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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR-7844-2012 (O&M)

Date of decision : 09.01.2018

Smt. Joginder Kaur

... Petitioner(s)

Versus

Bhag Singh and others

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Mahavir Sandhu, Advocate
for the petitioner.

Mr. Amit Jain, Advocate
for respondent Nos.1 to 6.

Mr. Parminder Singh, Advocate
for respondent Nos.7 to 9.

AMIT RAWAL, J. (ORAL)

The petitioner-plaintiff is in revision petition against the impugned order dated 19.11.2012 (Annexure P-3), whereby an application moved for impleading the LRs of defendant No.5, namely, Mohinder Kaur and for amending the written statement by treating it as a counter-claim, has been allowed by transposing them as co-plaintiffs.

Mr. Mahavir Sandhu, learned counsel appearing on behalf of the petitioner-plaintiff submits that the order impugned is not sustainable in the eyes of law in view of the provisions of Order 23 Rule 1-A of the Code of Civil Procedure (in short 'CPC') and the remedy of LRs lies elsewhere.

He further submits that until and unless the LRs are impleaded

in their individual capacity, they cannot set up a different plea and take a

different stand than one already taken. The suit has been filed by the plaintiff seeking following relief:-

"Suit for a decree for declaration to the effect that the plaintiff has got right of inheritance in the estate left by Shri Chhaja Singh to the extent of ½ share in the l and bearing Khewat/Khatauni No.13/15, 16, 24/53, 25/54, Khasra No.307//103/2 min (4-10), 307//103/2 min (4-9), 1-888//307/13/4 (0-2), 1-888//207/23 (23-3), 1-888//307/31 (52-17), 1-888//307/10/1/2/2 (21-12), 1-888//307/21 (13-0), as per the Jamabandi for the year 2005-06 situated in village Manakpur, H.B. No.35, Tehsil and District Ambala and land bearing Khewat/Khatauni No.151/197, 198/252, 184/236, 201/255, 24/25, Khasra No.15//21/1, (0-12), 16//16/2 (1-2), 25/1(4-4), 25/2/2 (3-16), 16/16/1/1 (1-11), 13//11/2/2 (0-9), 19 (0-11), 20/1/1 (3-2), 28/4 (7-13), 5 (0-19), 6 (7-8), 9/2 (1-0), 12/16 (8-0), 24/3/2 (3-16), 8 (8-0), 18 (8-0), 20/4 (0-12), 21 (7-4), 2/1 (1-0), as per jamabandi for the year 2003-04, situated in Village Dudiana, H.B. No.36, Tehsil and Distt. Ambala and the mutation of inheritance bearing No.181, sanctioned on 14/8.1935 and mutation No.327 sanctioned on 14/8.1935 of Village Manakpur and Dudiana, Tehsil and District Ambala regarding inheritance of Chhajja Singh entered in the name of Ram Kishan, mutation No.289 sanctioned on 13.7.1945 in favour of Labh Singh of Village Mankapur and Mutation No.526 of Village Dudiana, Tehsil and District Ambala and mutation No.381 sanctioned on 25.8.1953 of Village Manakpur, mutation No.638 of Village Dudiana, sanctioned on 1.7.1953 and mutation No.207, sanctioned on 25.8.1953 of Village Dudiana, Tehsil and District Ambala on the basis of registered Will dated 25.1.1935 regarding the inheritance of Labh Singh in favour of Joginder Kaur and Mohinder Kaur regarding the estate of Shri Chhaja Singh of all the three villages and Mutation No.15 on the basis of manipulated Gift

Deed dated 25.4.1964 and mutation No.21 on the basis of manipulated gift deed dated 25.1.1965 entered and sanctioned in the name of Shri Bhag Singh on 20.8.1965 regarding the estate of Smt. Ind Kaur of Village Dudiana, Tehsil and District Ambala and mutation No.441 of Village Manakpur, Tehsil and District Ambala, sanctioned on 28.6.1968, on the basis of the Gift Deed dated 20.2.1961 executed by Smt. Ind Kaur in favour of Bhag Singh, on the basis of the judgment and decree dated 18.9.1986 in case No.455 of 1989 titled as "Amarjit Kaur Versus Bhag Singh", passed by Shri S.K. Gupta, Sub Judge, Ist Class, Ambala by which the defendant No.1 has made the defendants No.2 to 4 as owners of the land, measuring 82 kanals 19 marlas out of land measuring 110 kanals 12 marlas to the extent of $\frac{3}{4}$ share along with mutation No.508 regarding land situated in Village Manakpur, Tehsil and District Ambala and mutation No.445 in respect of land measuring 49 kanals 18 marals out of the total land measuring 66 Kanals 10 marals to the extent of $\frac{3}{4}$ share situated in Village Dudiana, Tehsil and District Ambala are wrong, illegal, null and void, ineffective, inoperative, result of fraud and misrepresentations, not binding upon the plaintiff and the same are liable to be set aside by declaring the Will dated 25.1.1935 executed by Chhaja Singh son of Sh. Panjab Singh in favour of Mohinder Kaur and Joginder Kaur grand-daughters of Chhja Singh is liable to be upheld with a consequential relief of permanent injunction restraining the defendants from selling, alienating and creating any sort of charge over the aforesaid land in any manner whatsoever."

In the aforementioned suit, defendant No.5, Mohinder Kaur, filed the written statement admitting the claim of the plaintiff. The suit is based upon the Will dated 23.01.1935 executed by Chhaja Singh, registered on 25.01.1935, which was in the name of Mohinder Kaur and Joginder

Kaur. Joginder Kaur is the plaintiff. The Court below has exceeded jurisdiction in allowing the application by granting the relief which had not been prayed for. In support of his contentions, he relies upon the *ratio decidendi* culled out by Hon'ble Supreme Court in “Vidyawati V/s Man Mohan and others” (1995) 5 Supreme Court Cases 431 and the judgment rendered by the Kerala High Court in “Abraham V/s Antony Mathew” 2007 (5) RCR (Civil) 522, thus, urges this Court for setting aside the impugned order, under challenge.

Mr. Parminder Singh, learned counsel appearing on behalf of respondent Nos.7 to 9 submits that the prayer sought in the application was only for implementing the LRs of Mohinder Kaur and amendment of the written statement. It is the Court which mould the relief and no harm and prejudice would be caused to the plaintiff as in view of the admission in the written statement filed on behalf of defendant No.5, viz-a-viz the claim of the petitioner-plaintiff, thus, urges this Court for dismissal of the present revision petition.

Mr. Amit Jain, learned counsel appearing on behalf of respondent Nos.1 to 6 submits that he has been arrayed as respondent in the present revision petition owing to the fact that he is representing the co-defendants in the aforementioned suit.

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

It would be apt to reproduce the contents of the application moved by the LRs of Mohinder Kaur-defendant No.5 for impleadment of LRs, which read thus:-

"Application for impleading the LRs of Mohinder Kaur as

plaintiffs.

Sir,

The applicants stated as under:-

- 1. That the above titled case is pending before this Ld. Court and is fixed for 6.2.2012.*
- 2. That above titled suit was filed by Joginder Kaur by giving all the true facts.*
- 3. That Mohinder Kaur was also one of the legal heirs and no person can be adopted as a adopted son by a widow under any circumstances.*
- 4. That the property is and was ancestral and neither any will nor any gift-deed could have been made by a widow nor she had any right to suffer the decree.*
- 5. That Joginder Kaur and Mohinder Kaur are the legal heirs as per the Will also.*
- 6. That Mohinder Kaur has equal right with the plaintiff, who has expired and her legal heirs are entitled to inherit the property and there is no limitation for inheritance and either the applicants may be arrayed as plaintiffs or the applicants be allowed to amend the written statement by adding the word "counter claim".*

Hence this application and it is prayed that the same may kindly be accepted and the applicants may kindly be impleaded as legal heirs of Mohinder Kaur as plaintiffs or they may be allowed to amend the written statement by adding the word "counter claim" in the interest of justice."

The trial Court allowed the application in the following

manner:-

"7. The applicants/legal representative can set up their own independent title in which case there could be no objection to the court implead them no merely as the LR's of the deceased but also in their personal capacity avoiding thereby a separate suit for decision on the title. The court has also the power to

order transposition of parties for the purpose of complete adjudication of the question involved. The court by suo moto or on the application of any of the defendant may transpose a defendant as plaintiff. A person can be added as co-plaintiff only when he adopts plaintiff's case. In the case in hand, the plaintiff has claimed 1/2th share in the suit property on the basis of the Will dated 23.1.1935 executed by Chhaj Singh in favour of the plaintiff and deceased defendant NO.5 Mohinder Kaur, deceased defendant No.5 also adopts the plaintiff's case in her written statement. The applicants are also asserting their right to inherit the share of Mohinder Kaur being her legal heirs. So, this Court is of the considered vide that the transposition of the parties is required in the present case in order to do complete justice between the parties and to avoid multiplicity of proceedings. Thus, the applicants/legal representatives of deceased defendant No.5 Mohinder Kaur is hereby transposed as plaintiffs.

8. *In view of the aforesaid discussion, the application for amendment of the written statement is hereby dismissed whereas the application for impleading the LRs of Mohinder Kaur as plaintiffs is allowed.”*

In my view, the reasoning assigned by the trial Court is not only capricious, but arbitrary and illegal. The legal representatives cannot set up a different plea than the one already taken until and unless they are impleaded in their individual capacity under Order 1 Rule 10 CPC. The aforementioned view of mine is supported by the *ratio decidendi* culled out by Hon'ble Supreme Court in “Vidyawati's case (supra). For the sake of brevity, paragraph Nos.3 to 6 of the judgment *ibid*, read thus:-

"3. It is seen that the petitioners' claim of right, title and interest entirely rest on the will said to have been executed by Champawati in favour of the first defendant and herself. It is

now admitted across the Bar that the first defendant had life interest created under the will executed by Champawati. Therefore, the said interest is co-terminus with his demise. Whether the petitioner has independent right, title and interest de hors the claim of the first defendant is a matter to be gone into at a latter proceedings. It is true that when the petitioner was impleaded as a party - defendant, all right under Order 22 Rule 4(2), and defences available to the deceased defendant become available to her. In addition, if the petitioner had any independent right, title or interest in the property then she had to get herself impleaded in the suit as a party defendant in which event she could set up her own independent right, title and interest, to resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. This is the view the court below has taken rightly.

4. *This Court in Bal Kishan vs. Om Parkash & Anr. AIR 1986 SC 1952 has said thus:*

"The sub-rule (2) of Rule of Order 22 authorised the legal representative of a deceased defendant to file an additional written statement or statement of objections raising all pleas which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant or respondent."

5. *The same view was expressed in Jagdish Chander Chatterjee & Ors. vs. Sri Kishan & Anr., 1973 (1) SCR 850 wherein this Court said:*

"The legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words, the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representative from setting up also their own

independent title, in which case there could be no objection to the court impleading them not merely as the Lrs. of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the title."

6. This being the position in law, the view of the court below is perfectly legal. It is open the petitioner to implead herself in her independent capacity under Order 1 Rule 10 or retain the right to file independent suit asserting her own right. We do not find any error of jurisdiction or material irregularity committed in the exercise of jurisdiction by the court below warranting our interference. The SLP is, accordingly, dismissed."

The provisions of Order 23 Rule 1-A CPC can be pressed into service only on the situation envisaged therein i.e. abandonment and withdrawal of the suit. It is not the case of the petitioner that plaintiff attempts to withdraw the suit, much less, that of the LRs of defendant No.5. This is what has been held by the Kerala High Court in **"Abraham's case"** (supra). For the sake of brevity, paragraph 4 of the judgment reads thus:-

"4. The transposition of a defendant as plaintiff is permitted under this rule only if the suit is withdrawn or abandoned by the plaintiff, Only in such circumstance, A defendant can apply to the transposed as a plaintiff. The averment of the 4th defendant in ext. P3 petition, To transpose him as the plaintiff, Reveals that the original plaintiff, Though had left for abroad, Had not abandoned the suit, But had consciously executed a power of attorney in favour of the 4th defendant to prosecute the suit. Therefore, There was neither an abandonment nor withdrawal. In such circumstances, The condition in rule 1 - a of order xxiii extracted above, Is not satisfied to enable the court below to transpose the 4th defendant as the plaintiff. That the 4th defendant had a claim jointly with the original

plaintiff is not a reason for transposing him as the plaintiff. But, As the suit is neither withdrawn nor abandoned, It shall have to be continued, Until it is disposed of in accordance with law. Accordingly, Ext. P5 is set aside. Writ petition is allowed as above."

As an upshot of my findings, I am of the view that the transposition of the LRs of defendant No.5, Mohinder Kaur, could not have been ordered in the manner and mode as expressed above.

For the aforementioned facts and circumstances of the case, the impugned order dated 19.11.2012 (Annexure P-3) is not sustainable and the same is hereby set aside. Resultantly, the revision petition is allowed.

09.01.2018
Yogesh Sharma

(AMIT RAWAL)
JUDGE

✓
Whether speaking/reasoned Yes/ No
✓
Whether Reportable Yes/ No