

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

C.R. No.3040 of 2016 (O&M)

Date of Decision.05.02.2018

Om Lata Kalyan

.....Petitioner

Vs

Renuka and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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

Mr. Harkesh Manuja, Advocate
for respondent No.1.

Mr. Ranbir Singh, Advocate
for respondent No.2.

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AMIT RAWAL J.

The present revision petition is directed against the order whereby the application moved by the petitioner-defendant under the provisions of Order 14 Rule 5 CPC for framing of the additional issue has been declined by the trial Court.

Before adverting to the submissions of the learned counsel representing the respective parties to the *lis*, it would be apt to give the preface of the matter. As per the pleadings, the plaintiff-Renuka, respondent No.1 herein, was married with Nabheet Kalyan (since deceased) and out of said wedlock, Ananya, a minor daughter was born in the month of June 2007. Unfortunately, her husband-Nabheet Kalyan died in a bizarre incident on 22.4.2008. As per the pleadings in the suit, her husband owned moveable and immovable property and on account of death had left behind the plaintiff and Ananya, impleaded as defendant No.2, as legal heirs. The petitioner-defendant No.1 on the basis of some Will dated 26.03.2008 allegedly executed by

Nabheet Kalyan, husband of the plaintiff, moved an application before the Tehsildar for sanctioning of the mutation *vis-à-vis* his estate stating therein that Nabheet Kalyan had bequeathed his entire movable and immovable property except one half share in the land measuring 87 kanals 19 marlas in Village Kairwali to her and the half share measuring 87 kanals 19 marlas in favour of Ananya, his minor daughter. It was further averred that the petitioner-defendant No.1 was appointed as an executor and the custody of the child i.e. defendant No.2 was also entrusted to her. As per the contents of the Will, in case Ananya dies before the marriage or issueless after the marriage, her share of the property shall also be bequeathed in favour of defendant No.1. The Will aforementioned was challenged, in the aforementioned suit, being an act of forgery and fabrication. In other words, her husband never executed such Will and therefore, his entire property to be devolved by way of natural succession.

The aforementioned suit was contested by defendant No.1 and 3-Sudhanshu Kalyan by taking all the objections of *locus standi* and estoppel. It was stated that Ananya was removed from the custody of petitioner-defendant No.1 forcibly by the respondent No.1-plaintiff in the month of September 2008. Vide preliminary objection, it was categorically averred that the suit titled as “Ananya Vs. Om Lata Kalyan” was filed and the same is pending adjudication and her custody had been shown to be given to one Tejbir Singh, therefore, prayer was made for dismissal of the suit as per the provisions of Section 10 of the Code of Civil Procedure. It was also stated that the suit of the plaintiff was liable to be dismissed as the aforementioned Will had already been admitted to be true and correct by the respondent No.1-plaintiff as per her statement dated 19.09.2008 suffered before the Court of Ld. Civil Judge (Senior Division) and two affidavits of even date i.e. 27.05.2008 and the basis of the aforementioned statement, property of Nabheet Kalyan had already been

transferred in the name of the petitioner and Ananya. The aforementioned statement was suffered on the basis of compromise arrived at between the parties. The affidavits were duly signed by Renuka and were identified by an Advocate on the same date. However, the intention of the respondent No.1-plaintiff turned mala fide resulting into filing of the application for restoration of the suit, which was dismissed as withdrawn on 19.09.2008. The said application was dismissed vide order dated 08.02.2011.

As per the facts pleaded in the present revision petition, the aforementioned order dated 08.02.2011 was assailed in this Court in Civil Revision No.2496 of 2011 and vide order dated 05.09.2014 (Annexure P-1), the impugned order therein was set aside and the suit was ordered to be restored and registered to its original number. The trial Court was directed to dispose of the suit as per law by giving opportunities to the parties.

Mr. Amit Jain, learned counsel appearing on behalf of the petitioner submitted that after the order passed by this Court, on 13.08.2015, the Court had framed the issue as culled out in paragraph 3 of the civil revision petition. It was submitted that when both the parties concluded the evidence, it was realized by the petitioner-defendant No.1 that the issue qua Will had not been framed, particularly with regard to the affidavits and the statement made by the respondent No.1-plaintiff admitting the Will. Accordingly an application (Annexure P-2) under Order 41 Rule 5 CPC for framing of the following additional issue was submitted:-

“Whether the Will dated 26.03.2008 has been admitted to be correct by Renuka plaintiff vide her statement dated 19.09.2008 recorded in the present case and also by two affidavits dated 27.05.2008 of Renuka? OPD”

The aforementioned application was contested by respondent No.1-plaintiff resulting into dismissal of the same, therefore, it was argued by the counsel for the petitioner-defendant No.1 that the trial Court had committed illegality and perversity in not framing the issues despite the fact that the issue regarding the validity of the Will and affidavits *ibid* is necessary and proper for adjudication of the case. The trial Court had misread the order of this Court and had even taken away right to refer to those documents at the time of arguments despite having given liberty to confront the witness with the affidavits/statement during her cross-examination. The order is contradictory in nature and if read collectively, the petitioner-defendant No.1 is precluded to even refer and cite those documents during the course of hearing, therefore, prayed for proving the aforementioned in case one opportunity be given to the petitioner-defendant No.1 as the respondent-plaintiff would also be able to cross-examine the witnesses which would enable the Court to adjudicate the controversy in dispute, effectively.

On the contrary, Mr. Harkesh Manuja, learned counsel appearing on behalf of the respondent No.1-plaintiff submitted that the petitioner-defendant No.1 is adopting dilatory tactics in delaying the adjudication of suit. Application was filed with mala fide intention to circumvent the order of this Court, whereby the suit was ordered to be restored. He submitted that this Court had already held that the statement made by respondent No.1-plaintiff was not voluntarily and therefore, the rights of the parties were ordered to be determined independently as the statement made in the suit was also under pressure and coercion, owing to threat perception extended to involve her family in criminal case. Even it has been held that respondent No.1-plaintiff had no right to compromise the share of Ananya as she was not guardian of Ananya, much less, no permission was

taken from the Court to compromise on behalf of the minor. Minor Ananya was shown in the guardianship of petitioner-defendant No.1-Om Lata Kalyan, who had adverse interest against the interest of Ananya. Even an FIR against Ram Kumar Kalyan for killing the brother of the respondent No.1-plaintiff was registered, much less, criminal case was also registered against her parents as well. The finding rendered by the trial Court with regard to the maintainability of the application is perfectly legal and justified. Once the aforementioned issue has already been adjudicated by this Court, application under 14 Rule 5 CPC was not maintainable being hit by doctrine akin to *res judicata* as per Section 11 CPC.

In support of his contentions, he relied upon the judgment of Hon'ble Supreme Court in **Satyadhyan Ghosal and others Vs. Smt. Deorjin Debi and another AIR 1960 SC 941** wherein it was held that against the order of remand passed by the High Court assailing an interlocutory order, in an appeal to Supreme Court by special leave petition from final decision after remand, provision of Section 105(2) CPC, which is a *para materia* to the provisions of Order 43 Rule 1-A CPC would not apply. He referred to para 8 of the judgment to submit that *res judicata* applies between two stages in the same litigation to the extent that a Court, whether the trial Court or higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again, at a subsequent stage of the same proceedings. Since the question with regard to compromise has already been adjudicated by this Court vide order dated 05.09.2014 (Annexure P-1) which attained finality having taken to Hon'ble Supreme Court vide order dated 13.07.2015 passed in SLP (Civil) No.17572 of 2015, petitioner-defendant No.1 was precluded moving the application under Order 14 Rule 5 CPC.

He also laid emphasis on para 14 of the judgment of Hon'ble Supreme Court rendered in Arjun Singh Vs. Mohindra Kumar and others AIR 1964 SC 993 wherein on similar analogy it was opined that if an application submitted under the provisions of Order 9 Rule 7 CPC is dismissed and an appeal filed against the decree in suit in which such application was filed, there cannot be any doubt that propriety of the order rejecting the reopening of the proceedings and the refusal to relegate the party to an earlier stage is, impermissible. He stated that in case the plea of the petitioner is accepted, it would be tantamounting to putting the clock back as the order with regard to the statements suffered and affidavits has already attained finality. The judgment of Allahabad High Court in Sudhir Kumar Wadhwa Vs. IVth Additional District and Sessions Judge, Shahjahanpur and others 1997(1)CivCC 223 was also referred to wherein in para 8, it was held that principle of *res judicata* would apply between two stages of same litigation, be it trial Court or a higher court, thus, urges this Court for dismissal of the revision petition.

I have heard learned counsel for the parties and appraised the paper book.

Mr. Manuja laid emphasis on the judgments to contend that controversy involved in the present revision petition is covered by the same, therefore, decision in respect of affidavits and the statement adjudicated by this Court in its order dated 05.09.2014 (Annexure P-1) and rejected by the trial Court being hit by doctrine akin to *res judicata*. With lot of eloquence and vehemence, he referred to findings rendered by this Court enabling this Court to form an opinion as has been culled out in the judgments, cited supra. For facilitation, the findings rendered point wise by this Court in order dated 05.09.2014 (Annexure P-1) are reproduced as under:-

“(a) A perusal of this statement shows that Renuka-present petitioner has no right to compromise regarding the share of the property of Ananya. Firstly, as was not the guardian of Ananya in that case. Secondly, no permission was taken from the Court for compromise on behalf of the minor. Thirdly, at that time, minor Ananya was shown in the guardianship of Smt. Om Lata Kalyan-defendant No.1, who has adverse interest against the interest of Ananya. Fourthly, the Court as per the record has not appointed any other person as Court guardian of Ananya. Further more, it is admitted fact that FIR was registered against Ram Kumar Kalyan for killing the brother of the present petitioner and criminal case was also registered against the parents of the present petitioner. The Court is to see in the facts and circumstances whether this statement can be treated as voluntary or under some pressure.

A perusal of the statement itself shows, in the facts and circumstances, that the present petitioner made this statement under pressure and coercion because there is threat to involve her parental family etc. A perusal of the statement further shows that the present petitioner has not been given anything under the compromise. The statement of the petitioner cannot be held as voluntary in the facts and circumstances of the present case and it looks that this statement has been given under the pressure and coercion. Firstly, she lost her husband. Secondly, she was also injured and has received fire arm injuries and remained under treatment. Thirdly, her parents were involved in criminal case. Fourthly, she was not given any share in the property of her husband nor her minor daughter was given due share in the property. The petitioner has also lost her brother in the incident. There is also allegations that Ram Kumar Kalyan-father-in-law of the present petitioner has good relations with high rank officers and

political high-ups. The petitioner has stated that no compromise was finalized.

(b) On the other hand, the case of the respondents is that talks of compromise happened before 2.6.2008 and all talks of compromise would have come to an end on filing of the suit. The petitioner had executed affidavits on 26.5.2008 as well as on 27.5.2008. It has also come on the record that Shri R.S. Cheema, Advocate, who was instrumental in the compromise, left India for Canada on 28.5.2008 and thereafter, no further talks are shown to be proved for the purpose. If it is taken, no final compromise was effected before filing of the suit and no compromise after filing of the suit then as to why the present petitioner gave the statement on 19.9.2008 in the Court.

(c) As already discussed, the statement made by the petitioner cannot be held as voluntary. Even the share of the minor is stated to have been taken away by withdrawal of the suit. The rights of the parties in the present case, in the facts and circumstances, including the minor should be determined on merits and the order passed by the learned Civil Judge (Senior Division), Karnal is not as per law and the same is set aside.

(d) Finding merit in the petition, the same is allowed. The application filed by the petitioner before the lower Court for restoration of the suit is allowed. The suit be restored and registered to its original number and the learned trial Court is directed to dispose of the suit as per law after giving opportunity to the parties.”

The withdrawal of the suit on the basis of compromise and affidavit, the dismissal of the application for restoration and the order dismissing the application, which has been set aside by this Court are not in dispute or controverted. Now the only question posed which is required to be

considered by this Court, is “whether the findings rendered by this Court while allowing the application for restoration of the suit by making reference to the statement dated 19.09.2008 and affidavits would have an effect of *res judicata* for the adjudication of the suit, which has been ordered to be decided on merits or not?”

On conjoint reading of the extracted portion of the order, in the finding (a), the Court had given the reasons with regard to the suffering of the statement and in finding (b) with regard to the compromise dated 02.06.2008 and execution of affidavits by forming an opinion that no final compromise was arrived at. However, in finding (c), it was noticed by this Court that the statement made by the petitioner was not voluntarily but in the same breath, it was stated that the rights of the parties including the minor should be determined on “MERITS”. From finding (d), it is evident that while restoring the suit, direction was issued to the trial Court to dispose of the suit “As Per Law” after giving opportunities to the parties and therefore, the finding qua compromise and affidavit, in my view, would be an obiter for the purpose of adjudication of the suit by the trial Court, for, once the trial Court has been given an opportunity to decide the suit on merit as per law, by giving opportunity, the right of the parties cannot be shunted/taken away by applying the ratio. The attention of this Court was drawn to the findings as referred to in the judgment cited supra, where it had been held that the finding rendered either by the trial Court or the higher court would have a binding effect of doctrine akin to *res judicata*.

However, the findings rendered in my respectful observations are pertaining to pre-amendment era in the Code of Civil Procedure as the Legislature in the year 1979 incorporated Order 43 Rule 1-A by Act 104 of 1976 w.e.f. 1.2.1977 where a right to challenge had been given to the parties

against the non-appealable order. Order 43 Rule 1-A of the Code of Civil Procedure reads as under:-

“Order 43 Rule 1A. Right to challenge non-appealable orders in appeal against decrees.- (1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.

From the plain and simple language of Order 43 Rule 1-A, it is clear that any interim order, if passed by the trial Court and if not challenged by the parties, can always be assailed in appeal in case of a judgment and decree is rendered against them. It would be apt to reproduce here paras 8 and 13 of the *ratio decidendi* culled out by Hon’ble Supreme Court in **Satyadhyan Ghosal’s case** (supra):-

“8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Does this however mean that because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court cannot at a later stage of the same litigation consider the matter again?

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13. There can be little doubt about the salutary effect of the rule as laid down in the above cases on the administration of justice. The very fact that in future litigation it will not be open to either of the parties to challenge the correctness of the decision on a matter finally decided in a past litigation makes it, important that in the earlier litigation the decision must be final in the strict sense of the term. When a court has decided the matter it is certainly final as regards that court. Should it always be treated as final in later stages of the proceeding in a higher court which had not considered it at all merely on the ground that no appeal lay or no appeal was preferred? As was pointed out by the Privy Council in Moheshur Singh's Case (supra) the effect of the rule that at every stage of the litigation a decision not appealed from must be held to be finally decided even in respect of the superior courts, will put on every litigant against whom an interlocutory order is decided, the burden of running to the higher courts for redress of the grievances, even though it may very well be that though the interlocutory order is against him, the final order will be in his favour and so it may not be necessary for him to go to the appeal court at all. Apart from the inevitable delay in the progress of the litigation that such a rule would cause, the interests of the other party to the litigation would also generally suffer by such repeated recourse to the higher courts in respect of every interlocutory order alleged to have been wrongly made. It is in recognition of the importance of preventing this mischief that the Legislature included in the Code of Civil Procedure from the very beginning a provision that in an appeal from a decree it will be open to a party to challenge the correctness of any interlocutory order which had not been appealed from but which has affected the decision of the case.

It would also be apt to reproduce para 14 of the judgment rendered by the Hon'ble Supreme Court in Arjun Singh's case (supra):-

14. It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are

designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the court would be justified in rejecting the same as an abuse of the process, of court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit, nor put an end to the litigation. The case of an application under O. IX. R 7 would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be canvassed in the appeal and dealt with by the appellate court. In that sense, the refusal of the court to permit the defendant to "set the clock back" does not attain finality. But what we are concerned with is slightly different and that is whether the same Court is finally bound by that order at later stages, so as to preclude its being reconsidered. Even if the rule of res judicata does not apply it would not follow that on every subsequent day on which the suit stands adjourned

for further hearing the petition could be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the court does not however necessarily rest on the principle of res judicata. Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application 'of any rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the other case, on proof of fresh facts, the court would be competent, nay,, would be bound to take those into account and make an order conformably to the facts freshly brought before the court.”

Mr. Manuja also buttressed his arguments by taking the aid of provisions of Section 105 CPC, which is reproduced herein below:-

“105. Other orders.- (1) *Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.*

(2) *Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.”*

A conjoint reading of Section 105 and Order 43 Rule 1A CPC reveals that Section 105 CPC is not in tandem with the intention of the legislature while introducing the aforementioned provisions of Order 43 Rule 1A in the year 1977.

The trial Court while deciding the application had given the following findings:-

“After hearing the arguments and perusing the application as well as the reply the court is of the finding that the defendant No.1 by way of present application wants to get an additional issue framed to the effect that the will has been admitted by Smt. Renuka by making a statement before the court as well as by affidavits dated 27.5.2008. The plaintiff has objected to the framing of this issue on the ground that the said matter has already been adjudicated upon by the Hon’ble High Court and therefore if the same is tried again then it would be barred by principle of res judicata. The court is quite convinced with the argument of the learned counsel for the plaintiff because the Hon’ble Punjab and Haryana High Court vide decision made in Civil Revision No.2496 of 2011 had allowed the revision of the plaintiff and had set aside the finding of the learned Civil Judge (Senior Division) Karnal. The Hon’ble High Court had held that the statement made by Smt. Renuka before Court was not voluntary and had ordered the rights of the parties to be decided on merits. Therefore, as the Hon’ble High Court had adjudicated upon the question and had held that the statement of Smt. Renuka qua the Will is not voluntary, therefore, this Court cannot again adjudicate upon the said question as the same would be barred by principle of issue res judicata as this question had been raised in the proceedings of the present case only. Furthermore, it would be relevant to state here that the fact as to whether Smt. Renuka has admitted the genuineness of the Will or not is a matter of evidence and no particular issue can be framed qua this fact as the defendant No.1 is at liberty to put the statement and affidavit executed by her to the witness during her cross-examination. Accordingly, this

application for additional issue moved by the defendant No.1 is hereby dismissed.

All the applications stand disposed of. Now the case is adjourned to 23.09.2015 for evidence of the plaintiff.

*Sd/- (Akshay Chaudhary)
CJ/JD Karnal 09.09.2015”*

The trial Court while giving the aforementioned finding had opined that since the statement of the Renuka qua Will had already been held to be not voluntarily by this Court, the same, thus, would be barred by *res judicata* but in the same breath, observed that the question whether Renuka had admitted the genuineness of the Will or not, would be a matter of evidence and therefore, no particular issue can be framed, as the petitioner-defendant No.1 would be at liberty to put the statement and affidavit executed by her to the witness during her examination, which in my view is contradictory.

The apprehension expressed by Mr. Amit Jain is that in view of the impugned finding with regard to the statement being already held to be barred by law of *res judicata*, the liberty granted is a passing reference and would not help his clients even if they are confronted to the witness as neither this Court or the trial Court had taken into consideration the provisions of Section 33 of the Indian Evidence Act, which reads as under:-

“33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.—Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided—

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.”

In view of discussion, the question posed by me is answered in favour of the petitioner and against respondent No.1. The entire controversy would have come to rest, had this Court used the expression “Nothing Observed Herein Would Be Construed As An Expression On Merit And Demerit Of The Suit”, for, once the liberty had been given to the parties while relegating the suit to the trial Court to decide in accordance with law, any right accrued in favour of the parties in the earlier round of litigation cannot be taken away.

Now coming to other question whether the issue as sought to be framed at the instance of defendant No.1 would be necessary and essential for adjudication of the suit or not? It would be necessary to extract already framed issues:-

“1. Whether the property of late Sh. Nabheet Kalyan shall devolve by intestate succession amongst the plaintiff and defendant No.1 and 2? OPP

2. Whether the plaintiff entitled to the relief of permanent injunction as prayed for? OPP

3. Whether the plaintiff and defendant No.2 are entitled to a decree for mandatory injunction, directing the defendant No.4 to make the payment to them of their shares out of ₹5,00,000/- with interest and also to make the payment to defendant No.1 of her

share on the grounds mentioned in the plaint? OPP

4. Whether the plaintiff and defendant No.2 are entitled to the recovery of ₹5,04,667/- with interest as claimed from defendant No.5, as alleged? OPP

5. Whether late Sh. Nabheet Kalyan executed the alleged Will dated 26.03.2008? OPD No.1 and 3

6. Whether the alleged Will dated 26.03.2008 stands set aside by virtue of judgment and decree dated 06.02.2014 passed in Civil Suit No.64 of 2011? OPP.

7. Whether the plaintiffs have got no locus standi to file the present all four suits? OPD

8. Whether all four suits are not legally maintainable in the present forms? OPD

9. Whether the plaintiffs have no cause of action to file these all four suits? OPD

10. Whether the plaintiffs have not come to the Court with clean hands and have suppressed true and material facts from the Court? OPD

11. Whether the plaintiffs are stopped from filing the all four suits by their own act and conduct? OPD”

From perusal of the issues already framed and the issue sought to be incorporated qua Will, it is evident that though the issue with regard to validity of the Will executed by Nabheet Kalyan had been framed as issue No.5 and its effect by virtue of judgment, as issue No.6, but issue with regard to affidavits dated 27.05.2008 and statement dated 19.09.2008 has not been framed. It is also not apprised to this Court whether the parties to lis had already led evidence in this regard or not. Even if the suit is at the stage of trial, the provisions of Order 14 Rule 5 CPC does not debar the trial Court from framing the issues. For the sake of brevity, provisions of Order 14 Rule 5 read thus:-

“Order 14 Rule 5. Power to amend and strike out, issues.- (1) The

Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.”

In my view, it would be in the fitness of things to give an opportunity to the petitioner-defendant No.1 to lead evidence by permitting framing of additional issue, though some evidence might have already been led with regard to Will, but not, with regard to affidavits and compromise as it is also settled law that in case parties are alive to the situation had led evidence despite the issue has not been framed, the same can always be framed as pressed by the parties and looked into by trial Court at appropriate stage. The trial Court shall frame an additional issue with regard to affidavits dated 27.05.2008 and statement dated 19.09.2008 and adjudicate upon the same after giving one effective opportunity to both the parties.

In view of the aforementioned, the impugned order passed by the trial Court is set aside and the revision petition is allowed.

(AMIT RAWAL)
JUDGE

February 05, 2018
Pankaj*

Whether reasoned/speaking	Yes
Whether reportable	No