

In the High Court of Punjab and Haryana at Chandigar

SAO .No. 55 of 2011 (O&M)

Date of decision: 8.10.2015

Rajinder Kaur and another

.....Appellants

Versus

Shakuntla Devi

.....Respondent

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr.Paramjit Batta, Advocate,
for the appellants.

Mr. Dharampal, Advocate
for respondent No.1.

Mr.Prateek Mahajan, Advocate,
for respondent No.2.

Mr.Rakesh Chopra, Advocate
and Mr.Naresh Prabhakar, Advocate,
for respondent No.4.

1. Whether Reporters of local papers may be allowed to see the judgment ?

2. To be referred to the Reporters or not ?

3. Whether the judgment should be reported in the Digest?

Raj Mohan Singh, J.

1. The present second appeal against order has been filed by defendants No.1 and 2 against the judgment dated 25.7.2011 passed by Additional District Judge, Rupnagar, whereby appeal filed by the plaintiff against the judgment and decree dated 14.8.2010 passed by Additional Civil Judge

(Sr.Divn.), Rupnagar was disposed of and the case was remanded to the trial Court with a direction to decide the suit afresh by giving opportunities to both the parties to lead evidence on additional issues No.3-A and 3-B framed by the Court.

2. Plaintiff Shakuntla Devi filed a suit for declaration and permanent injunction on the ground that her son Paramjit Singh was married to defendant No.1. Defendant No.2 is the daughter of defendant No.1 born from the wedlock of Rajinder Kaur-defendant No.1 and Paramjit Singh- deceased. Paramjit Singh died on 11.9.2005 and was having strained relations with his wife-defendant No.1. Deceased Paramjit Singh had purchased number of insurance policies from defendants No.3 and 4 and also purchased a plot No.579, Phase-3-A, S.A.S. Nagar, Mohali and was raising construction thereon. The funds being utilized for the said construction were joint of the deceased, son of the plaintiff, his father Jagat Singh and and younger brother. The house and plot were joint properties of the family. Plaintiff being mother and legal heir of Paramjit Singh was entitled to inherit the property as per her share in the estate left by the deceased and also a share in the sum assured with defendants No.3 and 4 and in the bank account left by the deceased. The deceased had also raised a loan from the bank for raising construction and had also left other liabilities of more than ₹ 20,00,000/-. Defendants

No.1 and 2 were liable to share the amount of liabilities proportionally with the plaintiff. Defendants No.1 and 2 had taken hasty steps to receive all the amount of sum assured from defendants No.3 and 4 and also to dispose of the house in Mohali, which ultimately prompted the plaintiff to file the suit in question.

3. The suit was contested by defendants No.1 and 2 on all customary pleas. Defendants alleged that the plaintiff and her husband tried to create differences between defendant No.1 and her husband and they always used to instigate Paramjit Singh to ill treat defendant No.1 and her daughter. They encouraged Paramjit Singh to take liquor and had also taken away the policies with intention to deprive defendant no.1 of the benefit of those policies. The construction of house in Mohali was admitted. Defendant No.1 had also invested her savings and her husband had sold residential plot at Jalandhar to meet the expenses of construction.

4. Defendants No.1 and 2 further alleged that the plaintiff and her husband had no right, title or interest in the house at Mohali. Paramjit Singh, in a sound disposing mind, executed the Will dated 13.4.2001 in respect of house and other movable and immovable properties in favour of defendant No.1. Plaintiff, her husband and younger son were not included in the Will. The house belonged to defendants No.1 and 2 exclusively

and they were owners of the same. Defendant No.1 claimed that she is nominee of all the policies and is entitled to receive the entire amount due under these policies.

5. Defendant no.4 filed written statement challenging the locus of the plaintiff to file the suit. The suit was claimed to be not maintainable. Paramjit Singh had purchased Flexi Cash Flow Policy from defendant No.4 for a sum of ₹ 5,00,000/- with annual premium of ₹ 31,620/-. As per terms and conditions of the policy, either assured amount along with all other benefits were to be paid to the insured if he was alive or in case of death of insured, the nominee would be entitled to get the said amount. As per policy, Rajinder Kaur was entitled to get the benefit of the policy after the death of Paramjit Singh, who expired on 11.9.2005.

6. No replication was filed. Trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to the decree of declaration as prayed for ? OPP
2. Whether the plaintiff is entitled to the decree of permanent injunction as prayed for ? OPP
3. Whether this Court has no jurisdiction to try and decide the suit ? OPP
4. Relief.”

7. Parties led their respective evidence in support of their case.

8. Trial Court dealt with issues No. 1 and 2 jointly and decided the same against the plaintiff. Issue No.3 was decided against the defendants and in favour of the plaintiff by holding that the Court had jurisdiction to try and decide the suit. On the basis of findings recorded under issue Nos. 1 and 2, plaintiff was held not entitled to declaration and permanent injunction as she had failed to prove her case, whereas, defendants were able to prove their case and showed that defendant No.1 was the nominee of deceased Paramjit Singh and deceased had executed a Will in her favour. Accordingly, suit of the plaintiff was dismissed by the trial Court vide judgment and decree dated 14.8.2010.

9. Feeling aggrieved against the aforesaid judgment and decree, plaintiff filed appeal before the lower Appellate Court.

10. Before the lower Appellate Court, plaintiff-appellant contended that the trial Court did not frame any issue regarding Will and there was no occasion for the plaintiff-appellant to lead any rebuttal evidence on the issue. Plaintiff further contended that even if the document, alleged to be a Will of the deceased, is examined on legal parameters, the same did not fulfill the ingredients of a Will inasmuch as that the same was in the shape of an agreement on which the signatures of beneficiaries

were present. Viewed from any angle, such a document could not be treated to be a Will on any parameter whatsoever. The attesting witnesses of the Will were the brothers of the beneficiary of the Will and they being interested witnesses, make the Will totally shrouded with mysterious circumstances. The testator has to dispel the mysterious circumstances from the Will so as to project the Will to be the result of sound disposing mind of the testator and is not surrounded with any mysterious circumstances. Mother of the deceased is also Class-I heir and falls under the line of natural succession. No effort was made to bring on record the original documents nor any application for leading secondary evidence was moved.

11. Defendants-respondents opposed the plea of the appellant on the ground that the Will dated 13.4.2001 executed by Paramjit Singh in favour of defendant No.1 and her daughter is a lawful document having been proved by marginal witnesses of the Will. Defendants further contended that even if no issue was framed regarding the Will but the parties knew the case of each other and, therefore, findings recorded on Will were lawful findings and cannot be interfered with. Lower Appellate Court found that the findings recorded by the trial Court were primarily based upon the impugned Will to which no rebuttal was led by the plaintiff. Trial Court did not frame any issue with regard to Will. No findings should have been given by the trial Court on

an issue which was never framed.

12. Lower Appellate Court relied upon **Kalyan Singh Chauhan vs. C.P.Joshi 2011 (2) C.C.C. (1) (SC)** to hold that it is the issue which guides the parties in the matter of adducing evidence and not the pleadings. The Court should not decide a suit/ point on which no issue has been framed. The defendants relied upon the Will and it was reasonably expected from the trial Court to frame an issue on Will so as to allow the plaintiff-appellant to lead evidence in rebuttal of the Will. Such a course can be possible only when proper issue was framed by the trial Court. The trial Court proceeded to hold validity of the Will despite no rebuttal evidence was adduced by the plaintiff on the point of execution of Will. Lower Appellate Court thought it appropriate to frame issues No.3-A and 3-B in the following manner:-

“3-A Whether the document dated 13.4.2001 purported to be an agreement/ Will satisfies the definition of a Will and was executed by the deceased Paramjit Singh in favour of respondent-defendants No.1 and 2 out of his sweet will, if so its effect ? OPD

3-B If issue No.3-A is proved whether the said document purporting to be a Will of deceased Paramjit Singh is shrouded by suspicious circumstances ? OPP”

13. Thereafter, lower Appellate Court disposed of the appeal vide judgment dated 25.7.2011 and the case was remanded to the trial Court for deciding the suit afresh after providing reasonable opportunities to both the sides to lead evidence in support of their case.

14. This is how the present second appeal against the judgment of the lower Appellate Court came to be filed in this Court.

15. I have heard learned counsel for the parties and have also perused the material on record with the able assistance of both the sides.

16. Learned counsel for the appellant has vehemently contended that the order of remand does not satisfy the provisions of Order 41 Rule 23, Rule 23-A and Rule 25 CPC inasmuch as that the suit was not decided on any technical point nor the lower Appellate Court has reversed the findings on all the issues. On framing of additional issues, lower Appellate Court should have asked for a report under Order 41 Rule 25 CPC from the trial Court and the remand ought not to have been made in routine. Learned counsel placed reliance on **Gangi vs. Gian Kaur and others, AIR 1991 (P&H) 175** to contend that for remanding a case, condition precedent is that the Appellate Court must come to a conclusion that the decision of the trial Court is wrong. In the instant case, the appeal has been

disposed of by framing additional issues and the case has been remanded to the trial Court.

17. Learned counsel further relied upon **Kalyan Singh Chouhan vs. C.P.Joshi 2011 (1) RCR (Civil) 865** to plead exception clause that when the parties new case of each other and lead the evidence not only in support of their contentions but in refutation thereof by the other side, in such an eventuality, absence of an issue would not be fatal and would not be permissible for a party to submit that there has been a mis-trial and the proceedings stood vitiated.

18. Learned counsel for the appellant further contended that since no replication has been filed, non filing of replication amounts to admission of what has been written in the written statement. Therefore, plea of Will raised in the written statement stood duly admitted by the plaintiff by not filing replication and therefore, remand was totally unwarranted.

19. On the other hand, learned counsel for the respondent-plaintiff has argued that the Will itself is surrounded by mysterious circumstances inasmuch as that the manner of drafting Will is in the form of agreement. Scribe of the Will has not been examined nor any name of such person has been given. The attesting witnesses of the Will are none else but the brothers of the wife, namely, Mahinder Singh and Ravinder Singh. Mahinder Singh has been examined as DW-2. The

beneficiary of the Will is proved to have taken active part in execution of the Will. Learned counsel further contended that validity of the Will dated 13.4.2001 has been contested by the plaintiff in para No.8 of the affidavit and such a denial was totally inadmissible for want of plea taken in the replication. The defendants had specifically taken the plea of Will in para No.5 of the written statement which has not been denied by the plaintiff.

20. Learned counsel for the respondent further contended that the trial Court dismissed the suit primarily on the findings recorded under issues No.1 and 2 and the decision of issue No.3 went in favour of the plaintiff. The findings under issues No.1 and 2 were primarily recorded on the basis of Will to which no issue was framed. With the framing of issues 3-A and 3-B, findings on issues No.1 and 2 have been rightly reversed by the lower Appellate Court. Since the findings under issue No.3 were held in favour of the plaintiff, therefore there was no necessity of reversing the findings under issue No.3. In a way, findings on all the relevant issues have been reversed by the lower Appellate Court and the case has been rightly remanded to the trial Court for deciding the same afresh after providing reasonable opportunities to both sides on additional issues. The case squarely falls under category of Order 41 Rule 23 (A) CPC. Since issue of Will is the primary issue, issues No. 3-A and 3-B are to be decided on the basis of evidence likely to be led on

these issues. Therefore, the remand is the appropriate remedy instead of calling for report under Order 41 Rule 25 CPC. Since issue of Will was not there, therefore, parties are legally entitled to lead evidence and rebuttal thereof at appropriate stage of the trial. The exception to the mandate recorded in **Kalyan Singh Chauhan's case (supra)** that if parties knew the case of each other then framing of issue is not required is not applicable in the instant case inasmuch as that no evidence could be led by the plaintiff in refutation of the claim set up by the defendants in the written statement in the absence of proper issue to that effect. Non filing of replication does not amount to admission of what has been stated in the written statement. Replication is a facilitative procedure which parties adopt to join issues for denying what has brought through a written statement. The filing of replication becomes imperative only if counter claim is filed by the defendants.

21. On the aforesaid proposition, learned counsel for the respondents relied upon **Avtar Singh (deceased, through his LRs) vs. The Financial Commissioner (Appeals), Punjab, Chandigarh and others** 2013 (4) CCC 395 (P&H) and **K. Sajjan Raj vs. Gopisetty Chandramouli** 2011 (4) CCC 51. Filing of written statement cannot be equated with filing of counter claim or definition of set off. Therefore non filing of replication is not fatal to the case of the appellant.

22. Learned counsel also highlighted the mysterious circumstances of the Will in which beneficiary took active part in execution of the Will and the attesting witnesses are the real brothers of the beneficiary- defendant No.1. Scribe has not been examined. The Will was duly challenged in the examination-in-chief. Lower Appellate Court has correctly framed proper issues and no illegality can be pointed out in such a course.

23. Since lower Appellate Court has reversed the findings under issue Nos. 1 and 2, findings of issue No.3 were already in favour of the plaintiff, it is case of total reversal of relevant findings by the lower Appellate Court and therefore case falls under the category of Order 41 Rule 23 (A).

24. Lower Appellate Court has set aside the findings and thereafter, remanded the case to the trial Court. No other finding was required to be reversed by the lower Appellate Court. No exceptional case is made out to bring out the case under the applicability of principles laid down in **Kalyan Singh's case (supra)**. The plaintiff proceeded with the trial not fully knowing the case of the defendants for want of proper issue and did not lead evidence in refutation thereof by the defendants. Since no rebuttal to the evidence of the defendants was led by the plaintiff for want of proper issue, therefore, it cannot be presumed that the absence of an issue would not be fatal and

would not be permissible for the plaintiff. The case is apparently, proved to be a case of mis-trial and the proceedings are vitiated. The entire controversy is revolving around the genuineness of the Will allegedly executed by Paramjit Singh, therefore, trial Court is legally required to grant reasonable opportunities to the parties to lead evidence on the additional issues i.e. 3-A and 3-B and the plaintiff is also required to lead evidence in rebuttal of the Will in question. Since such a course is possible only before the trial Court, therefore, remand of the case is held to be justified.

25. In view of the facts and circumstances of the case, there is no merit in the appeal and the same is dismissed.

(RAJ MOHAN SINGH)
JUDGE

October 08, 2014
anita