketched out above, we express our complete and respectful agreement with the principle of law enunciated by the Division Bench in Jaswant Kaur's case (supra) and Surjit Singh's case (supra). And also a Single Bench decision in National Fertilizers Limited's case (supra). Ratio of law laid down in the said decisions is not prone to any conceivable or inconceivable doubt and, therefore, do not require any reconsideration. Reference is answered, accordingly. Matter be now placed before the learned Single Judge for decision on merits."

Accordingly, keeping in view the abovesaid principles and the facts, as noticed, this Court is of the opinion that the plaintiff was well aware of her case and had taken a specific plea that the gift deed was not valid and not having been executed by Chandro Devi and not thumb marked

by her as a witness. It was open to her to produce handwriting and finger-print expert at the initial stage itself in support of her case to prove that her thumb impression was not there on the gift deed and only because the defendants have led their evidence and produced a finger-print expert, it would not give a right to the plaintiff to lead the evidence in rebuttal on issue No.2, as has now been contended.

To deal with the argument raised by the counsel for the petitioner, who has very ably tried to ride over his difficulties by referring to Sections 122 & 123 of the Transfer of Property Act, 1882 that the gift deed was a voluntary act by one person, without consideration and to be executed by the other and had to be effected by registered instruments signed by the donor and attested by at least 2 witnesses. It is, accordingly, submitted that in view of the judgments of the Apex Court in **Krishna Mohan Kul @ Nani Vs. Pratima Maity & others (2004) 9 SCC 468** that any transaction which has been executed in a fiduciary relationship, the onus to prove the due execution of the document, in accordance with law, is on the person who had received the benefit, to show that the transaction was fair and honest. Thus, since issue No.2 was to the effect whereby the onus was on the defendant, the plaintiff-petitioner would have a right to rebuttal to that issue.

The said judgment, however, would not be applicable to the facts and circumstances of the present case, since the dispute wherein is as to the provisions of Order 18 Rule 3 CPC and the procedure which has to be followed. The principles laid down by the Apex Court as to the onus to prove has been expressed in the said judgment wherein it has been held that the burden to prove has been thrown upon the person receiving the benefit.

The Civil Appeal had, accordingly, been dismissed on the said principle by noticing that the view taken by the High Court was correct since the executant in that case was more than 100 years of age and was paralytic and his mental and physical conditions were not in order. The observations flowed in such circumstances. In the present case, once the onus of issue No.2-A was on the plaintiff-petitioner, it could not be said that they could lead the said evidence by examining the expert in rebuttal and therefore, the said judgment would not be applicable, in the facts and circumstances of the present case.

The averments in the application for leading evidence in rebuttal also goes on to show that the fact of not leading evidence in affirmative was admitted and therefore, the prayer was made to bring on record the evidence as additional evidence.

Accordingly, finding no merit in the present revision petition, the same is, hereby, dismissed.

14.01.2015
sailesh

(G.S.Sandhawalia)
JUDGE