

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL REVISION PETITION No.1396 OF 2016

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, is filed challenging the order dated 25.1.2016 in I.A. No.737 of 2014 in O.S. No.241 of 2012 on the file of the Court of Principal Senior Civil Judge, Mahabubnagar, wherein and whereby the petition filed by the plaintiff under Order XVIII Rules 1 and 3 read with Section 151 of CPC to direct the defendants to lead their evidence first reserving the right to lead his evidence thereafter was dismissed.

2. The petitioner is plaintiff and respondents are defendants in O.S. No.241 of 2012. For the sake of convenience, the parties to this revision petition will hereinafter be referred to as they are arrayed in the suit.

3. The learned counsel for the plaintiff seriously attacked the order under challenge on the following grounds: (1) the trial court failed to consider that mere filing of chief examination affidavits of P.Ws.1 and 2 by itself is not a valid ground to dismiss the petition filed under Order XVIII Rules 1 and 3 of CPC, without considering the other relevant facts; (2) the trial court failed to consider that the defendants admitted the title of the plaintiff over the suit schedule property and therefore, the defendants have to begin the suit in view of Order XVIII Rule 1 of CPC; (3) the trial Court ought to have allowed I.A. No.737 of 2014 as the defendants neither admitted nor denied the recitals of the notice issued to them under Order XII Rules 2 and 8 of CPC; and (4) if the order of the trial

court is allowed to stand, certainly it would amount to miscarriage of justice; therefore, it is a fit case to allow the revision petition by invoking the jurisdiction under Article 227 of the Constitution of India. ***Per contra***, learned counsel for defendant Nos.1 and 2 supported the impugned order on the following grounds: (1) I.A. No.737 of 2014 filed under Order XVIII Rules 1 and 3 is not maintainable as the plaintiff filed chief examination affidavits of P.Ws.1 and 2; (2) the finding of the trial court that the defendants did not admit the entire case of the plaintiff is sustainable either on facts or in law; (3) on most of the issues the burden of proof lies on the plaintiff, therefore he has to begin the trial, in view of Order XVIII Rule 1 of CPC; and (4) there is no illegality, irregularity or impropriety in the order passed by the trial court to warrant interference of this Court.

4. A perusal of the record reveals that originally the plaint was presented on the file of the court of Senior Civil Judge, Narayanpet, in the year 2009 and it was numbered as O.S.No.17 of 2009. The suit was filed against the defendant Nos.1 to 4 to declare the plaintiff as owner of the suit schedule property admeasuring an extent of Ac.10.88 cents in survey No.60 of Thirumalampura village, Daulatabad Mandal, Mahabubnagar District, recovery of the possession and mesne profits. The defendant Nos.1 to 3 filed written statement in the year 2009 itself. Subsequently the suit was transferred to the court of Principal Senior Civil Judge, Mahabubnagar and renumbered as O.S.No.241 of 2012. The defendants have taken a specific plea, in the written statement, that defendant Nos.2 to 4 purchased the suit schedule property from the plaintiff. After framing of the issues, the plaintiff filed

chief examination affidavits of P.Ws.1 and 2. Pending cross-examination of P.Ws.1 and 2, the plaintiff issued notice to the defendants under Order XII Rules 2 and 8 of CPC directing them to admit the facts mentioned in the plaint and also to cause production of certain documents. The defendants did not issue any reply either admitting or denying the facts. At that point of time, the plaintiff filed I.A.No.737 of 2014 under Order XVIII Rules 1 and 3 of CPC with a prayer to direct the defendants to lead their evidence first by reserving the right to lead his evidence later. During the course of enquiry, on behalf of the plaintiff, Exs.P1 to P80 were marked. The trial court, after considering material available on record, dismissed I.A.No.737 of 2014. Hence, the present revision.

5. The predominant contention of the learned counsel for the defendants is that I.A.No.737 of 2014 is not maintainable in view of filing of chief examination affidavits of P.Ws.1 and 2. The learned counsel for the plaintiff submitted that there is no bar to file application under Order XVIII Rules 1 and 3 of CPC even after filing of chief examination affidavits, in view of changed circumstances. To substantiate the argument he has drawn the attention of this court to the decisions in **Kamal Kumar Modi v Krishan Saigal**¹, **Nirajan Nath v Rabindra Nath Sharma**² and **Madan Mohan v Iswarchand**³. As per the principle enunciated in **Kamal Kumar Modi** (1 supra), the new amended of Order XVIII Rule 4 of CPC requiring the parties to file chief examination affidavits by the plaintiff is not a valid ground to dismiss the petition filed under

¹ AIR 2003 Del 349

² AIR 2011 Ori 190

³ 2014 (2) RCR (Rent) 136

Order XVIII Rules 1 of CPC, without looking into the other aspects of the case. The same principle was reiterated in **Niranjan Nath** and **Madan Mohan** (2 and 3 supra).

6. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am unable to countenance the submission made by the learned counsel for the defendants that the petition filed under Order XVIII Rules 1 and 3 of CPC, after filing of the chief examination affidavits of P.Ws.1 and 2, is liable to be dismissed at the threshold.

7. The predominant contention of the learned counsel for the plaintiff is that as the defendants have admitted the title of the plaintiff over the suit schedule property, there is legal obligation on the part of defendants have to begin the trial. The learned counsel for the defendants submitted that defendant Nos.2 to 4 have purchased the suit schedule property under the private sale deeds from the plaintiff, which itself clearly indicates that the defendants have not admitted the title of the plaintiff as on the date of filing of the suit.

8. In support of his contention, the learned counsel for the plaintiff relied upon the decisions in **K.Chengalraya Chetty v Gomatheswari**⁴, **Sandip Sankarlal Kedia v Pooja Sandip Kedia**⁵, **Asha Kapoor v Hari Om Sharda**⁶, **Gautam Sarup v Leela Jetly**⁷, **Jalal and Sons v Sita Bai (died) by L.Rs**⁸ and **Shikharchand v Bari Bai**⁹. As per the principle enunciated in the cases cited supra, admitted facts

⁴ 2015 (1) ALT 42 = 2014 (6) ALD 236

⁵ AIR 2014 Bom 26

⁶ 2011 (7) RCR (Civ) 1876 (Del)

⁷ (2008) 7 SCC 85

⁸ 2001 (2) ALD 547 = 2001 (2) ALT 683

⁹ AIR 1974 MP 75

need not be proved, except where they are specially required to be proved otherwise than by such admission, in view of Section 58 of the Indian Evidence Act. In civil trials, admitted facts do not call for evidence as they do not call for framing of issues. Admitted facts cease to be relevant facts in the determination of the issue before the Court.

9. In **Asha Kapoor v Hari Om Sharda**¹⁰, the Delhi High Court held at Paragraph Nos.18 and 19 as follows:

18. Order 8 Rule 5 of the Code is known as doctrine of non-traverse which means that where a material averment is passed over without specific denial, it is taken to be admitted. The rule says that any allegation of fact must either be denied specifically or by necessary implication or there should be a statement that the fact is not admitted. If the plea is not taken in that manner, then the allegation should be taken to be admitted.

19. Supreme Court in **M. Venkataraman Hebbar (D) By L.Rs v M. Rajgopal Hebbar**, 2007 (5) SCALE 598, observed; "Thus, if a plea which was relevant for the purpose of maintaining a suit had not been specifically traversed, the Court was entitled to draw an inference that the same had been admitted. A fact admitted in terms of Section 58 of the Evidence Act need not be proved."

10. In **Maria Margarida Sequeria Ferrandes v Erasmo Jack De Sequeria**¹¹, the Hon'ble apex Court held at Paragraph No.53 that, *"Pleadings are the foundation of litigation. In pleadings, only the necessary and relevant material must be included and unnecessary and irrelevant material must be excluded. Pleadings are given utmost importance in similar systems of adjudication, such as, the United Kingdom and the United States of America"*.

11. In **A.Shanmugam v Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam**¹², the Hon'ble apex Court held at Paragraph Nos.26 to 29 as follows:

¹⁰ 2011 (7) RCR (Civ) 1876 (Del)

¹¹ (2012) 5 SCC 370

¹² (2012) 6 SCC 430

26. As stated in the preceding paragraphs, the pleadings are the foundation of litigation but experience reveals that sufficient attention is not paid to the pleadings and documents by the judicial officers before dealing with the case. It is the bounden duty and obligation of the parties to investigate and satisfy themselves as to the correctness and the authenticity of the matter pleaded.

27. The pleadings must set forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the court must carefully look into it while deciding a case and insist that those who approach the court must approach it with clean hands.

28. It is imperative that the Judges must have complete grip of the facts before they start dealing with the case. That would avoid unnecessary delay in disposal of the cases.

29. Ensuring discovery and production of documents and a proper admission/denial is imperative for deciding civil cases in a proper perspective. In relevant cases, the courts should encourage interrogatories to be administered.

12. In **Purastam alias Pusosottam Gaigouria v Chatru alias Chatrubhuja Gaigouria**¹³, the Orissa High Court held at Paragraph No.6 as follows:

6. That an erroneous decision relating to 'the right to begin' in clear breach of the provisions of Rules 1 and 2 of Order 18, CPC causes irreparable injury to the party was noted in *Balakrishna Kar v. H. K. Mahatab*, AIR 1954 Ori 191, where it was said :

"If we do not interfere at this stage it may well be that the point will again be agitated at a later stage necessitating an order for re-trial. Such a course would involve the parties in considerable expense and would also entail delay which can be avoided by our interference at this stage."

13. In **Jayaram Sahoo @ Behera v Banamali Sahoo**¹⁴, the Orissa High Court held at Paragraph No.10 as follows:

10. In view of the above decisions, it is seen that only when the defendant admits the allegations made by the plaintiff in the plaint, but has pleaded a different set of additional facts, the onus of proving such facts lying on him, the exception of Order 18, Rule 1 C.P.C. providing that the defendant should begin the evidence first would be applicable, otherwise, the general principle as envisaged under Order 18, Rule 1 C.P.C. shall be followed.

¹³ AIR 1992 Ori 172

¹⁴ 2012 (2) Orissa LR 681

14. In **Bajaj Auto Ltd., v TVS Motor Company Ltd.**¹⁵, a Division Bench of the Madras High Court held at Paragraph No.32 as follows:

32. Burden of proof vis-a-vis onus of proof: Burden of proof generally lies on a party who asserts a particular fact. In other words, it would be on a party whose suit would fail, if no evidence was let in. Onus of proof by a party would cease the moment opposite party admits the transaction. Burden of proof on the pleadings of a party, never shifts to the other party. The initial burden of proving a particular fact is always on the party who asserts it. When he produces evidence in support of his statement, onus would shift on the opposite party to adduce rebutting evidence to meet the case made out by the other party. In civil cases, onus of proof is never fixed permanently, but it would fluctuate very frequently.

15. In **Firm Srinivas Ram Kumar v Mahabir Prasad**¹⁶, the Hon'ble apex court held at paragraph No.9 as follows:

9. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.

16. In **Shikharchand v Bari Bai**¹⁷, the Madhya Pradesh High Court held at Paragraph No.9 as follows:

9. The next contention of the learned counsel for the appellants is that the plaintiff cannot succeed on a case not pleaded by him and that the admissions for basins a judgment under Order 12, Rule 6 must relate to facts stated in the plaint itself. As defined in section 17 of the Evidence Act an admission is a statement oral or documentary which suggests any inference as to any fact in issue or relevant fact. From the language of Order 12, Rule 6 of the Code of Civil Procedure it is clear that it is open to the Court to base a judgment on admission on the pleadings or otherwise. The

¹⁵ 2010 (5) LW 454

¹⁶ AIR 1951 SC 177

¹⁷ AIR 1974 MP 75

word "otherwise", in the said provision clearly indicates that it is open to the Court to base the judgment on statements made by a party not only in the pleadings but also de hors the, pleadings. Such admissions may be made either expressly or constructively.

17. The decision in **Keshavlal Durlabhsinhbhai's Firm v Jalaram Pulse Mills**¹⁸ deals with scope of Order X Rule 2 and Order XIV Rule 1 of CPC. This decision is no way helpful to the plaintiff.

18. The decision in **Management of Borpukhurie Tea Estate v Presiding Officer, Industrial Tribunal, Assam**¹⁹ deals with Section 33(2)(b) of the Industrial Disputes Act, 1947, therefore this decision is no way helpful to the plaintiff's case.

19. The decision in **R.V.E. Venkatachala Gounder v Arulmigu Viswesaraswami and V.P. Temple**²⁰ deals with scope of Section 100 of CPC as well as Order XIII Rule 4 of CPC; therefore, this decision also is no way helpful to the plaintiff.

20. In **Asha Kapoor v Hari Om Sharda**²¹, the Delhi High Court held at Paragraph Nos.10 to 12 as follows:

10. Present petition has been filed under Article 227 of the Constitution of India. It is well settled that jurisdiction of this Court under this Article is limited.

11. In *Waryam Singh v Amarnath*, AIR 1954 SC 215, the court observed:

This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in '*Dalmia Jain Airways Ltd. v Sukumar Mukherjee*', AIR 1951 Cal 193 (SB) (B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

12. In light of principles laid down in the above decision, it is to be seen as to whether present petition under Article 227 of the Constitution of India against impugned order is maintainable or not.

¹⁸ AIR 1995 Guj 166

¹⁹ (1978) 2 SCC 667

²⁰ (2003) 8 SCC 752

²¹ 2011 (7) RCR (Civ) 1876 (Del)

21. In **Bir Babu v Raghubar Babu**²², the Patna High Court held at Paragraph No.2 that, “... .. *such power (under Section 115 of CPC) can be exercised to revise interlocutory orders of the Courts below in which the conditions of Clauses (a), (b) and (c) of Section 115 of CPC, are satisfied.*”

22. Let me consider the facts of the case on hand in the light of above legal principles.

23. It is the case of the plaintiff that he is the owner of the suit schedule property. It is the case of the defendants that they have purchased the suit schedule property from the plaintiff through his sister, Sonu Bai, under private sale deeds, and ever since they have been in possession and enjoyment of the same. Even as per the case of the plaintiff, the defendants have been in possession and enjoyment of the suit schedule property. The entire case revolves around whether the defendants have admitted the ownership of the plaintiff as on the date of the filing of the suit or subsequent thereto.

24. Basing on the pleadings of the both parties, the trial court framed the following issues, on 15.2.2010, which read as follows:

1. Whether the plaintiff is entitled to ask for declaration of his title over suit land and entitled for restoration of possession of suit land by evicting the defendants and any other?
2. Whether the plaintiff is entitled for perpetual injunction in restraining the defendants from their interference?
3. Whether the plaintiff is entitled for mesne profits as prayed for?
4. Whether the defendants are rightful purchasers of suit land from the plaintiff under unregistered sale deed and since then they are under bona fide possession and is not liable to be evicted?
5. To what relief?

²² AIR 1947 Pat 469

25. In **Haran Bidi Suppliers v M/s.V.M. & Co.**²³, the Bombay High Court held at Paragraph Nos.2 and 3 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.

26. As per the principle enunciated in the case cited supra, a party to the suit, who has to prove most of the issues, has to begin the trial.

27. A perusal of the above issues makes it clear that on issue Nos.1 to 3 the burden of proof lies on the plaintiff whereas, on issue No.4 the burden of proof lies on the defendants. It is needless to say that the burden of proof is always static. The plaintiff is not entitled for the relief of declaration, without establishing his title in respect of the suit schedule property, much less as on the date of filing of the suit, by preponderance of probabilities. It is a settled principle of law that the plaintiff is not entitled for the relief of declaration basing on the laches or weaknesses in the case of the defendants. Viewed from any angle, out of four issues framed by the trial court, the burden of proof lies on the plaintiff on three

²³ 2001 (4) CCC 415 (Bom.)

issues, which includes the core issue i.e., issue No.1. In such circumstances, the defendants cannot be directed to begin the trial, which is contrary to Order XVIII Rule 1 of CPC and Sections 101 to 104 of the Indian Evidence Act.

28. It is the case of the plaintiff that the defendants have admitted his case, therefore the defendants have to come into the witness box at the first instance. Once the defendants admit the case of the plaintiff, the question of framing the issues does not arise. The court will frame an issue when a material proposition of fact or law is affirmed by one party and denied by the other.

29. In order to appreciate the contention of the plaintiff, this court scanned the written statement filed by the defendant Nos.1 to 3. A perusal of the written statement clearly demonstrates that, *"... it is a fact that the plaintiff was the Pattadar for the suit land, ..."*. The learned counsel for the plaintiff mainly stressed on this sentence and argued as if the defendants admitted the entire case of the plaintiff.

30. In paragraph No.6 of the written statement, the defendants have taken the stand which reads as under:

6. "... ... further defendant No.1 submit that, it is an admitted fact that, the plaintiff is well educated and how it is going to believe that the plaintiff signed on the blank paper etc., and in fact this averments made by the plaintiff in a precaution to escape from the private sale deeds which are executed by the plaintiff in favour of the defendants and other purchasers of the village. Therefore, the defendants submit that the suit of the plaintiff is not maintainable on any aspect and the same is fit to be dismissed with costs."

31. It is needless to say that the court has to take into consideration the entire pleadings in the plaint and written statement in order to know the exact stand taken by the plaintiff

as well as to ascertain whether the defendants specifically traversed the facts much less the material facts. In view of the case of the defendants that defendant Nos.2 to 4 have purchased the suit schedule property from the plaintiff, the defendants are bound to admit the title of the plaintiff to the suit schedule property, prior to the date of filing of the suit. In such circumstances, admitting of the title of the plaintiff prior to the purchase of the suit schedule property by the defendants would not amount to admitting the entire case of the plaintiff, more so, as on the date of filing of the suit or subsequent thereto. The defendants are not admitting the title of the plaintiff as on the date of filing of the suit. The court has to decide whether the plaintiff is the owner of the suit schedule property as on the date of filing of the suit in order to grant the relief of declaration. Any ordinary prudent man after going through the averments made in the written statement will come to a conclusion that the defendants have not admitted the title of the plaintiff as on the date of filing of the suit. Viewed from any angle, the defendants did not admit the case of the plaintiff, thereby to direct the defendants to begin the trial.

32. If the argument of the learned counsel for the plaintiff is accepted, there is no triable issue between the parties in this suit. The plea taken by the defendants in the written statement will not fall within the purview of Section 58 of the Indian Evidence Act. As observed supra, after framing the issues on 15.2.2010, the suit was transferred to the present trial court and re-numbered as O.S.241 of 2012. On 20.4.2012, chief examination affidavits of P.Ws.1 and 2 were filed. On 28.2.2013, the plaintiff filed I.A.No.1181 of 2013 for appointment of advocate commissioner for

the purpose of cross-examination of P.Ws.1 and 2 and the same was dismissed. Thereafter, the plaintiff issued a notice to the defendants under Order XII Rules 2 and 8 of CPC to admit the facts in the plaint as well as to cause production of documents. For one reason or the other, the defendants did not choose either to admit or deny the contents of the plaint or cause production of the documents.

33. The learned counsel for the plaintiff strenuously submitted that the defendants failed to issue reply to the notice given by the plaintiff, therefore, it amounts to admission of contents of the notice issued by the plaintiff, and as such the defendants have to begin the trial. Rule 2A(1) of Order XII of CPC enables the court to draw a presumption that the documents deemed to be admitted if not denied after service of notice, which reads as follows.

ORDER XII-ADMISSION

2A. Document to be deemed to be admitted if not denied after service of notice to admit documents—

(1) Every document which a party is called upon to admit, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of that party or in his reply to the notice to admit documents, shall be deemed to be admitted except as against a person under a disability:

Provided that the Court may, in its discretion and for reasons to be recorded, require any document so admitted to be proved otherwise than by such admission.

34. A perusal of the above provision clearly demonstrates that if the defendant fails to issue reply to the notice issued by the plaintiff, it can be deemed to be admitted. “Deemed to be admitted” means the court can draw a presumption basing on the pleadings and the evidence available on record. To put it in a different way, the court cannot draw a presumption without recording evidence. Drawing of the presumption that the defendant deemed to be admitted a document would not be equated with the admission

made by the defendant as stipulated under Section 58 of the Indian Evidence Act. If the admission made by the defendant will fall within the ambit of the Section 58 or Section 17 of the Indian Evidence Act then, the court can direct the defendant to begin the trial. Mere non-issuance of the reply to the notice issued by the plaintiff under Order XII Rules 2 and 8 of CPC does not confer any right on the plaintiff, under Order XII Rule 2A of CPC. In such circumstances, no right is accrued in favour of the plaintiff, thereby to direct the defendant to begin the trial.

35. From the date of filing of the written statement in the year 2009, the plaintiff is very much aware of the stand taken by the defendants. If really the plaintiff was under the bona fide impression that the defendants admitted his entire case, nothing prevented him to bring it to the notice of the court at the time of framing of the issues on 15.2.2010. The plaintiff did not evince any interest to file any application before the trial court to frame the issues fixing the burden of proof on the defendants. At least, the plaintiff ought to have filed I.A.No.737 of 2014 before filing of the chief examination affidavits of P.Ws.1 and 2, which were filed on 20.4.2012. Till issuance of the notice to the defendants under Order XII Rules 2 and 8 of CPC, the plaintiff was under the belief and impression that he has to begin the trial. Simply because the defendants have not given a reply to the notice issued by the plaintiff that itself will not confer a right on the plaintiff to invoke the provision under Order XVIII Rule 1 of CPC and seek direction to the defendants to begin the trial. Various decisions cited by the learned counsel for the plaintiff, on this aspect, are no way helpful to substantiate his stand.

36. Having regard to the facts and circumstances of the case, I am of the considered view that the trial court has considered various aspects in right perspective and dismissed I.A. No.737 of 2014. I am fully endorsing the findings recorded by the trial court. There is no illegality, irregularity or impropriety in the order passed by the trial court, which warrants interference of this court, while exercising the jurisdiction under Article 227 of the Constitution of India. The civil revision petition lacks merits and bona fides.

37. Accordingly, the civil revision petition is dismissed. Miscellaneous petitions if any pending in this petition shall stand closed.

Date: 31.3.2017
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T.SUNIL CHOWDARY, J.

