



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Judgment reserved on: 25.01.2024

Judgment pronounced on: 15.04.2024

+ CM(M) 652/2023
MEENA KATARIA

..... Petitioner

Through: Mr. Ankit Jain, Mr. Aditya Chauhan
and Mr. Apurva Tyagi, Advs.

versus

REKHA & ORS.

..... Respondents

Through: Mr. Narender Sharma, Adv. for R-1.
Mr. R. S. Verma and Mr. Kartik
Dabas, Advs. for R-2, 3 & 4.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The present CM(M) petition no. 652/2023 has been filed by the petitioner under Article 227 of the Constitution of India against the impugned order dated 16.03.2023 passed by the learned Additional District Judge-03 (West), Tis Hazari Courts, Delhi (hereinafter referred to as learned "Trial Court") in Civ DJ no. 613733/2016, titled as "*Smt. Meena Kataria vs. Ms. Rekha & Others*" whereby the learned Trial Court dismissed the application under Order XVIII Rule 2(3) CPC filed by the petitioner seeking permission to lead evidence in rebuttal to the evidence led by the respondents.

2. For the purpose of adjudication of the present case, the relevant facts are that Mrs. Meena Kataria/petitioner herein, Ms. Rekha/respondent no. 1



herein, Mr. Anurag Chauhan/respondent no. 3 herein, Mrs. Manju Tanwar/respondent no. 4 herein and Mrs. Yashoda/respondent no. 5 herein are the legal heirs of late Mr. Mahavir Singh. Further, Mrs. Kamla Devi/respondent no. 2 herein is the wife of late Mr. Mahavir Singh and his legal heir.

3. Late Mr. Mahavir Singh, being the head of the family or Karta of the Hindu Undivided Family (hereinafter referred to as “HUF”) was responsible for managing several ancestral properties listed as follows: -

- a) A four-storey property bearing no. WZ-158 & WZ-156 situated at village Khampur Raya, New Delhi - 110008.
- b) 1/4th share in built up property bearing no. 12C, Sawan Park, Wazirpur, Delhi.
- c) Plot no. 20 measuring 127.99 square meters comprised in Khasra no. 20/22 of village Matiala known as Jain Colony, Part III Extension, Uttam Nagar, Delhi.
- d) Plot no. 56 measuring 83.65 square meters situated in Om Vihar Colony, Uttam Nagar, New Delhi.
- e) Plot no. D-53 measuring 83.65 square meters situated in Om Vihar Colony, Phase V, Uttam Nagar, New Delhi.
- f) A plot on lease measuring bearing Khasra no. 431-432 in the revenue estate of village Khampur Raya measuring about 250 square yards now known as Shiv Chowk, Ranjeet Nagar, New Delhi.
- g) A Saving Bank Account bearing no. 21250100002314 maintained in Bank of Baroda, Uttam Nagar, New Delhi in the name of Mr. Mahavir Singh, father of the plaintiff.



- h) Compensation pending in Court in three cases titled, “*UOI vs. Mamchand & Others*” in the name of Late Mr. Mahavir Singh in which land was acquired vide Award no. 14/DC(W)/06-07, Award no. 12/DC(W)/06-07 and Award no. 4/DC(W)/05-06 bearing LAC no. 14/2010, 15/2010 and 18/2010 respectively.
- i) Compensation lying in the Court in case titled, “*Sh. Phool Singh & Others vs. Union of India*” bearing LPA no. 1044/2004.
- j) Ancestral land comprised in old Khasra no. 754/21/2/2/2/2/2/2 (New Khasra no. 1083/1149/754/21) of the Revenue Estate of village Khampur Raya to the extent of the share of Late Mr. Mahavir Singh as per the revenue record.
- k) Insurance Policy bearing no. 120318373 dated 28.08.1995 in the name of Late Mr. Mahavir Singh, (hereinafter referred to as suit properties). The suit properties mentioned above are in dispute in the present case.
4. It is the case of the petitioner that her father, Late Mr. Mahavir Singh, died on 28.11.2009. Thereafter, in August 2010, the petitioner received a notice from this Court regarding an application for substitution in a Land Acquisition Appeal case no. 84/08 filed by the respondent no. 1. Through this application, the petitioner became aware of a Will dated 14.09.2009 registered at no. 6748 in Additional Book no. 3, Volume no. 7754 allegedly executed by Late Mr. Mahavir Singh during his lifetime. Neither the petitioner nor any member of the family had any prior knowledge of this Will. It is submitted that the Will is forged and fabricated, as it was never executed by the father of the petitioner.



5. Further, the petitioner shared a very close relationship with her father until his passing, and he used to confide in her. It is the case of the petitioner that all the aforesaid ancestral properties were neither partitioned during the lifetime of her father nor after his death. The petitioner visited her residence in Khampur Raya village, New Delhi in 2011 and enquired from respondent no. 1 about the status of the ongoing matter regarding land acquisition pending before the Court. This led to a dispute between the petitioner and respondent no. 1, resulting in respondent no. 1 throwing away the petitioner's belongings, calling the police and consequently, the petitioner had to go back to Chandigarh.

6. It is the case of the petitioner that she has come to know through a credible source that respondent no. 1, in collusion with other respondents is attempting to unlawfully transfer the aforesaid ancestral properties without the petitioner's consent and knowledge. It is submitted that the respondents do not possess any legal right, title or interest to transfer these properties without first initiating a partition suit. Further, the respondents have also intimidated the petitioner with threats of selling the ancestral properties based on the purported Will of their father.

7. In November 2012, the petitioner requested the respondents to partition the aforesaid ancestral suit properties and grant her 1/6th share in the same. Additionally, the petitioner asked the respondents to provide an account of the income and profits derived from these properties by way of rent etc. However, despite numerous assurances, the respondents have failed to partition the ancestral properties so far, on one pretext or the other.

8. Further, it is the case of the petitioner that she became aware through some reliable sources that respondent no. 1, under the guise of forged and



fabricated Will has sold some of the suit properties without the knowledge and consent of the petitioner. Moreover, respondent no. 1 has not provided the rightful share of the proceeds to the petitioner and has kept the entire consideration with him.

9. Subsequently, on 28.11.2009, the petitioner filed the suit for partition, rendition of account, declaration and injunction. In the suit, the petitioner prayed for a decree for partition to determine the respective shares of the parties in respect of the suit properties; a decree for rendition of accounts directing the respondents to disclose through affidavit the real income, proceeds, profits and sale consideration from the suit properties; a decree for permanent injunction against the respondents restraining them from creating any third-party interest in the suit properties and a decree for declaration to the effect that the Will dated 14.09.2009 is null and void being forged and fabricated.

10. Additionally, a decree for declaration was requested in favour of the petitioner, asserting that Late Mr. Mahavir Singh was not legally competent to execute the Will, as he did not possess the absolute ownership of the suit properties, which are ancestral in nature and in which the petitioner holds a 1/6th share as co-parcener.

11. Thereafter, respondent no. 1 filed her written statement wherein, she raised preliminary objections regarding the maintainability of the suit and claimed her right on the suit properties based on the Will. Respondent no. 2 to 4 filed their written statements in favour of respondent no. 1 and stated that the Will left behind by their father is valid. Further, respondent no. 5 filed her written statement wherein, she claimed that the Will has not been executed by her father and is a forged and fabricated document. The



learned Trial Court framed issues on the pleadings of the parties and the suit was set for recording of evidence.

12. Vide order dated 06.06.2019, the learned Trial Court closed the petitioner's evidence in affirmative. On 13.09.2022, the respondent's evidence was also closed. On the said date, the learned counsel of the petitioner pleaded that the case be fixed for evidence in rebuttal. However, the learned Trial Court was of the view that the petitioner should move an application in this regard. On 13.10.2022, the petitioner moved an application under Order XVIII Rule 2(3) CPC seeking permission to lead evidence in rebuttal emphasizing that for issues onus of which was on the respondents, the petitioner is entitled to lead evidence in rebuttal. Through this application, the petitioner sought to summon Mr. Shakti Singh along with the original Memorandum of Understanding. Further, the petitioner also sought to summon the record of the RML hospital regarding the treatment given to Late Mr. Mahavir Singh.

13. Thereafter, on 11.11.2022, the respondents no. 1 to 4 filed their reply disputing the right of the petitioner to lead evidence in rebuttal and contending that petitioner should have led evidence before petitioner's evidence was closed on 6.06.2019. The learned Trial Court vide impugned order dated 16.03.2023 dismissed the application of the petitioner and held that in the guise of leading evidence in rebuttal, the petitioner wants to wrongfully fill up the lacunae left in her evidence.

14. Further, the learned Trial Court was of the view that when the petitioner's evidence was closed on 06.06.2019, the petitioner did not reserve her right to lead evidence in rebuttal. Aggrieved by this impugned order, the petitioner preferred the present petition.



Submissions by the petitioner

15. Learned counsel for the petitioner submitted that the impugned order dated 16.03.2023 has been passed without taking into consideration the provisions of Order XVIII Rule 3 of CPC. It is submitted that Order XVIII Rule 3 of CPC stipulates that where there are several issues, the burden of proving some of them lies on the party, the party beginning may, either produce evidence on those issues or reserve it by way of answering to the evidence produced by the other party in rebuttal. Therefore, in the present case the petitioner has a right to lead evidence in rebuttal after the respondents have led their evidence relating to existence of the Will.

16. It is further submitted that the learned Trial Court failed to take into consideration Section 101 and 102 of the Indian Evidence Act, 1872 (hereinafter referred to as "IEA"), which stipulates that the burden of proof in a suit lies on that person who would fail if no evidence at all was produced on either side. In the present case, if no evidence is led on either side, there would be no proof of the alleged Will and hence the suit filed by the petitioner would be decreed automatically. Reliance is placed on the judgment of the Hon'ble Supreme Court in ***Rangamal vs. Kuppuswami & Anr.*** [(2011) 12 SCC 220].

17. It is submitted by the learned counsel that the onus to prove the existence of the Will is always on the propounder. Thus, the petitioner cannot be asked to lead evidence first in the negative to disprove that no such Will exists, in the affirmative. Reliance is placed on the cases titled as ***Shashi Kumar Banerjee & Ors. vs. Subodh Kumar Banerjee*** [AIR 1964



SC 529] and *Janki Narayan Bhoir vs. Narayan Namdeo Kadam* [(2003) 2 SCC 91].

18. Learned counsel for the petitioner submitted that the learned Trial Court failed to take into consideration that Section 103 of IEA stipulates that the burden of proof qua a particular fact lies on that person who wishes the Court to believe in its existence. In the present case, it is the respondents who want the Court to believe in the existence of the alleged Will and therefore, the burden of proof also lies upon the respondents.

19. It is further submitted that the contention of the respondents that the petitioner cannot be allowed to lead evidence in rebuttal of issue no. 5 is without any basis. It is submitted that the onus as well as the burden to prove the Will is upon the respondents. Therefore, the petitioner cannot lead evidence first, prior to the respondents leading evidence about the existence of the alleged Will. Reliance is placed on the judgments of this Court in *Wazirpur Small Industries Association vs. Union of India* [2010 (115) DRJ 221] and *Maharaj I. S. Wahi vs. Renuka Wahi* [2016 DHC 6142].

Submissions by the respondent nos. 1 to 4

20. Learned counsel for the respondents on the other hand refuted the submissions of the petitioner and contended that the Will executed by Late Mr. Mahavir Singh in presence of two witnesses, Mr. Anil Kumar and Mr. Shakti Singh is legally valid and Late Mr. Mahavir Singh was fully competent to execute the said Will. Further, it is submitted that the provisions of Section 30 of the Hindu Succession Act, 1956 is not applicable in the present case since there are no coparcenary properties



involved. It is contended that all the properties which were owned and possessed by Late Mr. Mahabir Singh were his self-acquired properties. Therefore, the petitioner has no right to challenge the Will.

21. It is submitted that it is settled proposition of law that a party cannot as a matter of right lead evidence in rebuttal on issues, the onus of proof of which is on it even after reserving its right to lead rebuttal evidence.

22. Learned counsel for the respondents submitted that after closure of the respondent's evidence, the petitioner came to know about the strained relationship between Mr. Shakti Singh and respondent no. 1 to 4. Consequently, in order to negate the evidence of Mr. Anil Kumar Tanwar (attesting witness of the Will), the petitioner wanted to summon Mr. Shakti Singh as her witness in rebuttal and had filed an application under Order XVIII Rule 2(3) CPC.

23. It is submitted that the learned Trial Court has rightly dismissed the application filed by the petitioner and there is no infirmity in the order dated 16.03.2023.

24. Learned counsel for the respondents submitted that to lead the evidence in rebuttal is not a matter of right. The onus to prove issue no. 8 was on the petitioner and not on the respondents who claimed that the said Will is a legal and a valid document. It is further submitted that during petitioner's evidence, the petitioner failed to take any step to prove issue no. 8 and now, the petitioner in guise of leading evidence in rebuttal of defense evidence wants to wrongfully fill up lacunae left in the petitioner's evidence. Reliance is placed on the judgment of this Court in the matter of ***Hemant Kumar Singhal vs Overseas Bank & Anr.*** [(2020) 267 DLT 639]



and another judgment of Hon'ble Punjab and Haryana High Court in the matter of ***R.K Yadav vs Dharamraj Singh & Anr.*** [(2020) 4 CivCC 540].

25. Lastly, learned counsel submitted that issue no. 5 and 8 framed by the learned Trial Court are interlinked. In order to discharge the burden of issue no. 5, the respondents were required to produce the evidence in affirmative and prove the said Will in positive assertion. In order to discharge the burden of issue no. 8, the petitioner was required to produce the evidence in affirmative and prove the said Will in negative assertion.

26. In support of the above said contentions, the respondents relied upon the case of ***Surjit Singh & Ors. vs Jagtar Singh & Ors.*** [AIR 2007 P&H 1]. It was submitted that Hon'ble Punjab and Haryana High Court and this Court in the judgments titled as ***Jagdev Singh & Ors. vs Darshan Singh & Ors.*** [AIR 2007 P&H 118] and ***Suman Kapoor vs Rakesh Kumar*** [(2015) 9 AD (Delhi) 29] have reiterated the same principles of law as enunciated in the case of ***Surjit Singh*** (*Supra*).

Analysis & conclusion

27. Order XVIII Rule 3 CPC deals with an important procedure in cases where there are several issues, the burden of proving some of the issues, which lies on the party, the party beginning may, at his option either provide his evidence on those issues or reserve it to be produced subsequently, when the evidence is led by the other party. In such a case, the party beginning may produce evidence on those issues after the other party has led its evidence. Order XVIII Rule 3 CPC provides the procedure as to how the evidence is to be produced in cases when the burden of proof of some of the issues is on one party and of other issues on



the opposite party. It is no longer *res-gestae* that right to lead evidence in affirmative need not be expressly reserved and the same could be implied from the facts and circumstances of cases. Needless to say, there can be no difficulty in cases where the right of rebuttal is expressly reserved by a party, who begins leading the evidence at the time of beginning of its evidence. Nonetheless, the right to rebuttal can also be expressed at the time when the said party closes its evidence and before opposite party begins the evidence of its side.

28. The said position in law is trite as enunciated in ***Surjit Singh v. Jagtar Singh* Vol 145 2007 (1) PLR 552**, the Division Bench of Punjab & Haryana High Court had dealt with the provision under Order XVIII Rule 3 CPC. The relevant portion of the judgment reads as under:-

"21. 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 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)."

29. Reverting to the facts of the case in hand, the following issues were framed by the learned Trial Court on the pleadings of the parties vide order dated 13.07.2015:-

1. Whether the Suit is not maintainable, as alleged in the preliminary objections? **OPD**
2. Whether the Suit is barred by the proviso to Section 34 of the Specific Relief Act? **OPD**
3. Whether the Suit is barred by time? **OPD**
4. Whether the Suit property is not properly valued and stamped? **OPD**
5. Whether late Sh. Mahabir Singh executed any legal and valid Will? **OPD**
6. Whether the present Suit filed by the Plaintiff is hit by the proviso to Sections 8 and 19 of the Hindu Succession Act, 1956 and Sh. Mahabir Singh has every right to execute the Will dated 14th September 2009 with regard to the property inherited by him under the provisions of



Sections 8 and 19 of the Hindu Succession Act, 1956? **OPD**

7. Whether the present Suit is a collusive proceeding between the Plaintiff and Defendant no. 5, if so to what effect? **OPD**
8. Whether the Plaintiff is entitled to a Decree for Declaration as prayed for? **OPP**
9. Whether the Plaintiff is entitled to a Decree for partition? **OPD**
10. Whether the Plaintiff is entitled to a Decree for partition? **OPD**
11. Whether the Plaintiff is entitled to a Decree for rendition of accounts?

OPP

12. Relief.

30. From the above issues, it is discerned that the onus of the issue nos. 1 to 7 & 9 has been placed on the respondents/defendants whereas the onus of two issues i.e. issue nos. 8 & 10 is placed on the petitioner/plaintiff. For the present petition, issue nos. 5 & 8 are relevant. Respondent's submissions are that the onus to prove issue no. 8 was upon the petitioner/plaintiff and by way of producing the evidence in affirmative, was required to prove that the Will dated 14.09.2009 is null and void, being forged and fabricated or that Sh. Mahabir Singh was not legally competent to execute the said Will. It was submitted that since beginning, it was in the knowledge of the petitioner that petitioner had to prove that the said Will was a forged document, therefore, the question to lead evidence in rebuttal subsequently does not arise.

31. The rival submission on behalf of the petitioner is that in the present case, the onus to prove the alleged Will by virtue of issue no. 5 is upon the respondents/defendants and in terms of Order XVIII Rule 3 CPC, the



petitioner/plaintiff has right to lead evidence in rebuttal after the respondents/defendants have led their evidence relating to existence of any Will.

32. It was submitted that the petitioner could not have first led evidence in negative to show that no such Will existed prior to respondents producing evidence about the existence of the alleged Will. Thus, the petitioner has an absolute right to lead evidence in rebuttal in regard thereto.

33. Pertinently, after framing of issues on 13.07.2015, the petitioner was given an opportunity to begin its evidence and after examining the witnesses, the plaintiff closed its evidence vide order dated 06.06.2019.

34. It is not disputed that at the time of closing of the evidence, the petitioner has reserved its right to lead evidence in rebuttal by closing its own evidence in affirmative. Thus, petitioner could lead evidence in rebuttal only after respondents could have led evidence on the issues, the onus of which was on them.

35. By virtue of the application moved under Order XVIII Rule 2(3) read with Section 151 CPC, the petitioner seeks to lead evidence in rebuttal particularly with respect to issue no. 5 for which he wants to produce Sh. Shakti Singh as its witness as well as Record Clerks from Kukreja Hospital, New Delhi and Dr. Ram Manohar Lohia Hospital, Delhi.

36. Having considered the submissions, the record and in totality of the circumstances, the petitioner is granted liberty to lead evidence in rebuttal in terms of following directions:-



(i) The learned Trial Court shall ensure that petitioner shall not lead fresh evidence.

(ii) The learned Trial Court shall also ensure that the evidence shall not be led to fill lacunae in petitioner's case

(iii) The learned Trial Court to permit evidence in rebuttal to the extent of evidence produced by the respondents.

(iv) The evidence in rebuttal to be concluded within two months from today and the learned Trial Court shall ensure that unnecessary adjournments are not requested by the parties.

37. In view of the above, impugned order dated 16.03.2023 of the learned Trial Court is hereby set aside. Consequently, the present petition is allowed.

SHALINDER KAUR, J.

APRIL 15, 2024/ss