

In the High Court of Punjab and Haryana at Chandigarh

C.R.No. 6996 of 2016
Date of Decision:25.9.2017

Nazar Singh

---Petitioner

vs.

Kulbir Kaur and others

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. G.S.Sirphikhi, Advocate
for the petitioner

Mr. R.D.Bawa, Advocate
for respondent Nos. 1 to 3

None for respondent No. 4

Rekha Mittal, J.

The present petition directs challenge against order dated 27.9.2016 (Annexure P-7) passed by the Civil Judge (Junior Division), Batala, whereby application filed by the petitioner/defendant No. 1 for striking off para Nos. 1 to 9, 13, 14, 18 to 22 of the affidavit of Paramjit Kaur plaintiff in rebuttal and de-exhibiting the documents mentioned in abovesaid paras has been dismissed.

Counsel for the petitioner has submitted that Kashmir Kaur

widow (since deceased) and three daughters of late Sh. Tara Singh filed the suit for declaration that plaintiffs are the co-sharers/owners in possession to the extent of 2/3rd share i.e. 1/6th share each in the land in question which they have inherited after death of Tara Singh son of Harnam Singh resident of village Dalam Nangal Tehsil Batala, against Nazar Singh and Major Singh sons of Tara Singh. The plaintiffs claimed their right in the suit property on the plea that suit property is joint Hindu family coparcenary property in the hands of Tara Singh, therefore, the plaintiffs have 1/6th share each in the land whereas the remaining 1/6th share each is co-owned by the defendants, sons of Tara Singh. The plaintiffs further averred that the alleged Will purported to be executed by Tara Singh in favour of defendants is illegal, ultra vires, null and void, inoperative, forged and fabricated document etc. as there was no occasion for the deceased to disinherit the plaintiffs. Tara Singh was not competent to execute any Will of the joint Hindu family ancestral property which he had inherited from his forefathers. Plaintiffs No. 2 to 4 have got right, title and interest in the suit land since their birth. Plaintiff No. 1 was looking after and serving Tara Singh during his life time and there was no occasion for the deceased to disinherit plaintiff No. 1. The defendants have got mutation of inheritance of Tara Singh sanctioned in their favour and the same is illegal, null and void and must be the result of collusion and conspiracy of the defendants with revenue authorities.

It is further argued that the trial court framed the issues reproduced in para 3 of the grounds of revision and onus of issue with regard to entitlement of the plaintiffs to relief of declaration has been

placed upon them whereas the onus of issue qua validity of Will dated 23.11.1994 has been cast upon the defendants/propounders of the Will. The plaintiffs opened the case for leading evidence in order to discharge the onus of issues qua declaration and injunction and they tendered into evidence certain documents. Thereafter, the defendants adduced their evidence to counter plea of the plaintiffs that the suit land is the joint Hindu family coparcenary property or plaintiffs No. 2 to 4 being coparceners in the said land and further to prove Will dated 23.11.1994 having been executed by Tara Singh in favour of his sons. One of the plaintiffs Paramjit Kaur daughter of deceased Tara Singh tendered into evidence her affidavit (Annexure P-4) in rebuttal and in the said affidavit, Paramjit Kaur has testified in respect of various facts which were required to be proved by the plaintiffs in their affirmative evidence. It is argued with vehemence that para Nos. 1 to 9, 13, 14 and 18 to 22 of the affidavit of Paramjit Kaur pertain to the facts that could be proved by the plaintiffs in affirmative, therefore, the aforesaid paras are liable to be deleted so that no prejudice is caused to the petitioner. The plaintiffs can not be permitted to lead affirmative evidence in the guise of leading rebuttal evidence qua the Will. In support of his contention, he has referred to judgment of this Court **Hanumant Singh vs. Babu Singh and others 2010(2) Civil Court Cases 311**. Further reference has been made to judgment of Hon'ble the Supreme Court of India **R.V.E.Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P.Temple and others 2003(4) RCR (Civil)704**. Reference has also been made to another judgment of this Court **Jasjit Singh and another vs. Prem Harjit Singh and another 2013(1) RCR**

(Civil) 514.

Counsel representing the respondents, on the contrary, has supported the impugned order with the submission that para Nos. 1 to 9 of the affidavit (Annexure P-4) are just introductory and pertain to relationship between the parties when otherwise there is no dispute between them that plaintiff No. 1 is the mother and plaintiff Nos. 2 to 4 are the sisters of petitioner/defendants Nazar Singh and Major Singh. Another submission made by counsel is that during pendency of the suit, Ms. Kashmir Kaur widow of deceased Tara Singh passed away and for that reason, para No. 6 and 19 to 21 have been added in the affidavit to prove the facts pertaining to subsequent events that occurred during pendency of the suit. It has been argued with vehemence that the petitioner raised an issue with regard to certain paras of the affidavit as well as de-exhibiting certain documents referred to in some of the paras of the affidavit (Annexure P-4). According to counsel, objection regarding admissibility of any material or marking a document is simply to be recorded by the Court and required to be decided at the last stage in the final judgment, therefore, the trial court was not obligated to decide objection of the petitioner at this stage of the proceedings. In support of his contention, he has relied upon judgment of Hon'ble the Supreme Court of India **Bipin Shantilal Panchal vs. State of Gujarat 2001(1)RCR (Criminal) 859**. Further reference has been made to judgment of this Court **Devi Sahai, Proprietor M/s Jai & Sons vs. Mrs. Triloch Pathak 2015(8) RCR (Civil)156**.

I have heard counsel for the parties, perused the paper book particularly various annexures including the order impugned and judgments

cited at Bar.

Before adverting to the submissions in the light of factual controversy involved in the present lis, it is pertinent to mention at the outset that the main issue involved in the case is whether the respondents/plaintiffs can be permitted to adduce affirmative evidence by way of rebuttal by filing affidavit in examination in chief (rebuttal stage) pertaining to evidence that can be adduced in affirmative as well as to counter/rebut the evidence adduced by the contesting party to discharge onus of the issue qua Will propounded by them (defendants).

In the case at hand, the entire controversy revolves around two issues. The first question is whether the land in question left behind by Tara Singh predecessor-in-interest of the plaintiffs and defendants is joint Hindu family coparcenary property having been inherited by Tara Singh from his forefathers. If so, whether Tara Singh was competent to bequeath the property by way of Will. The second vital issue is whether deceased Tara Singh executed a genuine and valid Will in favour of his sons.

There is no dispute that the trial court initially framed three issues in regard to entitlement of the plaintiffs to relief of declaration (issue No. 1), entitlement of the plaintiffs to relief of permanent injunction (issue No. 2) and the suit being barred by limitation (issue No. 3). The onus of first two issues was placed upon the plaintiffs and of the third issue upon the defendants. Later, the Court framed two more issues, read as follows:-

2-A Whether Will dated 23.11.94 was validly executed by Tara Singh in favour of defendants? OPD if so, its effect.

2-B Whether plaintiffs are stopped by their own act and

conduct to file the present suit? OPD

Counsel for the respondents has not disputed that in view of the averments set up in the plaint and issues framed by the trial court, it is obligation of the plaintiffs/respondents to establish their plea that land in dispute is joint Hindu family ancestral property having been inherited by Tara Singh from his forefathers, therefore, plaintiffs No. 2 to 4 (daughters of Tara Singh) have right by way of birth in the suit property. It is also not denied that the plaintiffs opened the case to discharge onus of issue Nos. 1 and 2 and tendered into evidence certain documents.

The question that arises for consideration is whether the plaintiffs in the guise of leading evidence to rebut evidence adduced by the defendants to discharge onus of issue No. 2-A reproduced hereinbefore, can be allowed to lead evidence required to be adduced in affirmative. The answer at the outset, is in negative. The only judgment relevant in the present context is the one rendered by this Court in **Hanumant Singh's case (supra)**. This Court in para 4 of the judgment has held that there can be no controversy about the fact that the affidavits tendered by the plaintiffs-respondents in rebuttal evidence cannot contain averments which pertain to the affirmative character of evidence. It is only that part of the affidavits, which relates to the rebuttal of defendants evidence, which can be validly tendered into evidence. The trial court shall accept/consider only that part of the affidavits which pertain to evidence of rebuttal character which the plaintiffs/respondents are entitled to adduce in rebuttal of the evidence adduced by the petitioners therein to discharge the onus of issues which they were required to prove. Any part of the contents of those

affidavits relatable to the averments of affirmative character would not be accepted in rebuttal evidence.

Reverting to the instant case, para Nos. 1, 5, 8 and 9 pertain to averments which were required to be proved by the plaintiffs in affirmative, therefore, para Nos. 1, 5, 8 and 9 of the affidavit are liable to be deleted. Though para Nos. 2 to 4, 6 and 7 also pertain to facts required to be stated in affirmative but as there is no dispute between the parties with regard to their inter se relationship coupled with that in case the suit property is not proved to be joint Hindu family ancestral property or in other words, held to be personal property of Tara Singh, the shares to which the plaintiffs and defendants on the basis of natural succession would be entitled to, no prejudice shall be caused to the petitioners in case these paras are kept intact.

The petitioner has not raised any issue with regard to para Nos. 10 to 12, 15 to 17.

Para Nos. 13 and 14 appears to have linkage with preceding para Nos. 10 to 12 and succeeding para Nos. 15 to 18. As such, objection of the petitioner qua paras 13, 14, 18 and documents Ex. P4 and P5 is kept pending to be decided by the trial court at the time of final adjudication.

Para Nos. 19 to 22 are beyond pleadings or pertain to something which happened during pendency of the suit. There is nothing on record suggestive of the fact that after death of Ms. Kashmir Kaur stated to have taken place during pendency of the suit, the respondents/plaintiffs No. 2 to 4 filed an application for bringing on record the subsequent events. Even it is not clear if Ms. Kashmir Kaur died before the plaintiffs concluded

their evidence in affirmative. The plaintiffs cannot be permitted to bring on record series of facts and documents in the guise of said facts and documents pertaining to subsequent events. If the plaintiffs/respondents wanted to prove subsequent events/documents, they were required to file an appropriate application before the trial court with an opportunity to the contesting defendants either to admit or deny those facts. In this view of the matter, I find merit in contention of the petitioner that the averments sought to be raised and documents marked as exhibits in para Nos. 19 to 22 cannot be allowed to be brought on record by way of rebuttal evidence.

To be fair to the respondents, counsel has relied upon judgment of Hon'ble the Supreme Court of India **Bipin Shantilal Panchal's case (supra)**. With due regards, the judgment pertains to taking evidence in a criminal case wherein the provisions contained in the Code of Civil Procedure are not relevant. A plain reading of the judgment makes it evident that Hon'ble the Court has not adverted to the provisions of Order 13 and 18 of the Code of Civil Procedure (in short 'the Code') while deciding the question of admissibility of document at trial stage. Hon'ble the Apex Court has held in paras 14 and 15, quoted thus:-

“14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such

objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed).

15. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.”

This Court in **Devi Sahai, Proprietor M/s Jai & Sons' case (supra)** has also referred to judgment of Hon'ble the Supreme Court of India in **Bipin Shantilal Panchal's case (supra)**. Moreover, in the said case the Court has dealt with order 18 Rule 4(4) of the Code which provides for procedure to be followed when an objection is taken at the time of production of evidence before a Commissioner. It was not the subject of controversy before this Court as to whether an evidence which is required to be adduced in affirmative can be allowed to be led in rebuttal. In this view of the matter, the respondents cannot derive any advantage to their contention from the referred authorities.

A full Bench of Bombay High Court in **Mr. Hemendra Rasiklal Ghia vs. Subodh Mody 2009(1) Civil Court Cases 362** after taking into consideration the judgment in **Bipin Shantilal Panchal's case (supra)** has held in para 84, extracted hereinbelow:-

“The question referred for our consideration arises out of civil proceedings governed by the provisions of the CPC. It is well settled that if certain things are required to be done by the Statute in a specific manner, then it cannot be done in any other manner as ruled by the Apex Court in the case of **Nazir Ahmed vs. King Emperor, AIR 1936 PC 243; State of Uttar Pradesh vs. Singhara Singh, AIR 1964 SC 358** followed by this Court in **Vanmala S.Aney vs. National Education Society, Khamgaon, 1982 Mh. LJ 403**. Thus, mandate of Order XIII Rules 3 and 4 read with Order XVIII Rule 4(1) and consensus of judicial opinion compel us to fall in line with the

view expressed in **R.V.E. Venkatachala Gounder and Smt.**

Dayamathi Bai vs. K.M.Shaffi (both cited supra)."

Taking into consideration judgment of Hon'ble the Supreme Court in **R.V.E. Venkatachala Gounder's case (supra)** coupled with settled position in law that a plaintiff cannot be permitted to lead evidence in rebuttal to prove the facts required to be established in affirmative, I have no hesitation to hold that the trial court committed a serious error in dismissing the application filed by the petitioner/defendants. Accordingly, claim of the petitioner for striking off paras 1, 5, 8, 9 and 19 to 22 is allowed. As the aforesaid paras are ordered to be deleted/struck off from the affidavit of Paramjit Kaur, the documents which are marked as exhibits in these paras would automatically be taken out of consideration. However, objection qua para Nos. 13, 14, 18 and documents Ex. P4 and P5 is kept open to be decided by the trial court at the time of final adjudication, as discussed in the earlier part of the judgment.

For the foregoing reasons, the petition is disposed of in the aforesaid terms leaving the parties to bear their own costs.

(Rekha Mittal)
Judge

25.9.2017
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No