

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Revision No.4142 of 2015 (O&M)
Date of Decision: 05.10.2016**

Phool Singh and another

.....Petitioners

Vs

Smt. Kamla

.....Respondent

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Amit Jain, Advocate
for the petitioners.

Mr. Partap Singh, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

CM No.18310-C of 2016

After hearing learned counsel for both the parties, the application is allowed. Accompanying documents are allowed to be placed on record.

Main case

[1]. Petitioners have assailed order dated 18.05.2015 (Annexure P-6) passed by Civil Judge (Jr. Divn.), Hisar whereby application of taking off affidavit of Jagat Pal moved by defendant was allowed and the plaintiffs were restrained from

examining PW Jagat Pal in the rebuttal evidence.

[2]. Brief facts of the case are that the plaintiff/petitioners filed a suit for pre-emption of agricultural land situated in the revenue estate of village Dhobhi, Sub-Tehsil Balsamand, Distt. Hisar on the ground of tenancy.

[3]. Trial Court passed order dated 16.05.2012 framing the following issues:-

- “1. *Whether the plaintiffs have been cultivating the land in suit as tenants on the date of sale and continues as such? OPP*
2. *Whether the plaintiffs have a superior right of Pre-emption? OPP*
3. *Whether the sale price of Rs.19,50,000/- was actually paid and fixed in good faith? OPD*
4. *If issue No.3 is not proved what is the market value of the suit land on the date of sale? Onus on the parties.*
5. *Whether the suit is not maintainable in the present form? OPD*
6. *Whether the plaintiff have relinquished their rights of tenancy in favour of defendants, if so to what effect? OPD*
7. *Whether Ram Kumar cultivated the land in suit as a tenant, if so to what effect? OPD (Ram Kumar defendant).*

8. *Whether the suit is bad on account of non-joinder of necessary parties. OPD*

9. *Relief.”*

[4]. Issue No.1 was to the effect that whether the plaintiffs have been cultivating the land in suit as tenant on the date of sale and were continuing as such thereafter. The onus to prove issue No.1 was on the plaintiff. Issue No.6 was framed on the stand of the defendant that the plaintiffs had already relinquished their rights of tenancy in favour of the defendant. Onus of this issue was on the defendant.

[5]. Plaintiffs filed an application to produce witnesses in their rebuttal. It was also prayed that besides two witnesses, other witnesses, if any, will be produced by the plaintiff. Diet money was also deposited in respect of two named persons. On 02.02.2015 affidavit of Jagat Pal was tendered in examination-in-chief by the plaintiff/petitioners in their rebuttal evidence. In the affidavit, Jagat Pal deposed in para Nos.1 and 2 in the following manner:-

“1. That I know Krishan Kumar son of Sh. Sheo Nath of village Kharia, Tehsil and Distt. Hisar. He moved an application to S.S.P. Hisar. This application was assigned to P.P. Balsamand and was enquired into by Daya Ram Head Constable, P.P. Balsamand. A compromise was got effected between the parties. The

land in suit is being cultivated by Phool Singh and Om Parkash and after later's death Naresh for the last about 50 years and the parties at that time agreed that no one will interfere in their possession till the suit is finally decided by the court. The compromise/application bears the signatures of the deponent alongwith other person who were present there. Krishan Kumar and Naresh were also present there and their statement was also recorded by the Head Constable Daya Ram in the presence of the deponent and other witnesses.

2. That the land in question is in continuous possession and cultivation of Phool Singh and Naresh at the spot.”

[6]. On 27.04.2015, defendant filed an application for taking off the affidavit of Jagat Pal from the file on the ground that he cannot be examined as a witness of the plaintiffs to show the alleged cultivating possession of Phool Singh and Naresh at the spot. Defendant alleged that onus of an issue in respect of alleged cultivating possession was upon the plaintiffs, who had already closed their evidence, therefore, Jagat Pal cannot be examined in rebuttal in respect of an issue the onus of which was on the plaintiffs.

[7]. The said application was contested by the plaintiffs. Trial Court allowed the application of the defendant on the premise that the plaintiffs were intending to produce PW Jagat

Pal in order to produce evidence in respect of issue No.1. The application was allowed on the aforesaid premise and evidence of Jagat Pal was not allowed to be led in rebuttal.

[8]. At the time of issuance notice of motion, following order was passed by this Court on 24.07.2015:-

“Vide impugned order dated May 18, 2015, the trial Court has allowed the application of the defendant-respondent and restrained PW Jagat Ram to be examined in rebuttal evidence. Plaintiff- petitioners have filed a suit for preemption of agricultural land mentioned in heading of the plaint claiming that they are in actual cultivating possession as tenant since long on payment of batai- Tihai. The defendant- respondent has taken up a plea that the plaintiff- petitioners are not in possession and that they have relinquished their right in the property by way of a compromise.

With the assistance of counsel for the petitioners, I have gone through the issues. Issue No.1 is to be established by the plaintiffs that they are in cultivating possession of the land as tenants on the date of the sale and they continued to remain in possession as such till date whereas Issue No.6 requires the defendant to establish that the plaintiffs have relinquished their rights of tenancy in favour of the defendant on the basis of compromise.

After hearing counsel for the petitioners, it appears that the compromise has already been produced on the record as PW4/A. The claim of the defendant is that by way of said compromise the rights of the plaintiffs had

been relinquished , whereas the plaintiff- petitioners seek to establish that the effect of the compromise was that they would continue to remain in possession. The terms of the compromise and the prevalent possession of the plaintiffs appears to be fact in issue under Issue No.1 and Issue No.6. Onus of Issue No.6 is on the defendant- respondent. Issues No.1 and 6 appear to be interrelated. Jagat Pal who is sought to be examined as PW5 in rebuttal has, in his affidavit under Order 18 Rule 4 CPC, sought to establish the compromise which has been relied upon by the plaintiffs as well as by the defendant but further seeks to add that plaintiffs had been in possession till date. The testimony of PW5 Jagat Pal appears to be in the nature of rebuttal evidence to issue No.6 which admittedly is a rebuttal issue. In view of the inter-relationship of Issues No.1 and 6, PW Jagat Pal could have been permitted to be examined leaving it open for the court to finally determine the admissibility, relevance and authenticity of the evidence produced by the plaintiff- petitioners by examining PW5 Jagat Pal.

Notice of motion for December 16, 2015.

Meanwhile, the proceedings may continue but the trial Court shall not pass the final order.”

[9]. Apparently, issue No.1 was in respect of fact that the plaintiffs were in cultivating possession of the land as tenant on the date of sale and they continued to remain in possession thereafter. The issue No.6 was to the effect that the defendant was to establish a fact that the plaintiffs had relinquished their right of tenancy in the suit land in favour of defendants on the

basis of compromise. The terms of compromise and thereafter possession of the parties in view thereof would be a fact to be covered under issue No.1 and issue No.6. Jagat Pal was to depose in respect of compromise.

[10]. The contents of the affidavit i.e. para No.2 of the affidavit was specific in nature to allege that cultivation of Phool Singh and Naresh was existing at the spot. The land was being cultivated by Phool Singh and Naresh and after the death of Naresh for the last about 50 years and the parties agreed at that time that no one will interfere in their possession till the suit was decided by the Court. Issue No.6 is an issue of rebuttal. The testimony of Jagat Pal would be in the nature of rebuttal evidence to issue No.6. Issue No.1 and 6 have intra relationship viz-a-viz. status of parties, but deposition of Jagat Pal in the light of affidavit filed would be rebuttal under issue No.6.

[11]. Perusal of certified copy of application dated 20.12.2014 would show that the plaintiffs have made specific prayer that other witnesses, if any, will be produced by the plaintiff. Even though no diet money was deposited in respect of Jagat Pal. Since Jagat Pal was to be produced without soliciting court's assistance, therefore, non-mentioning of his name in the application and non-deposit of diet money would be of no

consequence. The witness who is present in Court, even if not cited in the list of witnesses cannot be disallowed when evidence of such witness is to be recorded. Since onus of issue No.6 was on the defendant, examination of Jagat Pal in rebuttal would be in consonance of Order 18 Rule 3 CPC.

[12]. Learned counsel for the petitioners relied upon **Mange Ram vs. Brij Mohan and others, (1983) 4 SCC 36**; **M/s Preet Cold Storage and Ice Factory, Khamano Mandi, Ludhiana and another vs. M/s United Commercial Bank, Sangol Ludhiana and others, 1989(1) PLR 180** and **Hira Nand vs. Savita Rani, 1987(1) PLR 546** to substantiate his arguments.

[13]. From the record, I found that the testimony of Jagat Pal was claimed to be relied in rebuttal to issue No.6. Even if, his name was not shown in the application dated 20.12.2014, but he was sought to be examined on the strength of prayer made therein that the plaintiff would bring other witnesses, if any. Since witness was present in the Court and was sought to be examined without soliciting the assistance of the Court for the purposes of procuring presence of witness, therefore, on the strength of aforesaid precedents, the witness cannot be debarred from being examined.

[14]. In view of aforesaid, I find merit in the revision petition.

Resultantly, the impugned order dated 18.05.2015 passed by the Civil Judge (Jr. Divn.) Hisar is hereby set aside. Revision petition is allowed. Petitioners are held entitled to lead evidence of Jagat Pal in rebuttal. Normal consequences to follow.

October 05, 2016

Atik

**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes / No

Whether reportable

Yes / No