

*** HONOURABLE SRI JUSTICE T.SUNIL CHOWDARY**

+ CIVIL REVISION PETITION No.3262 of 2013

% Date: 10.3.2017

K.Arjuna Rao, S/o.Parasuramaiah

**... Revision Petitioner/
Defendant**

AND

\$ Katuru Yeukondalu, S/o.Parasuramaiah

**... Respondent/
Plaintiff**

! Counsel for revision petitioner : Sri P.Gopal Das

^ Counsel for respondent : Sri Srinivas Emani

< GIST:

> HEAD NOTE:

? CASES REFERRED:

- 1) 1996 (3) Civil LJ 135 (Kerala)
- 2) AIR 1957 Pat 145
- 3) AIR 1979 Pat 174
- 4) AIR 1995 Guj 166
- 5) AIR 1964 SC 136
- 6) AIR 1996 Mad 408
- 7) AIR 2004 Mad 243
- 8) 2008 (6) ALT 314
- 9) 2001 (4) CCC 415 (Bom.)

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY**CIVIL REVISION PETITION No.3262 OF 2013****ORDER:**

This civil revision petition is filed under Article 227 of the Constitution of India challenging the order dated 12.6.2013 passed on Memo in O.S. No.28 of 2006 on the file of the Court of Junior Civil Judge, Gannavaram.

2. The petitioner is the defendant and the respondent is plaintiff in O.S. No.28 of 2006. For the sake of convenience, the parties are hereinafter referred to as they are arrayed in the suit.

3. The plaintiff filed the suit for specific performance basing on the agreement of sale dated 09.7.2000 and consequential perpetual injunction. The defendant filed written statement denying the very nature of the document dated 09.7.2000. The plaintiff filed Memo before the trial court with a prayer to direct the defendant to begin the trial for which the defendant filed objections. However, the trial Court over-ruled the objections and directed the defendant to begin the trial. Hence, the defendant filed the present revision petition.

4. The contention of learned counsel for the petitioner-defendant is four fold: (1) the finding of the trial court that the defendant admitted execution of the document, therefore he has to begin the trial, at the first instance, is factually incorrect and legally unsustainable; (2) when the burden of proof lies on the plaintiff in respect of some of issues, the trial court ought not to have directed the defendant to begin the trial; (3) the trial court failed to consider that the defendant has been disputing the very

nature of the document dated 09.7.2000; and (4) Order XVIII Rule 1 of CPC confers a right on the defendant to begin the trial if he/she so wishes and there is no obligation on the part of the defendant to begin the trial. ***Per contra***, learned counsel for the respondent-plaintiff submitted that having admitted the execution of the document dated 09.7.2000, the burden of proof lies on the defendant to establish that the said document is not legally enforceable. He further submitted that the burden of proof lies on the defendant on the main issue; therefore he has to begin the trial. He also submitted that there are no grounds, which warrant interference with the impugned order passed by the trial court.

5. The edifice of civil suit is built on pleadings. Pleadings form bedrock in a civil suit. Order VI of CPC deals with pleadings. The word 'pleading' encompasses in it all material facts, which give rise for cause of action. Pleading is nothing but a precise statement of material facts. It is the primary duty of the plaintiff to plead all material facts and if such facts are proved, he is entitled for the relief sought. In view of the provisions of Order VII of CPC, a duty is cast on the defendant to specifically deny or traverse the material facts pleaded by the plaintiff. Mere or general denial of the pleadings by the defendant itself is not sufficient to demolish the case of the plaintiff. The defendant has to specifically deny the material facts pleaded in the plaint in order to substantiate his/her stand. It is needless to say that any amount of oral or documentary evidence, without a pleading, is of no avail.

6. Order XIV of CPC deals with framing of the issues. While framing the issues the court has to keep in mind the scope of Order XVIII Rule 1 of CPC. The underlying object of Order XIV of

CPC is mainly to focus on the *lis* involved in the suit, which is the basis for framing of the issues for adjudication, thereby to enable the parties to adduce evidence to substantiate their stand. A perusal of Order XVIII Rule 1 of CPC clearly demonstrates that, as a general rule, the plaintiff has the right to begin the suit, exception is the right of the defendant to begin. Who has to begin the suit depends upon the facts and circumstances of each case. There is no obligation on the part of the defendant to begin the suit first. Though Order XVIII Rule 1 of CPC does not obligate the defendant to begin the trial, the defendant has to come into the witness box at the first instance, if the burden of proof lies on him on all the issues. Even when burden of proof lies on the defendant on the main issue, he has to begin the trial, though the burden of proof on the other issues lies on the plaintiff. However, Rule 3 of Order XVIII of CPC enables the party who begins the suit to reserve his or her right to adduce rebuttal evidence.

7. It is needless to say that Sections 101 to 104 of the Evidence Act deal with burden of proof. It is a settled principle of law that burden of proof lies on the person, who would fail if no evidence is adduced on either side. The burden of proof is always static and does not shift. If the plaintiff discharges the burden cast on him, the onus of proof shifts on the defendant to substantiate the stand taken by him. The onus of proof shifts from one party to the other party depending upon facts and circumstances of each case. If both parties adduce evidence, the onus of proof loses its significance. The basis to begin the suit depends upon whom the burden of proof lies on the main issue.

8. In view of the principles enunciated in **Chandralatha v Annamallai Finance Ltd.**¹, **Ramesh Chandra v H.D. Jain College**², **Ram Narain Prasad v Seth Sao**³ and **Keshavlal Durlabhasinbhai's firm v Shri Jalaram Pulse Mills**⁴, the defendant has to begin the suit in the following circumstances: (1) if the defendant unconditionally admits the material facts pleaded by the plaintiff, (2) when any fact is especially within the knowledge of the defendant in view of Section 106 of the Indian Evidence Act, (3) when the defendant pleads certain additional facts, and (4) if the defendant denies the suit claim, such denial is without any substance, in view of the other admitted facts.

(1) In **Addagada Raghavamma v Addagada Chenchamma**⁵, the Hon'ble Supreme Court held at paragraph No.15 (Manupatra) as follows:

15. ... There is an essential distinction between burden of proof and onus of proof; burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.

(2) In **Chinnayyan v Jayaraman**⁶, the Madras High Court held at Paragraph No.7 (Manupatra) as follows:

7. ... Having thus considered the two reliefs, viz., the relief claimed in the suit as well as the counter-claim made in the written statement, with reference to the pleadings of the both the parties, it is all well to say that both the reliefs are different and distinct and the plaintiff and the defendant are put on separate onus to prove the said reliefs by adducing legal evidence. But, however, pursuant to the Order 18, Rule 1 of the Code of Civil Procedure, **since the plaintiff has come forward with the suit with a specific relief,**

¹ 1996 (3) Civil LJ 135 (Kerala)

² AIR 1957 Pat 145

³ AIR 1979 Pat 174

⁴ AIR 1995 Guj 166

⁵ AIR 1964 SC 136

⁶ AIR 1996 Mad 408

it is for him to discharge his onus first and then, the defendant is entitled to adduce rebuttal evidence, which may sometimes or if allowed by the trial Court, include the first issue framed for the purpose of trial regarding the counter-claim made in the written statement.

(emphasis supplied)

9. To substantiate the argument, learned counsel for the plaintiff has relied upon the judgment in **Mrs.Bama v Rukiya Bivi**⁷, wherein the Madras High Court held at paragraph No.6 as follows:

6. If the defendant admits material allegations in the plaint, the defendant may begin. However, the plaintiff must prima facie satisfy that there are reasons to believe that particular thing is within the knowledge of the defendant. ...

10. The learned counsel for the defendant submitted that in a civil suit, evidence has to be recorded in a comprehensive manner touching all the issues but it cannot be split issue-wise. He further submitted that the defendant never admitted execution of agreement of sale dated 09.7.2000 and hence no legal obligation is cast on him to begin the trial. In support of his contentions, he has drawn attention of this court to the following decisions:

1) **Sundaragiri Ramulu v Sundaragiri Siddi Rajaiah @ Siddi Raju**⁸,

wherein this court held at Paragraph Nos.4 and 5 as follows:

4. In a suit for partition, the burden squarely rests upon the plaintiff, not only to prove, that the suit schedule property is liable to be partitioned, but also to establish his entitlement for a share, in it. The denial by the defendant, in such a suit, of any plea raised by the plaintiff, would only lead to a necessity, to undertake trial. The mere fact that the defendant had pleaded prior partition of the properties, does not alter the sequence, provided for, under Order 18 C.P.C.

5. The contention of the petitioner, that the respondent must be required to discharge his burden, as regards issue No. 1, is equally untenable. Issues are framed by the Trial Court, based upon the pleadings of the parties. While the burden to prove some issues may rest upon the plaintiff, the one, as regards the others, may be upon the defendant. The evidence in a suit is adduced by the parties, and recorded by the trial Court, in a comprehensive manner, touching all the issues. The evidence that is adduced by a party, would take care, not only of the issues, on which the burden is upon him, but also, those, as regards of which, the burden is, on the other party. Oral or documentary

⁷ AIR 2004 Mad 243

⁸ 2008 (6) ALT 314

evidence cannot be split, with reference to each issue. Therefore, the application filed by the petitioner was untenable, and the Trial Court had rightly dismissed it.

2) **Haran Bidi Suppliers v M/s.V.M. & Co.**⁹, wherein Bombay

High Court held at Paragraph Nos.2, 3 and 4 as follows:

2. ... The only reason indicated in the said order is that burden is cast on the plaintiff to prove only four issues out of total 14 issues and, therefore, the defendants have been directed to enter the witness-box. According to the non-applicant/plaintiff, the said order was in terms of Order 18 Rule 1. Order 18 Rule 1 reads thus:

“The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.”

3. On the plain language of the said provisions, it would appear that it is only an enabling provision entitling the defendant of right to begin. In my view, this provision cannot be interpreted to mean that the Court would be competent to direct the defendant to enter the witness-box before the plaintiff and lead evidence in support of its case. In the circumstances, the impugned order passed by the Trial Court cannot be sustained in law.

11. Let me consider the facts of the case on hand, in the light of the above legal principles. Basing on the pleadings of both parties, the trial court framed the following issues:

1) Whether the agreement of sale deed dated 09.7.2006 (*sic*, 2000) was executed as a security for payment of Rs.10,000/- by the defendant?

2) Whether the plaintiff is in possession and enjoyment of the plaint schedule property?

3) Whether the suit is bad for non-joinder of proper and necessary party?

4) Whether the plaintiff is entitled to specific performance of agreement of sale dated 09.7.2000 as prayed for?

5) Whether the plaintiff is entitled to injunction as prayed for?

6) To what relief?

12. Issue Nos.1 and 4 are interrelated to each other. Issue No.4 is the main issue in the suit when compared to issue No.1. On issue Nos.2, 3 and 4, the burden of proof lies on the plaintiff. It is

⁹ 2001 (4) CCC 415 (Bom.)

the case of the plaintiff that the defendant executed the agreement of sale in his favour on 09.7.2000. It is the case of the defendant that he executed a document dated 09.7.2000 as a security and not the agreement of sale. The defendant specifically and unequivocally denied that he never executed agreement of sale. The plea of the defendant is that he executed a deed as a security and not the agreement of sale. A perusal of the written statement *prima facie* reveals that the defendant has been challenging the very nature of the agreement of sale. The very basis for the plaintiff to file the suit is the document in question dated 09.7.2000. The defendant never admitted the document in question as an agreement of sale, as pleaded by the plaintiff. Mere admission of execution of a document does not amount to admission of the nature of the document. The real controversy between the parties in the suit is whether the document dated 09.7.2000 is an agreement of sale or a deed of security. In order to succeed the suit, the plaintiff has to *prima facie* establish that the document dated 09.7.2000 is an agreement of sale. If the plaintiff discharges the burden of proof cast on him, the onus of proof shifts on the defendant to establish that the document dated 09.7.2000 is not an agreement of sale and it is only a deed of security. This is the real test to be followed by the trial court before directing the one of the parties to the suit to begin the trial.

13. The learned counsel for the plaintiff strenuously submitted that the defendant admitted the execution of the document; therefore he has to begin the trial. The finding of the trial court is that the defendant himself admitted execution of the document dated 09.7.2000; therefore, he has to begin the trial.

14. The trial court, in its order, made the following observation, *“No doubt with regard to the hearing of 1st issue the burden rests on the plaintiff. Unless the defendant discharges his prima facie burden of proving alleged execution of said agreement of sale as a security, it may be held, the burden will be shifted to the plaintiff. As such the direction can be given to the defendant to commence the trial, in view of the discussion and objections made supra.”* A perusal of the extracted portion gives an impression even to an ordinary prudent man that the burden of proof of lies on the plaintiff on issue No.1. Whether the trial court is justified in directing the defendant to begin the trial, having come to such a conclusion, is one of the points to be considered by this court. By overruling the objection of the defendant on the Memo, though not directly by necessary implication, the trial court has accepted the contention of the plaintiff that the document dated 09.7.2000 is an agreement of sale and not a security bond, even before commencement of trial, which is impermissible under law. The finding of the trial court, as referred supra, is contrary to Order XVIII of CPC. Had the defendant admitted the execution of *“agreement of sale”* dated 09.7.2000, the burden of proof lies on the defendant, but, the defendant denied the very nature of the document itself. Since the defendant denies the very nature of the suit document itself, the burden of proof of lies on the plaintiff that the suit document is an agreement of sale dated 09.7.2000 executed by the defendant. Once the plaintiff discharges the burden of proof cast on him then only the onus of proof shifts on the defendant to prove his stand. Leave that apart, the trial court has not considered the scope of issue No.4, which is the core issue in the suit. Undoubtedly, the burden of proof lies on the plaintiff

on issue No.4. Though issue Nos.2 and 3 are ancillary to issue No.4, the burden of proof lies on the plaintiff on these two issues. Out of four issues framed by the trial court, the burden of proof lies on the plaintiff on three issues, which includes the core issue. In such circumstances, directing the defendant to begin the trial is contrary to Order XVIII Rule 1 of CPC and Sections 101 to 104 of Indian Evidence Act. The trial court has not expressed any opinion on whom the burden of proof lies on issue Nos.2, 3 and 4.

15. Having regard to the facts and circumstances of the case and also principle enunciated in the cases cited supra, the Memo filed by the plaintiff is not sustainable either on facts or in law. While exercising the jurisdiction under Article 227 of the Constitution of India, this court can interfere with the order passed by the trial court when there is illegality or irregularity apparent on the face of the record. If the order of the trial court is allowed to stand, certainly it would amount to miscarriage of justice. Hence, it is liable to be set aside.

16. In the result, the civil revision petition is allowed, setting aside the order dated 12.6.2013 passed on Memo in O.S. No.28 of 2006. Consequently, the Memo filed by the plaintiff in O.S. No.28 of 2006 on the file of the Court of Junior Civil Judge, Gannavaram is hereby rejected. Miscellaneous petitions, if any pending in this civil revision petition shall stand closed.

T.SUNIL CHOWDARY, J.

Date: 10.3.2017

NOTE:

L.R. Copy be marked : YES / NO
(By order)
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