

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR-1209-2020

DATE OF ORDER: 23.12.2022

Rajesh Kumar and others

.....Petitioners

Vs.

Babita

.....Respondent

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present: Mr. Yagsimant Attri, Advocate for the petitioners.

Mr. Fateh Saini, Advocate for the respondent.

Nidhi Gupta, J.

Present Revision Petition has been filed by the petitioners/defendants against order dated 06.02.2020 passed by learned Civil Judge (Junior Division), Pehowa whereby application filed by respondent/plaintiff for summoning Dinesh Kaushik, Deed Writer, Tehsil Complex, Pehowa, District Kurukshetra, in rebuttal evidence has been allowed.

Brief facts of the case are that respondent/plaintiff filed a suit for declaration and permanent injunction claiming to be owner in joint possession of suit land inter-alia, on ground that registered release deed No. 3530/1 dated 27.11.2013 was got executed and registered fraudulently by the petitioners/defendants. Petitioners/defendants in their written statement denied the averments in the suit.

It is vehemently submitted by learned counsel for the petitioners that in the present case onus to prove the issue at hand viz that the release deed dated 27.11.2013 is a result of misrepresentation, was on the respondent-plaintiff. It is stated that as per provision of Order 18 Rule 3 of the CPC, it was not open to the respondent to lead evidence in rebuttal on the said issue. Order 18 Rule 3 is reproduced hereunder:

“3. Evidence where several issues.—Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.”

It is submitted that accordingly, it was incumbent upon the respondent to either prove the document by herself, or if the other party is going to prove it, then the respondent should have specifically reserved the right to prove it. However, respondent has even failed to reserve right to answer evidence produced by the petitioner, and as such, it was now not open to the petitioner to lead evidence on the said issue in rebuttal.

In support, Id. Counsel for the petitioner relies upon **Civil Revision No.1782 of 2015 titled as “Rashpinder Singh Vs. Seema”**.

It is further submitted by Id. Counsel for the petitioner-defendant that perusal of the record shows that on the contrary, vide statement dated 12.4.2018, respondent-plaintiff had chosen to give up the

said witness Dinesh Kaushik, Deed Writer, Tehsil Complex, Pehowa, District Kurukshetra being unnecessary. In this regard, Learned counsel refers to Annexure P1 which is zimni order dated 12.04.2018 wherein it is noted that *"learned counsel for the plaintiff has given up PW Dinesh Kumar being unnecessary"*. Subsequently, vide statement dated 19.09.2019 Annexure P3, defendants also gave up said DW Dinesh Kaushik being unnecessary and closed their oral evidence, as they had already examined attesting witness DW2 Bharat Bhushan. Learned counsel then refers to Annexure P5 dated 19.12.2019 which is application filed by the respondent/plaintiff for 'summoning in rebuttal' and states that vide this application, respondent had once again sought the summoning of said witness Dinesh Kaushik but again said application was not pressed on statement of respondent, and vide order dated 09.01.2020 Annexure P7, that *"At this stage, learned counsel for plaintiff made a statement before the Court that he does not want to press the application dated 19.12.2019. Therefore, the present application is disposed of"*. It is stated that thereafter, on 23.01.2020, evidence was closed and the case was adjourned for 30.01.2020 for rebuttal evidence, if any and arguments. Accordingly, application dated 30.01.2020 Annexure P9 for summoning said witness Dinesh Kaushik is the second application in this regard, and at this stage respondent cannot be permitted to lead evidence in rebuttal on issue onus to prove which was on the respondent, especially in view of the fact that the respondent had given up said witness several times being unnecessary. It is further submitted that in any event, there is already enough material on record including the evidence of PW1 Sham Singh, Registration Clerk, who is eyewitness to the

release deed and who has already been examined by the respondent/plaintiff on 12.4.2018.

It is further stated that the evidence has been closed and trial is at its last stage and the respondent/plaintiff has already given up the said witness being unnecessary twice before and cannot now be permitted to produce the said witness in rebuttal.

In response, it is submitted by learned counsel for the respondent/plaintiff that it has been rightly noted in the impugned order by the learned Court below that both parties had deposited the expenses and process fee to call the said witness but however, both counsel have given the witness as unnecessary. It is further submitted that onus to prove execution of the release deed was on the petitioners/defendants and respondent/plaintiff was under the impression that she would get an opportunity to cross-examine the said witness when he would be called by the petitioners. It is further submitted that the said witness is very necessary for the case of the respondent and learned Court below has rightly allowed his application for summoning of Dinesh Kaushik. Reference is also made to Annexure P5 i.e. application dated 19.12.2019 and it is clarified that by way of the said application, the respondent had merely wanted to summon the record of registration dated 12.11.2013 in possession of the Sub-Registrar, dealing with the area of village Mangna where the suit property is situate to prove that the Sub-Registrar was available on 12.11.2013 for registration of documents. It is admitted that the said application was not pressed subsequently. However, by way of application dated 30.01.2020, the respondent had specifically sought

summoning of Dinesh Kaushik, Deed Writer, Tehsil Complex, Pehowa, District Kurukshetra. It is submitted that therefore, the two applications cannot be treated as similar as register dated 27.11.2013 is not with the Sub-Registrar but is with the Deed Writer. It is further stated that the respondent/plaintiff had closed her evidence in affirmative and therefore, she had reserved her right to lead evidence in rebuttal.

I have heard learned counsel for the petitioner and perused the record.

In the present case, the respondent seeks to summon DW Dinesh Kaushik, Deed Writer, along with his record/ Register pertaining to Release Deed No. 3530 dated 27.11.2013, to prove that the said release deed purported to have been executed by her on 12.11.2013, and registered on 27.11.2013, has been fraudulently executed and registered. The respondent wants to show whether her signatures were borne in the register of DW Dinesh Kaushik on 12.11.2013.

However, admittedly, the said witness was given up as being unnecessary by the respondent-plaintiff vide statement dated 12.4.2018 Annexure P-1 (colly), page 19 of the paperbook. In my view, the respondent was well aware of her rights even at that stage and knowing the stated importance of said witness, should have been alive to her rights and the consequences of giving him up.

Further, Vide order dated 8.3.2028, the following issues were framed in the suit, by the Id. Trial Court:

- “1. Whether the plaintiff is entitled for relief of declaration and joint possession declaring the plaintiff to be the owner in joint possession of the suit land and the transfer deed/Vasika No.3530/1 dated 27.11.2013 and mutation Nos.1384 and 1433 subsequent rice record are null, void and be set aside not binding upon the rights of the plaintiff ? OPP*
- 2. Whether the plaintiff is entitled for relief of permanent injunction restraining the defendants from alienating or creating any charge over the suit property? OPP.*
- 3. Whether the suit of the plaintiff is not maintainable? OPD*
- 4. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD*
- 5. Whether the plaintiff is estopped from filing the present suit by her own act and conduct? OPD*
- 6. Whether the plaintiff has come to the Court with clean hands and concealed true and material facts from the Court? OPD*
- 7. Relief.”*

A perusal of the above shows that the onus to prove Issue No. 1 is on the respondent-plaintiff. As has been very persuasively argued by learned counsel for the petitioners, the respondent/plaintiff cannot be permitted to produce the said witness by way of evidence in rebuttal as, plaintiffs cannot as of right lead evidence in rebuttal on issues, the onus of proof of which is on them. In this regard, reference may be made to aforementioned judgment cited by Id. Counsel for the petitioner, passed by this Court in **Civil Revision No.1782 of 2015 titled as “Rashpinder Singh Vs. Seema”** and headnote of the same is reproduced hereinbelow:-

“Rebuttal evidence - Examination of handwriting and fingerprint expert - Suit for specific performance was filed on the basis of agreement to sell - In the written statement filed by the defendant, plea of denial was taken in respect of execution of agreement to sell - While leading affirmative evidence, the plaintiff did not adduce any evidence to prove due execution of agreement to sell removing all doubts with regard to the plea taken by the defendant in the written statement - Evidence of the plaintiff was closed and in the evidence of the defendant, she wants to examine handwriting and fingerprint expert to show that

the signatures appearing on the agreement to sell are not that of defendant - Thereafter plaintiff sought to examine handwriting and fingerprint expert in rebuttal evidence - Plaintiff cannot lead evidence in rebuttal in respect of an issue, the onus of which was on the plaintiff himself - Even if the plaintiff has reserved the right to lead evidence in rebuttal, the same is relatable to the issue as there was no such rebuttal issue in view of facts on record - Petition dismissed.” (Emphasis supplied)

Even SLP against above said case was dismissed by the Hon’ble Supreme Court vide order dated 08.02.2019 passed in SLP (Civil) Diary No.3580/2019.

In this regard, reference may be made to Division Bench judgment of this Court in **CR 5513 of 1998** titled as ‘**Jagdev Singh and others vs Darshan Singh and others**’ wherein it has been inter-alia, held that “*Issues framed and plaintiff leading evidence on issues in which onus of proof was on plaintiff – Opposite party beginning its evidence – the plaintiffs cannot as of right lead evidence in rebuttal on issues, the onus of proof of which on them.*”

Reference may also be made to Division Bench judgment of this Court passed in **Civil Revision No. 2203 of 2010**, titled as ‘**Avtar Singh and another vs. Baldev Singh and others**’; and **Civil Revision No.1213 of 2005** titled as “**Surjit Singh and others Vs. Jagtar Singh and other**” headnote of which is reproduced hereinbelow:-

“A. Civil Procedure Code, Order 18 Rule 3- Rebuttal evidence under Order 18 Rule 3 CPC - Whether the party can be permitted to lead evidence on the issues for which burden of proof was on that party - Held, (No) - Last stage for exercising option to reserve the right of rebuttal can well be before the other party begins its evidence - Question referred to D.B. answered

accordingly. 2001(4) RCR(Civil) 565 (P&H) overruled. 1983 (2) RCR(Rent) 57 (P&H) relied.”

Para 15 of the said judgment is reproduced herein:-

“15. In our opinion, Order 18 Rule 3 of the CPC would not give a right to the plaintiff to lead evidence in rebuttal on issues in which the onus of proof is on the plaintiff. Accepting such an interpretation would be to ignore a vital part of Order 18 Rule 3 of the CPC. The rule clearly postulates that "the party beginning, may, at his option, either produce his evidence on these issues or reserve it by way of answer to the evidence produced by the other parties". No matter, how liberally a provision in the statute is required to be interpreted, by interpretation it cannot be amended. Whilst construing a statutory provision the Court cannot reconstruct it. The rule consciously provides the parties with an option either to produce the evidence in support of the issues or to reserve it by making a statement to that effect. The statement itself may well be liberally construed to avoid any unnecessary technical obstacles. One such example has been given by the Division Bench in the case of Smt. Jaswant Kaur (supra). It has been held that if a statement is made by the Advocate for the plaintiff that "the plaintiff closes its evidence in the affirmative only," the same would be read to mean that the plaintiff had reserved its right to lead evidence in rebuttal. We are, therefore, unable to agree with the observations made by the learned Single Judge in the case of Kashmir Kaur (supra) that he is entitled to lead evidence in rebuttal as a matter of right. In our opinion, this observation runs contrary to the observations of the Division Bench in Jaswant Kaur's case (supra). The Division Bench has even fixed the maximum time on which the plaintiff has to exercise his option to reserve the right to lead evidence in rebuttal. It has been clearly held that such a reservation has to be made at the time of the close of the evidence of the plaintiff. We are also unable to agree with the observations of the learned Single Judge in the case of M/s Punjab Steel Corporation (supra). In that case the plaintiff sought to lead evidence in rebuttal, after the close of the evidence of the defence. At that stage, the plaintiff cannot be permitted to reserve the right to lead evidence in rebuttal. The observations of the learned Single Judge run contrary to the law laid down by the

Division Bench in the case of Smt.Jaswant Kaur (supra). No doubt, the Division Bench clearly lays down that an overly strict view cannot be taken about the modality of reserving the right of rebuttal. But at the same time, it has been held that the last stage for exercising option to reserve the right of rebuttal can well be before the other party begins its evidence. We are in respectful agreement with the aforesaid observations of the Division Bench in the case of Jaswant Kaur (supra) and R.N. Mittal, J. in National Fertilizers Ltd. (supra).” (Emphasis supplied)

Accordingly, the ratio of the above said judgments is that the respondent/plaintiff cannot lead any evidence in rebuttal on the issues the onus to prove which, was upon the plaintiff. As per the above referred law, such evidence should have been led by the respondent by leading evidence in the affirmative. Admittedly, the onus to prove that alleged lease release deed dated 27.11.2013 is a result of fraudulent misrepresentation, is upon the respondent. As per the law laid down by this Court, the respondent cannot examine the Deed Writer of the said release deed while leading evidence in rebuttal; especially when the respondent had intentionally given up the said witness vide her statement dated 12.4.2018, while leading evidence in affirmative. Moreover, on 23.01.2020, evidence already stands closed and the case was adjourned for 30.01.2020 for rebuttal evidence, if any and arguments.

A perusal of the record further shows that contrary to the assertion of the respondent, the respondent had not reserved her right to lead evidence in rebuttal, while closing her evidence in affirmative. This is Evident from Zimni order dated 28.02.2019 Annexure P2, reproduced hereinbelow:

“No PW is present. Learned counsel for plaintiff closed his evidence after tendering some documents. His statement to this effect has been recorded. Now, case is adjourned to 04.04.2019 for defendants evidence at own responsibility.”

Admittedly, the respondent/plaintiff has challenged the release date on ground of misrepresentation. Therefore, onus to prove fraud and misrepresentation is upon the respondent/plaintiff. It is the suit of the respondent-plaintiff, and her rights qua the suit property have to be determined. That being so, as per the ratio of the aforementioned judgments, respondent cannot be permitted to lead evidence in rebuttal on the issues the proving of which was upon her. The impugned order is thus, in violation of the law laid down by this Court. Ld. Counsel for the respondent/ plaintiff is unable to controvert this position in law.

Accordingly, the impugned order is set aside, and the present revision petition is allowed. Pending applications if any stand disposed of.

23.12.2022

Sunena

(Nidhi Gupta)
Judge

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No