Before Anil Kshetarpal, J.

KULDEEP SINGH AND OTHERS—*Appellants*

versus

OM PAL AND OTHERS—*Respondents*

RSA No.3565 of 2005

November 30, 2018

(A) ***Code of Civil Procedure, 1908 — O.6 Rl.2 — Pleadings — To contain a statement in concise form of material facts on which party pleading relies, from claim or defence as the case may be — Evidence not to be pleaded.***

Held, that as per Order 6 Rule 2 CPC, the pleadings shall contain a statement in concise form of material facts on which the party pleading relies, from his claim or defence as the case may be. The evidence is not required to be pleaded. Both the Courts have held that since the written statement filed by Smt. Maya is silent on this aspect that Taken having independent source apart from income from the coparcenary property, therefore, the evidence led is beyond pleadings. It will be noted that defendant No.1 had pleaded in his written statement that Taken used to do hard work and was doing business of purchasing and selling the cattles and from the aforesaid income, he purchased the land measuring 29 bighas and 8 biswas. Once, it has been pleaded that the land has been purchased by Taken during his life time, the fact had been pleaded and the evidence was not required to be pleaded. Hence, question No.1 is answered in favour of the defendant-appellant.

(Para 19)

(B) ***Code of Civil Procedure, 1908 — O. 41 Rl. 27 — Procedure — Effort by Courts to do substantial justice while following prescribed procedure under law — Procedure — Handmade for justice — Cannot be used to scuttle justice — Additional evidence permitted only within prescribed parameters — First Appellate Court — Not to dismiss applications for additional evidence giving flimsy reasons.***

Held, that still further, in the considered opinion of this Court, the provision for additional evidence under Order 41 Rule 27 has been provided in the statute for permitting the parties to lead additional evidence with the permission of the Court. Of course, the additional

evidence can be permitted only within the parameters as prescribed under Order 41 Rule 27 of the Code of Civil Procedure. However, learned First Appellate Court is not expected to dismiss the applications for additional evidence by giving flimsy reasons. It has been noticed that sometime, the additional evidence sought to be produced goes to the route of the case but learned First Appellate Court dismisses the application while relying upon one technicality or the other. The Courts have been constituted to do justice between the parties. Effort must be made by the Courts to do substantial justice while following the prescribed procedure under the law. However, the procedure cannot be used to scuttle the justice. The procedures have been laid down to help the Court to do substantive justice between the parties. The procedures are handmade for justice.

(Para 21)

(C) ***High Court Rules and Orders — Coparcenary joint hindu family — Proof — Revenue record before and after consolidation to be examined — Provision made in the High Court Rules and Orders — Appoint a revenue official and get an excerpt of revenue record prepared.***

Held, that before recording that the property is coparcenary, it is necessary for the party which alleges the property to be coparcenary, proves that a coparcenary existed and is continuing till filing of the suit. For establishing coparcenary property, it is necessary that the old and new khasra numbers (pre and post consolidation of holdings) are properly connected and identification of the land has been established beyond doubt. It is for this reason provision has been made in the High Court Rules and Orders for appointing a revenue official and get an excerpt of the revenue record prepared. No doubt, the production of the excerpt is not necessary but in absence of excerpt and examination of the revenue official, the Court or the party must produce on file sufficient record allowing the Court to compare the records so as to identify the land which has claimed to be coparcenary property. As noted above on careful examination of Naksha Haqdarbar and Misal Hakiyat (first Jamabandi after consolidation), it is apparent that more than 80% of the old khasra numbers do not matching with new khasra numbers which have been allotted after consolidation. The Jamabandi for the year 1955-56 bear testimony to the aforesaid fact. Still further, the Naksha Haqdarbar clearly establishes that the land of 6 different khewat numbers noted above has been amalgamated, however, the revenue record prior to the consolidation connected to the aforesaid all

6 khewats has not been produced.

(Para 22)

(D) ***Coparcenary property — Property purchased by a person cannot be presumed to be purchased from nucleus/common funds of joint Hindu family unless there is evidence on the file to support the conclusion.***

Held, that as regards question No.5, it is well settled that the property which has been purchased by a person cannot be presumed to be purchased from nucleus/common funds of joint Hindu family unless there is evidence on the file to support the conclusion. It has been proved on file that 29 Kanals and 4 marlas was purchased by Taken on 16.11.1957. It has come in evidence that Taken was hard working person who was not only cultivating his own land but was also taking the land on lease. Still further, in the Will, Taken has specifically stated that the land which is sought to be bequeathed is his self-acquired property. Apart therefrom, it has come in evidence that Taken was also trading in cattles apart from giving the money on loan repayable with interest. Before the learned First Appellate Court, old bahis (notebooks) written by Taken were sought to be produced in evidence but the learned First Appellate Court refused to admit the aforesaid evidence. In any case, once there cannot be any presumption that the property purchased was from common nucleus or the joint Hindu family funds, the plaintiff has failed to lead any unimpeachable evidence to establish that fact. The Courts have presumed this fact without reliable evidence on file.

(Para 24)

In view of the aforesaid, question No.5 is also answered in favour of the defendant-appellant.

(Para 25)

Ashok Singla, Advocate with Aakash Singla, Advocate, *for the appellants (*in RSA-3565-2005) for the respondents (in RSA-3835-2005).

Arun Jain, Sr. Advocate with Chetan Salathia, Advocate, for the respondents (in RSA-3565-2005) for the appellants (in RSA-3835-2005).

ANIL KSHETARPAL, J.

(1) Vide this judgment, these two appeals bearing RSA No.3565

of 2005 and RSA No.3835 of 2005 filed by the plaintiff as well as by the defendants shall stand disposed of as both the appeals are arising from the same suit and counsel for the parties are also ad idem that both the appeals can be disposed of conveniently by a common judgment.

(2) In the considered opinion of this Court, the following substantial questions of law arise for consideration:-

1. Whether the evidence is required to be pleaded?

2. Whether First Appellate Court is justified in disposing of the appeal in a cursory/superfluous manner?

3. Whether First Appellate Court while deciding the appeal should be liberal in granting opportunity for additional evidence at the same time being governed by the provisions of Order 41 Rule 27 of the Code of Civil Procedure, if the document sought to be produced is of unimpeachable credence?

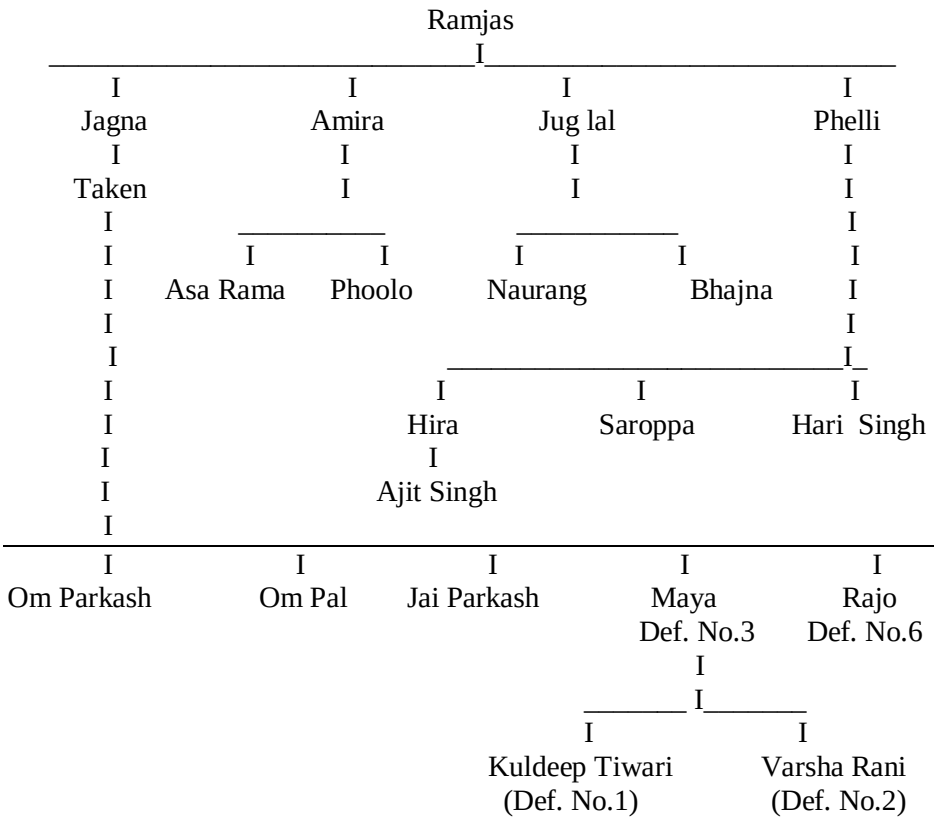
4. Whether the Courts before recording a finding that the property is coparcenary joint Hindu family must carefully examined the old and new revenue record (before and after consolidation of holdings) and arrive at a finding that the property is connected and there is no scope for doubt about identification of the property claimed to be ancestral?

5. Whether the Courts are justified in drawing presumption that the property purchased by the father of the parties is from the earning derived from the ancestral land and common nucleus and hence, the property purchased is also coparcenary property?

6. Whether the argument of learned counsel for the parties while defending interest of his clients for lesser/a part of the relief can operate as an estoppel in further appeal while claiming the entire relief claimed in the suit?

(3) However, before questions of law are answered, it would be appropriate to notice certain facts.

(4) Relationship between the parties can be conveniently understood from the following pedigree table:-



(5) Plaintiff-Om Pal has filed the suit claiming that the plaintiff, defendants No.4 and 5 and their father Taken son of Jagna constituted a joint Hindu family and their father was Karta/Manager of the Joint Hindu Family. Defendants No.3 and 6 being married daughters had ceased to be members of the family. The plaintiff, defendants No.4 and 5 and their father are governed by Mitakshra law in the matter of alienation, succession and partition in respect of joint Hindu family/coparcenary property. It is further the case of the plaintiff that out of the total land, the land measuring 29 kanals and 4 marlas was purchased by his father Taken from the income and usufruct of the ancestral/coparcenary property. The plaintiff thus pleaded that the Civil Court decree dated 05.02.1994 is illegal and not binding on his rights. It was claimed that the total land was 29 kanals 4 marlas (self- purchased) plus 51 kanals 6 marlas received in succession by Taken from Jagna.

(6) Defendant No.1 contested the suit and pleaded that there is no joint Hindu family as the plaintiff as well as defendants No.4 and 5 were residing separately from Taken. The plaintiff and his brothers

were not looking after Taken in his old age and it is rather defendants No.1 to 3 who were looking after and serving late Sh. Taken in his old age. It is further claimed that Taken had executed a registered Will dated 06.11.1992 in favour of defendants No.1 and 2 and thereafter, on the basis of family settlement, it is acknowledged that 48 kanals 18 marlas had fallen to the share of defendants No.1 to 3. Taken was claimed to be a hard working person who was doing business of purchase and sale of cattles and therefore, he purchased the land measuring 29 kanals and 4 marlas vide sale deed dated 16.11.1957 from the amount earned by him and therefore, the Will and decree was defended. Separate written statement was filed by defendant No.3-Maya who apart from supporting the case of defendants No.1 and 2 stated that she along with defendants No.1 and 2 were residing with Taken for the last many years.

(7) Replication to the written statement was filed and the assertions made in the separate written statements filed by defendants No.1 and 3 were rebutted.

(8) Plaintiff in order to prove its case produced on record copies of Jamabandies for the year 1911-12 to 1943-44, 1955-56. The Jamabandi for the year 1911-12 proves that Jagna, Amira, Jug Lal and Phelli sons of Ramjas were joint owners of the land in equal share measuring 89 bighas and 15 biswas. Next Jamabandi for the year 1915-16 also prove the aforesaid fact. In the year 1918, Jagna is said to have died and mutation of land comprised in Khewat Nos.178, 181, 198 and 210 (Shamlat Deh Khewat) was sanctioned in favour of Taken vide mutation No.363 sanctioned on 04.04.1919. Next Jamabandi produced on file is for the year 1923-24 which records that in place of Jagna, Taken has been recorded as an owner of 1/4th share in the land measuring 89 bighas and 15 biswas. This fact is further substantiated by Jamabandi for the year 1927-28, 1931-32 and 1939-40. However, Jamabandi for the year 1939-40 proves that the total land owned by all the four branches of the family that means heirs of Ramjas are owners of 53 bighas and 7 biswas. The Jamabandi for the year 1943-44 also established that the family was owner of 53 bighas and 7 biswas.

(9) Thereafter, Misal Hakiyat (Jamabandi which records pre-consolidation and post-consolidation khewat numbers) for the year 1955-56 has been produced which establishes that Khewat of Taken has been separated and he is shown to be owner of 51 kanals and 6 marlas and most of the khasra numbers (i.e. more than 80%)

which have been mentioned as old numbers are not matching/connected to the previous land holding of Taken when he was recorded joint with other successors of Ramjas.

(10) Naksha Haqdarwar (details of the land of the proprietor) prepared during consolidation in which it is proved that the land of all four branches of the family from Ramjas have been separated and their property has been partitioned. Naksha Haqdarwar prove that Taken was allotted the land in Khewat No.281 in lieu of old Khewat Nos.219, 220, 223 to 225 and 253 measuring 43 kanals and 5 marlas whereas Khewat of Asa Ram son of Amira has been separated and allocated khewat No.282. If one compares this Naksha Haqdarwar with Jamabandi for the year 1955-56, it is apparent that the entire land measuring 51 kanals and 6 marlas is not result of amalgamation of all the land previously owned by Taken along with other family members received from the common ancestor i.e. Ramjas. Apart from that Khatoni Paimaish prepared during consolidation of holdings has been produced which proves that the property between 4 branches emanating from Ramjas has been partitioned and their land holdings have been separated. The land measuring 9 kanals and 4 marlas has also been allotted to Taken in Khewat No.270.

(11) In oral evidence produced, it has come on record that Taken and all his three sons had starting living separately and Maya, defendant No.3, daughter of Taken who was married with Rishi, could not pull along with her husband and therefore, came back and started residing with Taken, her father. Wife of Taken had died during the life time of Taken and it was Maya and her children who used to serve Taken. Gianeshwar who has appeared as PW-2, has admitted that Taken during his life time had given to his sons separate land for cultivation as there was dispute between the three brothers and all the three brothers used to reside separately from Taken.

(12) It is also admitted by Om Pal-Plaintiff that Taken was also cultivating Panchayat land on lease. It is further admitted that one of their uncle i.e. Asa Ram had died issueless 22-23 years back and his property had come to the sons of Taken as well as son of Maya i.e. Kuldeep, defendant No.1.

(13) Taken had executed a registered Will Ex.DW-6/A in favour of defendants No.1 and 2, his grand children from Maya (the daughter). The execution of this Will has been found to have been proved by both the Courts below. According to the aforesaid Will Ex.DW-6/A, Taken had bequeathed 1 acre of land to his granddaughter Versha

Rani, defendant No.2 and the remaining land i.e. 40 kanals and 18 marlas in favour of his grandchild Kuldeep son of Maya. In the Will, it is specifically recorded that he has 3 sons, 2 daughters and he has already transferred the land which had fallen to the share of sons along with separate residences and he does not wish to bequeath any further property to his other daughter Smt. Raj Kumari apart from what he has spent on her marriage and gifts at different occasions. It has been further stated that his three sons are out of his control and, although, he is ill but the sons do not want to spend on his treatment. It is further written in the Will that his daughter Maya and her children are taking care while residing with him for approximately 12 years. It is further stated that the aforesaid property is his self-acquired property. The Will has been proved by examining Hansa Ram, the attesting witness apart from examination of the Sub-Registrar.

(14) Further, it has been proved on file that defendants No.1 to 3 filed a suit on the basis of family settlement against Taken, in which Taken filed the written statement admitting the claim of the plaintiff. Taken also appeared in evidence and stated on oath that he admits the claim of the plaintiff in that suit. Thus, a Civil Court judgment and decree was passed on 05.02.1994 declaring defendants No.1 to 3 (herein) as owners in possession of land measuring 48 kanals and 18 marlas. This decree as well as Will is under challenge in this litigation.

(15) Both the Courts have decreed the suit filed by the plaintiff although, the execution of the Will has been held to be proved. However, the Courts have drawn the following conclusions:-

> 1. That 51 kanals and 6 marlas of land is proved to be coparcenary property.
>
> 2. 29 kanals and 8 marlas of land purchased by Taken vide sale deed dated 16.11.1957 is from earnings derived from coparcenary property as Taken was only doing agriculture work and therefore, obviously, the property was purchased from the earnings derived from coparcenary property.
>
> 3. Joint Hindu family coparcenary property cannot be alienated by the Karta in any manner whatsoever without legal necessity which is not proved in the present case.

(16) As noted above, the revenue record which has been produced on file does not prove that the entire property had come to the

share of Taken from Ramjas. In fact, no document has been produced to prove that Ramjas was owner of the land in question. The Jamabandi for the year 1911 onward prove that four sons of Ramjas were owners of 89 bighas and 15 biswas. On the death of Jagna, the land was mutated in favour of Taken and there total joint land holding is 89 bighas and 15 biswas. The land comprised in 4 khewats i.e. 178, 181, 198 and 210 (Shamlat Deh) was mutated in favour of Taken in place of Jagna. However, as per Jamabandi for the year 1939-40, the land of these four branches emanating from Ramjas is reduced to 53 bighas and 7 biswas which continues in the Jamabandi for the year 1943-44. Misal Hakiyat (first Jamabandi after consolidation) which records old and new khasra numbers clearly prove that there was partition between four branches and khewat of Taken was separated. However, on perusal of the old and new khasra numbers, it is apparent that the majority of khasra numbers are not connected with the previous Jamabandi i.e. 1943-44. From 1943-44 to till 1955-56, no Jamabandi has been produced. Still further, as per Naksha Haqdarbar, which has been produced on file, proves that to work out the land measuring 51 kanals 6 marlas of land from 6 different khewats has been amalgamated bearing No.219, 220, 223, 224, 225 and 253.

(17) In the considered opinion of this Court, before a finding can be returned that the property is coparcenary property and it continues to be coparcenary as well as joint Hindu family, it has to be proved that joint Hindu family continues coparcenary is a much narrower body as compared to joint Hindu family. Coparcenary is a creation of law and merely because even if assuming for the argument's sake that the property has been inherited from a common ancestor, coparcenary does not necessarily come into existence. During consolidation of holdings, land of four branches had been separated. It has come in evidence and also recorded in the Will by Taken that he has separated his sons and given them the land and the houses. It has also come on record that Asa Ram, who died issueless, cousin of Taken had left behind 7 acres of land which was succeeded by the plaintiff, defendants No.4 and 5 and others. The disruption in the joint Hindu family stand proved from a narration in the Will as well as statement of Gianeshwar who has appeared on behalf of the plaintiff who admit that the sons of Taken are living separately in their separate houses and Taken had given them land during his life time separately. It has rather come in evidence that Om Parkash, defendant No.4 separated 30 years ago when he was married. Even after the death of their mother, Maya and her children were living with Taken and the

plaintiff or his brothers namely defendants No.4 and 5 did not stay with their father. In the Will, it has also been written that his sons are not taking care of him even when he is ill and Maya and her children are serving him.

(18) In view of the aforesaid, questions of law which have been framed earlier, are required to be answered.

Question No.1

(i) Whether the evidence is required to be pleaded?

(19) As per Order 6 Rule 2 CPC, the pleadings shall contain a statement in concise form of material facts on which the party pleading relies, from his claim or defence as the case may be. The evidence is not required to be pleaded. Both the Courts have held that since the written statement filed by Smt. Maya is silent on this aspect that Taken having independent source apart from income from the co-parcenary property, therefore, the evidence led is beyond pleadings. It will be noted that defendant No.1 had pleaded in his written statement that Taken used to do hard work and was doing business of purchasing and selling the cattles and from the aforesaid income, he purchased the land measuring 29 bighas and 8 biswas. Once, it has been pleaded that the land has been purchased by Taken during his life time, the fact had been pleaded and the evidence was not required to be pleaded. Hence, question No.1 is answered in favour of the defendant-appellant.

Question No.2 & 3

(ii) Whether First Appellate Court is justified in disposing of the appeal in a cursory/superfluous manner?

(iii) Whether First Appellate Court while deciding the appeal should be liberal in granting opportunity for additional evidence at the same time being governed by the provisions of Order 41 Rule 27 of the Code of Civil Procedure, if the document sought to be produced is of unimpeachable credence?

(20) As per Section 96 of the Code of Civil Procedure, learned First Appellate Court is required to re-appreciate the pleadings and the evidence available on the file. Learned First Appellate Court being last Court of finding of fact is to re-decide the suit keeping in view the reasons given by the trial Court for its decision. Learned First Appellate Court is not justified in disposing of the first appeal in a superfluous manner. This is against the mandate of law. In the present

case, learned First Appellate Court has chosen to decide the appeal without referring to the entire evidence particularly documentary evidence produced on the file and analyze the same. It was incumbent upon the First Appellate Court to decide the appeal after discussing the entire evidence produced by the parties on record.

(21) Still further, in the considered opinion of this Court, the provision for additional evidence under Order 41 Rule 27 has been provided in the statute for permitting the parties to lead additional evidence with the permission of the Court. Of course, the additional evidence can be permitted only within the parameters as prescribed under Order 41 Rule 27 of the Code of Civil Procedure. However, learned First Appellate Court is not expected to dismiss the applications for additional evidence by giving flimsy reasons. It has been noticed that sometime, the additional evidence sought to be produced goes to the route of the case but learned First Appellate Court dismisses the application while relying upon one technicality or the other. The Courts have been constituted to do justice between the parties. Effort must be made by the Courts to do substantial justice while following the prescribed procedure under the law. However, the procedure cannot be used to scuttle the justice. The procedures have been laid down to help the Court to do substantive justice between the parties. The procedures are handmade for justice. Accordingly, questions No.2 and 3 are also answered in favour of the defendant-appellant.

Question No.4

> (iv) Whether the Courts before recording a finding that the property is coparcenary joint Hindu family must carefully examined the old and new revenue record (before and after consolidation of holdings) and arrive at a finding that the property is connected and there is no scope for doubt about identification of the property claimed to be ancestral?

(22) Before recording that the property is coparcenary, it is necessary for the party which alleges the property to be coparcenary, proves that a coparcenary existed and is continuing till filing of the suit. For establishing coparcenary property, it is necessary that the old and new khasra numbers (pre and post consolidation of holdings) are properly connected and identification of the land has been established beyond doubt. It is for this reason provision has been made in the High Court Rules and Orders for appointing a revenue official and get an

excerpt of the revenue record prepared. No doubt, the production of the excerpt is not necessary but in absence of excerpt and examination of the revenue official, the Court or the party must produce on file sufficient record allowing the Court to compare the records so as to identify the land which has claimed to be co- parcenary property. As noted above on careful examination of Naksha Haqdarbar and Misal Hakiyat (first Jamabandi after consolidation), it is apparent that more than 80% of the old khasra numbers do not matching with new khasra numbers which have been allotted after consolidation. The Jamabandi for the year 1955-56 bear testimony to the aforesaid fact. Still further, the Naksha Haqdarbar clearly establishes that the land of 6 different khewat numbers noted above has been amalgamated, however, the revenue record prior to the consolidation connected to the aforesaid all 6 khewats has not been produced.

(23) Hence, question No.4 is also answered in favour of the defendant-appellant.

Question No.5

(v)Whether the Courts are justified in drawing presumption that the property purchased by the father of the parties is from the earning derived from the ancestral land and common nucleus and hence, the property purchased is also co-parcenary property?

(24) As regards question No.5, it is well settled that the property which has been purchased by a person cannot be presumed to be purchased from nucleus/common funds of joint Hindu family unless there is evidence on the file to support the conclusion. It has been proved on file that 29 kanals and 4 marlas was purchased by Taken on 16.11.1957. It has come in evidence that Taken was hard working person who was not only cultivating his own land but was also taking the land on lease. Still further, in the Will, Taken has specifically stated that the land which is sought to be bequeathed is his self-acquired property. Apart therefrom, it has come in evidence that Taken was also trading in cattles apart from giving the money on loan repayable with interest. Before the learned First Appellate Court, old bahis (notebooks) written by Taken were sought to be produced in evidence but the learned First Appellate Court refused to admit the aforesaid evidence. In any case, once there cannot be any presumption that the property purchased was from common nucleus or the joint Hindu family funds, the plaintiff has failed to lead any unimpeachable evidence to establish that fact. The Courts have presumed this fact

without reliable evidence on file.

(25) In view of the aforesaid, question No.5 is also answered in favour of the defendant-appellant.

Question No.6

(vi) Whether the argument of learned counsel for the parties while defending interest of his client for lesser/a part of relief can operate as an estoppel in further appeal while claiming the entire relief claimed in the suit?

(26) A plea taken by learned counsel for the party at the time of arguments cannot operate as estoppel and debar the party from raising an argument based upon the pleadings. A counsel while arguing the case is permitted to raise all arguments which are permissible in accordance with the case set up. Sometime, the argument is raised by bifurcating the claims made in order to at least convince the Court with regard to a part of the relief. Such argument cannot be construed as relinquishment of remaining claim made in the suit/litigation. The argument of learned counsel praying for a part of the relief claimed in the suit does not operate as estoppel while claim entire relief as claimed in the pleadings unless counsel on the instruction of the party or the party himself has relinquished a part of the claim. Hence, the argument of learned counsel for the plaintiff that in para 16 of the judgment of the learned First Appellate Court, learned counsel has submitted that the land purchased is at least self-acquired property cannot be taken as an admission of the remaining property to be coparcenary property.

(27) Hence, question No.6 is also answered in favour of the defendant-appellant.

(28) Now let us take up the appeal filed by the plaintiff. The plaintiff has challenged the concurrent findings of the Courts below on the genuineness of the registered Will Ex.DW6/A. Learned counsel for the plaintiff-appellant has submitted that the aforesaid Will is attested by three witnesses namely Sube Singh, Nambardar, Nathu Ram Nambardar and Hansa Ram. However, it has come in evidence of Jai Parkash and Mahender that no person in the name of Hansa Ram son of Nema lives in village.

(29) On careful examination of evidence of Hansa Ram who has appeared, it is apparent that he settled in village Atterna, from where

the parties to this litigation belongs, in November, 1992 when he started working as a Mason for construction of G.T. Road by the PWD Department and started residing in a thatched hut. On appreciation of evidence, both the Courts have found that evidence of Hansa Ram is reliable.

(30) Learned counsel for the appellants could not draw attention of the Court to any substantive fact impeaching the credibility of the attesting witness Hansa Ram.

(31) In view of the aforesaid discussion, RSA No.3565 of 2005 is allowed whereas the appeal filed by the plaintiff being RSA No.3835 is dismissed.

CM-9186-C-2015 in RSA-3565 of 2005

(32) Application is for directing the defendants-appellants to deposit mesne profits in respect of the land in dispute during the pendency of this appeal.

(33) Application is disposed of in terms of the main judgment.

(34) All the pending miscellaneous applications, if any, shall stand disposed of accordingly.

Shubreet Kaur