

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No.7048 of 2017(O&M)
Date of Decision: 23.09.2019

Smt. Kanwaljit Kaur BediPetitioner

Versus

Paramjit Singh Sawhney and othersRespondents

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present:Mr. Amar Vivek, Advocate
for the petitioner.

Mr. Kanwaljit Singh, Sr. Advocate with
Mr. Gagandeep Singh Virk, Advocate
for respondent No.1.

Mr. Jaivir S. Chandail, Addl., Govt. Pleader
for U.T. Chandigarh-respondent No.3.

RAJ MOHAN SINGH, J.

CM No.13953-CII of 2019

Notice of this application was issued on 08.07.2019.

With the concurrence of the parties, the date of hearing
is preponed and the main case is taken up today itself.

Application stands disposed of.

Main case

[1]. Petitioner has challenged the orders dated 27.02.2017 and 17.04.2017 passed by Civil Judge (Junior Division), Chandigarh whereby opportunity to lead rebuttal evidence was declined.

[2]. Vide impugned order dated 27.02.2017, the application for grant of permission to allow handwriting expert to take photographs of various documents was dismissed on the ground that the plaintiff can lead rebuttal evidence only in respect of an issue, the onus of which was on the defendants. It was also observed that the plaintiff has not made clear as to which document, the plaintiff wanted to take photographs and for what purpose. Handwriting expert is to be examined at the rebuttal stage.

[3]. Thereafter, another application was filed under Section 151 CPC on the premise that the plaintiff wishes to lead rebuttal evidence to rebut the photocopy of Will of late Sh. H.S. Sawhney as the same has been produced in the secondary evidence in pursuance of order dated 11.10.2017 passed by this Court in CR No.3794 of 2016. Plaintiff submitted that under Order 18 Rule 3 CPC, party/defendants have led evidence in respect of Will only after taking permission for leading secondary evidence, therefore, the plaintiff is entitled to rebut

the evidence of the defendants at rebuttal stage. Since the defendants have relied upon Will in their defence evidence, therefore, in addition to the cross-examination done by the plaintiff, she is entitled to lead evidence in rebuttal as well. Both the aforesaid orders were passed when CR No.3794 of 2016 was pending in the High Court and was ultimately decided on 11.10.2017.

[4]. Trial Court vide order dated 04.04.2014, framed the issues in the following manner:-

- “1. Whether the plaintiff is entitled to declaration as prayed for? OPP*
- 2. Whether the plaintiff is entitled to mandatory injunction as prayed for? OPP*
- 3. Whether the plaintiff is entitled to permanent injunction as prayed for? OPP*
- 4. Whether the present suit is not maintainable? OPD*
- 5. Whether the plaintiff has not affixed the ad valorem Court fee? OPD*
- 6. Whether this Court has no jurisdiction to try the present suit? OPD*
- 7. Relief.”*

Perusal of the aforesaid issues would show that onus to prove issue No.1 was on the plaintiff.

[5]. This Court while deciding CR No.3794 of 2016 has observed in para Nos.24, 25 and 26 in the following manner:-

“[24]. The facts involved in the present case are

somewhat different. The prayer in terms of Section 65 of the Act has been allowed by the impugned order. It will not dilute the rigor of proving the execution of the document, admissibility and validity thereof. The Court would apply its mind as regards execution, validity and genuineness and admissibility of the document at a later stage. The impugned order commenting conclusiveness, if any, in the aforesaid context has to be ignored and diluted. The photostat copy of document can be produced in evidence only when it is alleged and proved that the original was in existence and the same has been lost or destroyed or is in possession of the opposite party, who failed to produce it, or any other circumstances mentioned in Section 65 of the Act. These facts are fundamental to the controversy and would be tested with reference to the material on record at an appropriate stage on merits.

[25]. At this stage, only an enquiry in terms of Section 65 of the Act is pending. These facts can be established at a later stage when the Court will apply its mind on merits, however photostat copy of the document may or may not come within the definition of secondary evidence as contained in Section 63 of the Act. There cannot be any straightjacket formula by any defined words and answers because photostat copy may or may not carry the probative value of such a document and has to be proved independently and, therefore, the case relating to photostat copy to be considered as secondary evidence has to be considered on defined parameters in accordance with law.

[26]. In the light of aforesaid attending facts and circumstances of the case, the impugned order can be explained to mean that no such conclusive opinion with regard to genuineness of the secondary evidence has been given by the trial Court. The evidence led by the party on record in the context of secondary evidence would be tested by the trial Court on the defined parameters and its validity, genuineness and admissibility in accordance with law. Mere exhibition of document will not dispense with proof of its execution in accordance with law. If the admissibility of document is commented upon at this stage, it may prejudice the case of either side at the time of trial. It is under the domain of the trial Court to see validity and admissibility of the document which was allowed to be exhibited with an endorsement of objection. Since both the parties have already concluded their respective evidence and the case is fixed for rebuttal and arguments, therefore, the trial Court shall proceed to decide the admissibility of the document produced by the defendants as secondary evidence in accordance with law and thereafter the trial Court shall proceed to decide the suit on merits.”

[6]. Only an inquiry in terms of Section 65 of the Evidence Act was pending. The incriminating facts recorded by this Court in the aforesaid paragraphs would show that admissibility, veracity and genuineness of the document i.e. photostat copy of the Will would be seen by the trial Court at the relevant stage. At the time of leading secondary evidence, the document can be

exhibited, leaving the admissibility to be considered by the trial Court at the relevant stage. To decide the admissibility of a document at such stage would be an *archaic* practice as held by the Hon'ble Apex Court in **Bipin Shantilal Panchal Vs. State of Gujarat, 2001(1) RCR (Criminal) 859.**

[7]. It was further submitted that plaintiff has not stated that the Will is forged and fabricated in the plaint, rather the case of the plaintiff is that the Will was forged and fabricated as the original had never been produced on record. In the plaint, the plaintiff has stated that defendant No.1 has been claiming erroneously on the basis of some alleged Will in respect of estate of late Sh. H.S. Sawhney. Defendant No.1 has not produced any such alleged original Will before any Authority and the alleged Will, if any, is false and fabricated. Plaintiff further pleaded that Estate Officer, U.T. Chandigarh has committed error and violation under Indian Succession Act by transferring the property in favour of one of the heirs of the deceased H.S. Sawhney. Plaintiff also pleaded some incriminating facts in para Nos.3, 7, 8 and 10 of the plaint.

[8]. In the written statement filed by defendant No.1, contents of the plaint were denied. Defendant No.1 relied upon affidavit filed by the plaintiff before Estate Office, U.T. Chandigarh, wherein she has pleaded no objection in case the

property is transferred in the name of two brothers. Later on, she backed up from her stand. The factum of Will was known to the plaintiff from the very beginning. Will dated 17.04.1990 was claimed to be genuine and validly executed document by late Sh. H.S. Sawhney in the presence of the witnesses.

[9]. By referring to para Nos.7, 8 and 9 of the written statement filed by defendant No.1, learned counsel for the plaintiff submitted that even the contents of the written statement would show that necessary evidence would be led at appropriate time of leading evidence. Learned counsel for the plaintiff/petitioner further submitted that for the first time, defendant No.1 sought to lead evidence on Will by way of filing application for secondary evidence.

[10]. The application for secondary evidence was accepted by Civil Judge (Junior Division), Chandigarh vide order dated 08.04.2016. Thereafter, this Court passed the order dated 11.10.2017 in CR No.3794 of 2016, operative part of which has already been reproduced in the preceding para of this order.

[11]. Learned counsel for the parties have tried to argue the case in extenso with reference to some case laws.

[12]. Learned counsel for the petitioner by relying upon para Nos.24, 25 and 26 of the order dated 11.10.2017 passed by this Court in **CR No.3794 of 2016** titled **Kanwaljit Kaur Bedi Vs.**

Paramjit Singh Sawhney and others, Dharam Singh Vs. Labh Singh and others, 2017(3) Law Herald 2257 and **Parsini (dead) through LRs Vs. Atma Ram, (1996) 8 SCC 321 (Supreme Court)** submitted that when the application under Section 65 of the Evidence Act was allowed and secondary evidence of Will was allowed to be led, then even the photocopy of the document can be subjected to expert opinion and the rebuttal evidence at the instance of the plaintiff cannot be shut out on preposterous plea that comparison cannot be made on the basis of photocopy of the document. Learned counsel further submitted that burden to prove the Will is on the propounder to prove its genuineness by removing all doubts. When permission to lead secondary evidence was allowed and secondary evidence was led by the defendants by examining the witnesses in proof of execution of Will, then the plaintiff has a right to rebut the evidence of the defendants in rebuttal.

[13]. Per contra, learned Senior Counsel for respondent No.1 submitted that handwriting expert cannot be examined by the plaintiff in rebuttal in respect of an issue, onus of which was on the plaintiff herself. Learned Senior Counsel placed reliance upon **Ram Kumar Vs. Raj Kumar and others, 2014(2) PLR 536, Gurcharan Kaur and others Vs. Gurjant Singh and others, 2017(3) PLR 558** and **Sukhwinder Pal Singh Vs.**

Bhupinder Kaur, 2014(3) PLR 19 and submitted that the Will was very much in the knowledge of the plaintiff from the very inception and she could have led evidence in order to discharge the onus under issue No.1. By referring to **Surjit Singh and others Vs. Jagtar Singh and others, 2007(1) RCR (Civil) 537, Jagdev Singh and others Vs. Darshan Singh and others, 2007(1) RCR (Civil) 794** and **Avtar Singh Vs. Baldev Singh, 2015(1) PLR 230 (DB)**, learned Senior Counsel submitted that plaintiff cannot be permitted to lead evidence in rebuttal in respect of an issue, the onus of which was on the plaintiff herself. Order 18 Rule 3 CPC has provided the scope and ambit of right of the plaintiff to lead evidence in rebuttal of an issue, the onus of which was on the plaintiff herself. It was held in negative.

[14]. Having considered the submissions made by learned counsel for the parties, I find that the Will was set up only after application for secondary evidence. In pursuance of order dated 11.10.2017 passed by this Court in **CR No.3794 of 2016**, the defendants have examined the witnesses of the Will. The propounder of the Will has to prove its due execution. Issue No.1 is to the effect that whether the plaintiff is entitled to declaration as prayed for. The declaration is sought in respect of Will propounded by the defendants.

[15]. It is a settled principle of law that the onus keeps on changing. When specific plea has been taken by the plaintiff in respect of Will being fraudulent, then the burden will be shifted upon the defendants to prove the document to be genuine. It is a settled principle of law that a person who claims some right on the basis of document, is required to prove the same positively. Reference can be made to **Subhash Chander and others Vs. M/s Active Promoters Pvt. Ltd., 2015(1) RCR (Civil) 62**. Onus to prove a relevant fact is on the party who asserts in affirmative.

[16]. Sections 101 and 102 of the Evidence Act would assume importance in the present context. Section 101 of the Evidence Act provides for initial burden of proof. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. If a person desires a Court to give judgment that another person be punished for a crime, then the first person must prove that the second person has committed the crime. Section 102 of the Evidence Act deals with the proposition on whom burden of proof lies. The initial onus is always on the party who claims some right on the basis of

document and makes out a case which entitles him to a relief.

The onus shifts to the other party if the party relying upon the document proves its due execution.

[17]. In the instant case, the propounder of the Will set up the same in the application for secondary evidence. In pursuance of permission granted by the trial Court in respect of secondary evidence, the defendants led evidence of execution of Will in the defence evidence. The Will was set up only in the application for secondary evidence. The burden to discharge onus of issue No.1 would come only after proof of due execution of Will by the defendants. The ratio of **Thiruvengada Pillai Vs. Navaneethammal and another, 2008(2) RCR (Civil) 262** and **Anil Rishi Vs. Gurbaksh Singh, 2006(3) RCR (Civil) 347** can be relied in the aforesaid context.

[18]. In the instant case, the plaintiff can discharge onus of issue No.1 only when execution of Will is established on record. Plaintiff is not supposed to lead evidence in negative. Defendants led evidence in the context of execution of Will only in their defence after acceptance of their prayer for leading secondary evidence. In such a scenario, the application of the plaintiff to lead evidence on Will was not crystallized at the time of leading evidence in affirmative. No Will was placed on record by the defendants. It was only placed on record by means of

secondary evidence. Even if, the prayer for leading expert evidence by defendants was disallowed by the trial Court, the same will not curtail the right of the plaintiff to lead evidence in rebuttal. The ratio laid down in **Surjit Singh and others case (supra)**, **Jagdev Singh and others case (supra)** and **Avtar Singh's case (supra)** cannot be applied in the present set of circumstances, where the factum of Will in terms of its execution was proved only in defence by leading evidence. Even if, the factum of Will was in the knowledge of the plaintiff from the very beginning, still the plaintiff was not supposed to lead evidence in negative to prove that the Will was not genuine. It is only after the evidence led by the defendants in terms of execution of Will, the plaintiff would lead evidence to show that the Will is not genuine.

[19]. In my considered opinion, the plaintiff needs to be given opportunity to lead evidence in rebuttal in view of facts and circumstances of the present case, where the evidence has been led by the defendants in respect of due execution of Will in question. The plaintiff has a right to rebut the same by leading evidence in rebuttal for which no such impediment can deter the right of the plaintiff.

[20]. For the reasons recorded hereinabove, this revision petition is allowed. Impugned orders are thus set aside. Plaintiff

would be entitled to lead evidence in rebuttal in the context of prayer made in the application.

23.09.2019
Prince

(RAJ MOHAN SINGH)
JUDGE

Whether reasoned/speaking

Yes/No

Whether reportable

Yes/No