

Before Ram Chand Gupta, J.
BHUPINDER KUMAR,—Petitioner
versus
ISHWAR DEVI,—Respondents

C.R. No. 4557 of 2009

2nd May, 2011

Constitution of India, 1950—Art.227—Code of Civil Procedure, 1908—O.XVIII Rl.3—Challenging the permission to lead evidence in rebuttal for which of proof on that party—to rebut evidence of petitioner it is necessary that respondent also gets evidence examination—Petition accepted—Permission granted to examine evidence in rebuttal by trial Court set aside.

Held, that in the present case, onus to prove the issue that the sale deed in dispute allegedly executed by respondent—plaintiff in favour of petitioner—defendant is a result of fraud and misrepresentation was upon respondent—plaintiff and she already led evidence on the issue in affirmative. She has not reserved her right to adduce evidence on the said issue in rebuttal. Evidence was adduced in rebuttal by petitioner—defendant to disprove the said issue, onus of which was upon respondent—plaintiff. Hence, it cannot be said that respondent—plaintiff is having right to examine handwriting and finger-print expert in rebuttal to the evidence adduced by petitioner—defendant on the point. Respondent—plaintiff should have examined handwriting and finger-print expert, if so advised, while leading evidence in affirmative in order to discharge the burden of proof on issue No. 2

(Para 11)

Further held, that learned trial Court has committed illegality and material irregularity in observing that to rebut the evidence of the petitioner—defendant and the statement of handwriting expert examined by petitioner—defendant, it has become necessary that respondent—plaintiff should also get her handwriting and finger-print expert examined.

(Para 12)

A.K. Khunger, Advocate for the petitioner.

Sameer Sachdeva, Advocate for the respondent.

RAM CHAND GUPTA, J.

(1) The present revision petition has been filed under Article 227 of the Constitution of India for setting aside order dated 24th July, 2009 passed by learned Civil Judge, Junior Division, Abohar. *vide* which application filed by respondent-plaintiff for examination of handwriting expert in rebuttal was allowed.

(2) I have heard learned counsel for the parties and have gone through the whole record carefully including the impugned order passed by learned trial Court.

(3) Facts relevant for the decision of present revision petition are that respondent-plaintiff filed a suit for declaration to the effect that she is owner in possession of one double storeyed house bearing No. 1782, situated in Street No. 13, 2nd Chowk at Abohar. Respondent-plaintiff also challenged the sale deed dated 16th July, 1996 executed by her in favour of petitioner on the ground that the said sale deed is a result of fraud and misrepresentation as the same is without consideration. After notice, petitioner-defendant appeared before the trial Court and filed detailed written statement by taking the plea that respondent had sold the house in question to petitioner for a consideration of Rs. 2,25,000 and after receiving the entire sale consideration, sale deed was executed in his favour on 16th July, 1996, which was also got registered.

(4) From the pleadings of the parties, following issues were framed by learned trial Court :-

- “1. Whether the plaintiff is entitled for declaration as prayed for ?
OPP
2. Whether the sale deed dated 16th July, 1996 Vasika No. 1711 is result of fraud and misrepresentation without consideration, illegal, null and void and liable to be set aside ? OPP
3. Whether the mutation on the basis of sale deed is wrong, illegal, null and liable to be dismissed ? OPP
4. Whether the plaintiff is entitled for permanent injunction as prayed for ? OPP

5. Whether the defendant is a *bond fide* purchaser of the disputed property for valuable consideration in good faith ? OPD
6. Whether the plaintiff is estopped by his own act and conduct from filing the present suit ? OPD
7. Whether the plaintiff has no cause of action to file the present suit ? OPD
8. Whether the suit of plaintiff is not maintainable ? OPD
9. Whether the suit of plaintiff is liable to be dismissed with special cost ? OPD
10. Relief.”

(5) Evidence of respondent-plaintiff was concluded. Petitioner-defendant also led his evidence and also examined handwriting and finger-print expert for proving the thumb impression of respondent-plaintiff on the sale deed with her standard thumb impression. Witness was also cross-examined by respondent-plaintiff.

(6) After conclusion of the evidence of petitioner-defendant, respondent-plaintiff moved an application for examining handwriting and finger-print expert in rebuttal. The said prayer was allowed by learned trial Court *vide* impugned order dated 24th July, 2009.

(7) It has been contended by learned counsel for the petitioner-defendant that onus to prove issue No. 2, i.e., sale deed dated 16th July, 1996 executed by respondent-plaintiff in favour of petitioner-defendant is a result of fraud and misrepresentation and without consideration, was on respondent-plaintiff and that respondent-plaintiff also led evidence in order to discharge the said onus in affirmative and petitioner-defendant in order to rebut the said evidence adduced by respondent-plaintiff examined handwriting and finger-print expert in order to prove her thumb impression on the disputed sale deed. Hence, it is contended that respondent-plaintiff is having no right to examine handwriting and finger-print expert in rebuttal to the said evidence adduced by petitioner-defendant. He has also placed reliance upon Division Bench judgments of this Court rendered in **Surjit Singh and others versus Jagtar Singh and other, (1)** and **Jagdev Singh and others versus Darshan Singh and others, (2)**.

(1) 2007 (1) RCR (Civil) 537 = 2007(1) PLR 552

(2) 2007 (1) RCR (Civil) 794 = 2007 (1) RCR (Rent) 196

(8) On the other hand it has been contended by learned counsel for the respondent-plaintiff that even if respondent-plaintiff has closed her evidence in affirmative on an issue. the onus of which was on her, she is still has a right to ask for an opportunity of rebuttal to the evidence produced by petitioner-defendant because onus again shifts upon her. On the point he has placed reliance upon **Kashmir Kaur versus Bachan Kaur** (3).

(9) Law on the point has been settled by Division Bench judgement of this Court in **Surjit Singh and others'** case (*supra*) in which single Bench judgment of his Court in **Kashmir Kaur's case** (*supra*) alongwith some other judgements on the point were also discussed and it was held that under Order XVIII Rule 3 of the Code of Civil Procedure. a party cannot be permitted to lead evidence in rebuttal on a issue for which burden of proof was on that party. Relevant paragraph of the same reads as under :-

“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 the 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*).”

(10) The said legal proposition was reiterated by this Court in another Division Bench judgment of this Court in **Jagdev Singh and others'** case (*supra*), wherein it was also observed that plaintiff cannot as a matter of right lead evidence in rebuttal on issues, the onus of proof of which was on them and the same was to be seen in the facts and circumstances of each case.

(11) In the present case, onus to prove the issue that the sale deed in dispute allegedly executed by respondent-plaintiff in favour of petitioner-defendant is a result of fraud and misrepresentation was upon respondent-plaintiff and she already led evidence on the issue in affirmative. She has not reserved her right to adduce evidence on the said issue in rebuttal.

Evidence was adduced in rebuttal by petitioner-defendant to disprove the said issue. onus of which was upon respondent-plaintiff. Hence, it cannot be said that respondent-plaintiff is having right to examine handwriting and finger-print expert in rebuttal to the evidence adduced by petitioner-defendant on the point. Respondent-plaintiff should have examined handwriting and finger-print expert, if so advised, while leading evidence in affirmative in order to discharge the burden of proof on issue No. 2.

(12) Hence, learned trial Court has committed illegality and material irregularity in observing that to rebut the evidence of the petitioner-defendant and the statement of handwriting expert examined by petitioner-defendant, it has become necessary that respondent-plaintiff should also get her handwriting and finger-print expert examined. Moreover handwriting and finger-print expert examined by petitioner-defendant was fully cross-examined on behalf of the respondent-plaintiff.

(13) Hence, in view of these facts, the present revision petition is accepted. Impugned order passed by learned trial Court is set aside to the extent permission was granted to respondent-plaintiff to examine handwriting and finger-print expert in rebuttal evidence.

A. Agg.