

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CR No.1060 of 2016
Date of decision:17.11.2017

Jitender Kumar

... Petitioner

Vs.

Suresh Kumar and others

... Respondents

CR No.6426 of 2014

Suresh Kumar and others

... Petitioners

Vs.

Jitender Kumar and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Naresh Bansal, Advocate
for the petitioner (in CR No.1060 of 2016) and
for respondent No.1 (in CR No.6426 of 2014).
Mr. Arvinder Arora, Advocate
for the petitioners (in CR No.6426 of 2014)
for respondents No.1 to 3 (in CR No.1060 of 2016).

Mr. Jatinder Nagpal, Advocate
for the Municipal Committee in both cases.

AMIT RAWAL J.

This order of mine shall dispose of two revision petitions between the parties to the lis, one on behalf of the defendants, i.e. 6426 of 2014 (Ist petition) and another on behalf of the plaintiffs, i.e., CR No.1060 of 2016 (2nd petition). The facts are being taken from CR No.6426 of 2014.

Mr. Arvinder Arora, learned counsel for the petitioners in CR No.6426 of 2014 and respondents No.1 to 3 in CR No.1060 of 2016 submitted that in a civil suit titled as Jatinder Kumar vs. Suresh Kumar and others, the plaintiff therein had sought the following relief:-

“It is, therefore, respectfully prayed that the suit of the plaintiff may kindly be decreed with costs and a decree of partition with possession by metes and bounds of the properties bearing No.110, 131 and 132, Abadi Naraingarh, Tehsil Naraingarh, District Ambala and other articles left by father of the plaintiff and defendants No.1 to 3 Sh. Yash Pal as detailed in Annexure 'A' filed with the plaint may kindly be passed in favour of the plaintiff and against the defendants with the consequential relief of a decree of a permanent injunction restraining the defendant no.4 from entering/changing the mutation of above described properties in the name of the defendants no.1 to 3 in any manner and further restraining the defendants no.1 to 3 from selling, alienating, disposing off and transferring the possession of the properties in question may kindly be also passed.”

The aforementioned suit was contested by the petitioner/defendant(s) by setting up a Will dated 15.08.2007 by Yash Pal. Since the parties were at variance, the trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to the relief of possession by metes and bounds of the suit property as prayed for?OPP*
- 2. If issue no.1 is proved whether the plaintiff is entitled to the relief of permanent injunction restraining the defendant no.4 from entering/changing the mutation as prayed for?OPP*
- 3. Whether the suit of plaintiff is not maintainable in its present form?OPD*
- 4. Whether the plaintiff has not come to the Court with clean hands?OPD*
- 5. Whether the plaintiff has concealed the true and material facts from the Court?OPD*
- 6. Whether the plaintiff is stopped to file the present suit by his own act and conduct? OPD*
- 7. Whether the suit of the plaintiff is bad for non-joinder of necessary parties?OPD*
- 8. Whether plaintiff has no cause of action to file the present suit?OPD*
- 9. Whether the plaintiff has no locus standi to file the present suit?OPD*
- 10. Relief.”*

He further submitted that though the issue of Will was not framed but the parties were alive to the situation and led the evidence. The evidence of the respondent/plaintiff was closed, vide order dated 03.07.2013. Thereafter, the respondent(s) suffered a statement for closing

the evidence and order passed thereon of even date read thus:-

Statement

“Jitender Kumar Vs. Suresh

*Statement of Sh. Mohinder Singh, Adv., counsel for the plaintiff
on SA*

Stated that I closed the oral evidence on behalf of plaintiff.

One opportunity be given for documentary evidence.

RO & AC

*Sd/-
CJJD
N/Garh 3/7/13”*

Order dated 03.07.2013

Present: Shri Mohinder Singh, counsel for the plaintiff.

Shri Ram Singh, counsel for defendants No.1 to 3.

Shri Rajan Gupta, counsel for the defendant no.4.

*No plaintiff evidence is present. Learned counsel for
the plaintiff has appeared and closed the plaintiff oral evidence
and sought some time for filing documentary evidence.
Statement to this effect recorded separately. Heard. Allowed.
Now, to come upon 6.7.2013 for filing documentary evidence.
It shall be the last opportunity, it is made clear that no further
opportunity will be given for this purpose.*

*Sd/-
(Rekha)
CJ (JD)/Naraingarh
Dated 3.7.2013”*

On the adjourned date, i.e., 06.07.2013, the plaintiff(s) tendered

the documents Ex.P12 to Ex.P13 and closed the evidence. The statement of 06.07.2013 and the order of even date read thus:-

“Jitender vs. Suresh

Statement of Sh. Mohinder Singh, Adv. Counsel for the plaintiff on SA.

Stated that I tendered Ex.P12 to Ex.P13 in the plaintiff evidence, original document seen and return (all documents objected to on the mode of proof) and closed the evidence of plaintiff.

RO&AC

*sd/-
CJJD, N/garh
6.7.2013”*

Order dated 06.07.2013

*“Present : Shri Mohinder Singh, counsel for the plaintiff.
Shri Ram Singh, counsel for defendants no.1 to 3.
Shri Rajan Gupta, counsel for defendant no.4.*

Today Shri Mahinder Singh, counsel for the plaintiff has appeared and suffered statement that he has closed the plaintiff evidence after tendering the documents Ex.P-12 to Ex.P-13. (Objected to on the mode of proof). Statement to this effect recorded separately. Heard. Allowed. Now, to come upon 7.8.2013 for defendant evidence at his own responsibility.

*Sd/-
(Rekha)
CJ(JD)/Naraingarh
Dated 6.7.2013.”*

The plaintiff moved two applications, one for permission to take photographs of the signatures of Yashpal son of Sh. Ram Lubhaya on

Ex.D1 and on Ex.PX by the handwriting expert for comparison and another for permission to lead evidence in rebuttal (Annexure P-9). The same was contested by filing a reply (Annexure P-8). However, the trial Court, vide order dated 11.08.2014, Annexure P-9, allowed the application by relying upon the ratio decidendi culled by this Court in M/s Punjab Steel Corporation Batala vs. M.S.T.C. Limited, Calcutta, 2002(I) CCC, 503 by holding therein that where the plaintiff has closed the evidence, there is implied reservation of right to adduce evidence by way of rebuttal, whereas, the aforementioned finding is contrary to the law laid down to the statutory provisions, i.e., Order 18 Rule 3 CPC as well as Division Bench judgment rendered by this Court in **Surjit Singh and others vs. Jagtar Singh and others 2007(1) RCR (Civil) 537** and un-reported judgment of this Court in **CR No.6129 of 2015 titled as Manjit Kaur vs. Surjit Singh and another, decided on 18.09.2015.**

On the other hand, Naresh Bansal, appearing on behalf of petitioner in CR No.1060 of 2016 submitted that in pursuance to the permission granted by the trial Court, vide order dated 11.08.2014 impugned in the first revision petition, the plaintiff had led the evidence but realizing that the trial Court had not framed the issue on the Will, moved an application by invoking the provisions of Order 14 Rule 5 CPC for framing the additional issues in order to avoid any ambiguity and illegality in the judgment and decree or at any stage of suit. The aforesaid application has erroneously been dismissed, vide order dated 19.11.2015. Once the parties

were at variance and the defendants had set up a Will dated 15.08.2007, and produced the same only at the stage of their evidence, the issue in this regard was required to be framed.

By supporting the impugned order passed in civil revision petition No.6426 of 2014, he submitted that onus to prove the Will was upon the defendants, therefore, the plaintiff had the chance to rebut the same only at the stage where the defendants had led the evidence to prove the Will as per the statutory provisions of Order 18 Rule 3 CPC.

In support of his contention, he relied upon the ratio decidendi culled by the Division Bench of this Court in Avtar Singh and another vs. Baldev Singh and others 2015(5) RCR (Civil) 625, **wherein, in pursuance to the reference order dated 07.12.2012**, the judgments rendered in National Fertilizers Ltd. Vs. Municipal Committee, Bathinda AIR 1982 (P&H) 432; Surjit Singh and others v. Jagtar Singh and others, 2007 (1) RCR (Civil) 537 and Swaran Singh vs. Bhagwan Singh 2000(1) RCR (Civil) 521 were referred to the larger Bench and thus, there is no illegality and perversity in the impugned order challenged in first revision petition and the impugned order in revision no.2 is liable to be set aside as the framing of the issue on the Will was very necessary and proper for adjudication of the lis between the parties.

I have heard learned counsel for the parties and appraised the paper book and of the view that both the revision petitions are liable to be dismissed and the reasons is not one but many.

From the perusal of the issues already framed, the onus to believe the claim of the plaintiff in the aforementioned suit was upon the defendants as per the averments made in the written statement paragraph 1 on merits of the written statement, which read thus:-

“That para no.1 of the plaint is correct to the extent of relationship inter-se parties to this suit. Rest of para is wrong and denied. It is wrong that father of the parties, namely Sh. Yash Pal died intestate, leaving behind the plaintiff and the answering defendants as the only legal heirs. As a matter of fact, Shri Yash Pal, the father of the parties during his life time, executed a legal and valid Will in his state of mind dt.15.08.2007 and the plaintiff is well aware of this fact from the very beginning and he also admitted the correctness and genuine requests of said Will by executing an affidavit dated 7.1.2008, got attested by Executive Magistrate, Naraingarh. Shri Yash Pal, left behind four sons, i.e, plaintiff and answering defendants, two daughters namely Anju Bala and Sonia Bala and a widow, namely Smt. Krishna Rani. But the plaintiff intentionally with-held these facts and have not impleaded them as necessary parties to this suit.”

The defendants had led the evidence on the Will and the same has been produced only at the time of their evidence, therefore, the plaintiff did not have any chance to lead evidence on the issues, onus of which was upon the defendants. The interpretation of Order 18 Rule 3 CPC came to be

debated upon in view of the findings already rendered by a Division Bench of this Court in **Jaswant Kaur and another vs. Devinder Singh**, AIR 1983 (P&H) 210, wherein it was held that the plaintiff cannot lead the evidence, in case he has failed to reserve the right to lead the evidence in rebuttal but the aforesaid decision was again referred to the Division Bench of this Court in Avtar Singh's case (supra), wherein the Division Bench had framed following questions for answering the reference:-

“Question No.1, i.e., whether it is mandatory for the trial Court to provide an opportunity to the plaintiff to lead evidence in rebuttal only in those cases where he had reserved his right of rebuttal?

Division Bench of this court in Surjit Singh's case (supra), while relying upon a decision of an earlier Division Bench in [Jaswant Kaur and another v. Devinder Singh](#), AIR 1983 P&H 210 (DB) and a Single Bench in [National Fertilizers Ltd. v. Municipal Committee, Bhatinda and another](#), AIR 1982 P&H 432(1), crystallized the true import of the provisions of Order 18 Rule 3. And the principle of law that has been enunciated is that plaintiff has the option to lead his entire evidence on all the issues, and in case, he intends to lead rebuttal evidence or answer the evidence that is to be led by the defendant, as regards the issues the onus of proof of which is upon the defendant, he shall have to reserve his right. Further, he shall have to exercise his option either when he closes his evidence in affirmative or in any case before the

other party begins its evidence. But if he fails to reserve any such right, in terms of the provision of Order 18 Rule 3 CPC, his right to lead evidence in rebuttal would stand forfeited.

Question No.2, i.e., whether plaintiff can independently lead evidence in rebuttal over such issues, the onus of which is purely on the defendant?

From a plain reading of the provisions of Order 18 Rule 3 CPC and the principle of law enunciated by the Division Bench in Surjit Singh's case (supra), it is axiomatic that in a case, where there are several issues, and the burden of proof some of which lies upon the defendant, plaintiff who is conscious to the lis and alive to the matter in issue, he can adduce his evidence in entirety vis-a-vis all the issues including those onus of proof of which is upon the defendant. Or having led the evidence in affirmative, as regards the issues, the onus of proof of which is upon the plaintiff himself, he can reserve his right to lead evidence in rebuttal. Needless to assert, leading evidence in rebuttal is also a part of the plaintiff's evidence. Whether he leads it in one go qua all the issues and close his evidence or reserve his right to lead rebuttal evidence.

Question No.3, i.e., whether Rule 3 Order 18 of the Code if read in conjunction with Order 18 Rule 1 of the Code widens the scope of evidence in rebuttal?"

On a due and thoughtful consideration, we are of the view that the provision, which perhaps intended to be referred to by the

learned Single Judge was Order 18 Rule 2 and not Order 18 Rule 1. As Order 18 Rule 1, only defines as to which of the parties has a right to begin first. Be that as it may. Provisions of Order 18 Rule 2 and Order 18 Rule 3 CPC are mutually exclusive and have their independent domains, and thus, operate in different situations. We deem it necessary to refer to the provision of Order 18 Rule 2 CPC, which reads thus:-

"2. Statement and production of evidence-- (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case."

The answer to question no.2 is squarely applicable to the facts and circumstances of the case, wherein it has been held that leading an evidence in rebuttal is also part of the plaintiff's evidence as to whether he leads evidence in one go qua all the issues and close his evidence or reserve his right to lead rebuttal evidence. It has also been held that the plaintiff, who is conscious to the lis and alive to the matter in issue, can adduce his evidence in entirety vis-a-vis all the issues, including those onus of proof of which is upon the defendants or lead evidence in affirmative as regards the

issues, the onus of proof of which is upon the plaintiff himself, he can reserve his right to lead the evidence in rebuttal.

In the instant case, concededly, the original Will in question has been produced for the first time at the time of defendants' evidence. Had the original Will been produced alongwith list of documents filed with written statement, perhaps the plaintiff would have led the evidence on all the issues including the one, onus of which was upon the defendants, so the principles culled out in the aforementioned judgments would apply to the facts and circumstances of every individual case. There would have been force in the arguments of Mr. Arvinder Singh, had the original Will been produced on record, or the plaintiff had not led evidence on the Will or not reserved the right.

In pursuance to the order, the plaintiff had already led evidence in rebuttal by examining the expert. The Court, in my view, will opine on the evidence brought on record by both the parties to the lis to adjudicate the controversy involved. Thus, revision petition No.1 is hereby dismissed.

With regard to other revision petition seeking permission of the Court to frame the specific issue on the Will, I am of the view that law on framing of the issue when the party being alive to the situation and had led the evidence on the said issue is not longer res integra, in view of the ratio decidendi culled out by the Hon'ble Supreme Court in ***P. Purushottam Reddy vs. M/s Pratap Steels Ltd. 2002 (2) R.C.R.(Civil) 70***. For the sake of brevity, paragraphs 7 to 10 read thus:-

“7. The next question to be examined is the legality and

propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remanded by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so the evidence recorded together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 41 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause of Sub-rule (1) of Rule 27 being attracted such additional evidence oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being

satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because as held in [Mahendra v. Sushila](#) (AIR 1965 SC 365 at p. 399), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand de hors the Rules 23 and 23A.

To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.

8. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary Neither Rule 23 nor Rule 23A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule.

The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A of CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to Clause (c) of [Section 16](#) of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise in as much as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless the parties and the trial court were very much alive to the issue whether [Section 16\(c\)](#) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not - In law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material in as much as the High Court being the court of first appeal, all the questions fact and law arising in the case were open before it for consideration and decision.

9. Assuming that there was any deficiency in the pleadings and also an omission on the part of the trial court to frame a specific issue, the present one is a case where the applicability of the law laid down by this court in [Nagubai Ammal and Ors. v. B. Shama Rao and Ors.](#) AIR 1956 SC 593, was squarely

attracted. In Nagubai case this court was called upon to examine if the plea of lis pendens was not open to the plaintiff on the ground that it had not been raised in the pleadings. Neither the plaint nor the reply statement of the plaintiff contained any averment that the sale was affected by the rule of lis pendens. There was no specific issue directed to that question. However, evidence was adduced by the plaintiff on the plea of lis pendens and not objected to by the defendants. The question was argued and tested by taking into consideration the evidence that the proceedings were collusive in character with a view to avoid operation of [Section 52](#) of the T.P. Act. This court felt satisfied that the defendants went to trial with full knowledge that the question of lis pendens was in issue, had ample opportunity to adduce their evidence thereon, and fully availed themselves of the opportunity. This court formed the opinion that in the circumstances of the case, absence of a specific pleading on the question was a mere irregularity which resulted in no prejudice to the defendants. After having noticed the rule of pleadings as applicable to civil law that "no amount of evidence can be looked into upon a plea which was never put toward", this court held. "The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present in the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence relating thereto".

In the instant case, it is not matter of dispute that both the parties had led evidence on the issues at the appropriate stage as indicated above. Thus, arguments of Mr.Bansal impugning the order declining the

application for framing additional issue is wholly fallacious and not tenable.

Once the party, who is alive to the situation, had already led evidence, the trial Court can always render adjudication on the controversy involved on the preponderance of evidence already brought on record in the absence of the issue and therefore, revision petition no.2 is also dismissed.

As an upshot of my findings, both revision petitions stand dismissed.

(AMIT RAWAL)
JUDGE

November 17, 2017
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No