

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.
APPELLATE SIDE JURISDICTION

WRIT PETITION NO. 6583 OF 2013

RAMNATH RENU SHINDE AND OTHERS
VERSUS
ANURADHA RAMAN KAPOOR

...

Mr. Patil Ujwal Subhash, Advocate for Petitioners.

Mr. R. S. Wani, h/f Mr. Anil S. Bajaj, Advocate for Respondent.

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CORAM : **V. K. JADHAV, J.**

RESERVED ON : 24th January, 2018.

PRONOUNCED ON: 30th January, 2018.

ORDER:

. Heard finally with consent at admission stage.

2 Being aggrieved by the order dated 10th July, 2013 passed by the 3rd Joint Civil Judge Senior Division, Aurangabad below Exhibit 37 in Special Civil Suit No.102 of 2012, the original Defendants have preferred this writ petition.

3 Brief facts giving rise to the present writ petition are as follows:

- a) The Respondent / original Plaintiff has instituted the suit bearing Special Civil Suit No.102 of 2012 before the Civil Judge Senior Division, Aurangabad for specific performance of contract in respect of land bearing Gut No.70 admeasuring 2 Acres, situated at Waladgaon, Taluka and District Aurangabad and for a decree of perpetual injunction.
- b) The Petitioners / original Defendants have strongly resisted the suit by filing the written statement and denied the claim of the Respondent / Plaintiff. The Petitioners have denied the execution of the agreement of sale dated 23rd April, 2012 and further denied the acceptance of the consideration amount. The Petitioners in their additional written statement contended that the suit of the Respondent is barred by limitation. The Petitioners have further admitted that they have borrowed some hand

loan from the Respondent / Plaintiff and in lieu of the security of repayment, the Respondent obtained their signatures and thumb impressions on the blank papers. It is also their case that they have repaid the entire amount of the said hand loan before 10th July, 2004.

- c) During the pendency of the suit, the Respondent / Plaintiff has filed an application Exhibit 30 under Order VI Rule 17 of the Code of Civil Procedure to delete the relief of specific performance of contract and restricted his claim only to the extent of recovery of earnest money paid by him to the present Petitioners. The Trial Court has allowed the said application Exhibit 30 and permitted the Respondent / Plaintiff to restrict his claim to the extent of recovery of earnest amount. Thus, the Trial Court has recasted the issues and framed as many as six issues at Exhibit 36. So far as issue No.3 is concerned, the burden is placed on the Petitioners /

Defendants to prove that they repaid the amount of Rs.4,00,000/- to the Plaintiff.

- d) The Respondent / Plaintiff thereafter, has filed an application Exhibit 37 praying therein that since the Petitioners have admitted the amount and as such, the burden of the main issue lies on the Petitioners / Defendants and the Petitioners therefore, may be directed to open the evidence first. The Petitioners have strongly resisted the said application by filing their say. The Trial Court has allowed the said application Exhibit 37. Hence, this writ petition.

4 The learned counsel for Petitioners submits that the Respondent / Plaintiff has restricted the claim to the extent of recovery of earnest amount paid to the Petitioners and as such, the burden is on the Plaintiff to prove about the entitlement of the refund of the earnest amount. Furthermore, the issue of limitation is also framed and as such, the burden is on the Respondent / Plaintiff to prove that the suit is within limitation. The learned counsel submits that the

Court has no power to issue directions to the Defendants compelling them to lead the evidence before the Plaintiff adduces his evidence. A direction against the Defendant to lead evidence before the Plaintiff leads evidence cannot be issued under Rule 1 of Order XVIII of the Code of Civil Procedure. It is the privilege of the Plaintiff to lead his evidence first, however, it enables the Defendant to exercise the right in the contingency mentioned in the Rule. It would appear from the plain language of Order XVII Rule 1 of the Code of Civil Procedure that it is only an enabling provision entitling the defendant to begin and 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 his case.

5 The learned counsel for Petitioners in order to substantiate his submissions placed his reliance in the case of **Bhagirath Shankar Somani and another Vs. Rameshchandra Daulal Soni and another**, reported in, **2007 (5) Mh.L.J 508**, wherein this Court has also referred two cases wherein the decision has been rendered on the same point (i) **Haran Bidi Suppliers and anr. Vs V. M. and Company, Bhandara**, reported in, **2001 (4) Mh.L.J. 112** and

(ii) **Gouri Food Products, Nagpur Vs. Priya Trading Company, Nagpur**, reported in, **2002 (4) Mh.L.J.880** and also distinguished the case **Kumudini Damodar Magar and ors. Vs. Bhushan Damodar Magar and ors**, reported in, **2004(3) Mh.L.J. 214**, by observing that this case cannot be read as a binding ratio or a binding precedent. The learned counsel also placed his reliance in the case of **Gopal Changu Patil Vs. Hasuram Mahadu Patil and others**, reported in, **2012(3) Mh.L.J. 236**.

6 The learned counsel for Respondent / original Plaintiff submits that the procedure as contemplated under Order XVIII Rules 1 and 2 of the Code of Civil Procedure is not an empty formality. The learned counsel for Petitioners / Defendants has not disputed the receipt of the amount and by way of additional facts merely contended that the Plaintiff is not entitled to the relief of refund of the earnest amount as claimed. The learned counsel submits that the Court would not have to dwell into the facts shown by the Plaintiff because those facts are admitted by the Defendants and the Court would have to consider only the additional facts as pleaded by the Petitioners / Defendants. Thus, as per issue No.3, the burden to prove lies on the

Petitioners / Defendants. In consequence of the burden of proving issue No.3 lies on the Petitioners / Defendants and in the event if the said burden is not discharged, then the Respondent / Plaintiff need not adduce any evidence. The Trial Court has therefore, rightly allowed the application Exhibit 37 and directed the Petitioners / Defendants to open the evidence. The order impugned thus, calls for no interference. There is no substance in the writ petition and the same is thus, liable to be dismissed.

7 The learned for the Respondent in order to substantiate his submissions placed his reliance on the following cases:

- a) **Sandip Sankarlal Kedia Vs. Pooja Sandip Kedia**, reported in, **2014(1) Mh.L.J. 423**.
- b) **Subhash Chander Malhotra Vs. Krishna Chopra and others**, decided on 7th December, 2012 in C. R. No.7319 of 2012 (O&M) by the Punjab and Haryana High Court (Coram: L. N. Mittal, J.).

8 The question that arises for consideration is whether the Trial Court is justified in directing the Defendants to lead their

evidence first. It is therefore, necessary to reproduce hereinbelow Order XVIII Rules 1 and 3 of the Code of Civil Procedure:

“1. Right to begin.— 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. Evidence where several issues.— Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.”

9 In the instant case, the Trial Court has framed the following issues at Exhibit 36:

1. Whether plaintiff proves that he is entitled to refund of Rs.4,00,000/- with damages by way of interest and the interest calculated @ 18% p.a. which comes to Rs.4,00,000/- from the person and property of the defendants?
2. Whether plaintiff proves that, he is entitled to interest @ 18% p.a. on Rs.8,00,000/- from the date of filing of the suit till the payment or realization of the entire amount ?
3. Whether defendants prove that, they repaid amount of Rs.4,00,000/- to the plaintiff ?
4. Whether plaintiff proves that the suit is within limitation?
5. Whether defendants are entitled for compensatory cost of Rs.10,000/- each against the plaintiff ?
6. What order and decree?

10 The issues at Exhibit 36 came to be recasted when the Respondent / Plaintiff was allowed to restrict his claim by amending the plaint to the extent of refund of earnest amount. By issue No.3,

the burden is placed on the Petitioners / Defendants to prove that whether they repaid the amount of Rs.4,00,000/- to the Respondent / Plaintiff. In the plain language of Rule 1 of Order XVIII, the Plaintiff has the right to begin unless the defendant admitted all the material allegations in the plaint and contend that either in the point of law or some other additional facts, the Plaintiff is not entitled to the relief claimed, in which case the Defendant has right to begin. In terms of Rule 3 of Order XVIII of the Code of Civil Procedure, where there are several issues and the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party and may lead the rebuttal evidence.

11 In the case of *Bhagirath Shankar Somani and another Vs. Rameshchandra Daulal Soni and another* (supra), relied upon by the learned counsel for Petitioners, this Court by referring the cases of *Haran Bidi Suppliers and anr. Vs V. M. and Company, Bhandara*, (supra) and *Gouri Food Products, Nagpur Vs. Priya Trading Company, Nagpur* (supra) in paragraphs 16 and 17 has made the

following observations:

“16. Thus, the consistent view taken by this Court is that a direction against the defendant to lead evidence before the plaintiff leads his evidence cannot be issued under sub-rule (1) of Order XVIII of the said Code. The scheme of Rule 1 appears to be that as a normal Rule it is the privilege of the Plaintiff to lead his evidence first. However, it enables the defendant to exercise the right in the contingency mentioned in the Rule. The plaintiff in a given case can make a statement before the trial Court stating that as the case is covered by exception in Rule 1 of Order XVIII of the said Code, he is reserving his right to lead evidence in rebuttal after the defendant leads his evidence. The said option can be exercised in mofussil Courts by the plaintiff by filing a pursis to that effect. In a Court in which there is no practice of filing pursis, the plaintiff can make oral statement to that effect which will be normally recorded in the roznama of the case. After the plaintiff exercises option it is for the defendant to decide whether he wants to lead the evidence. If the defendant decides to lead the evidence, the plaintiff can always lead evidence in rebuttal. As held by this Court, the Court has no power to issue a direction to the defendant compelling him to lead his evidence before the plaintiff adduces his evidence. Only when the defendant claims right to begin under Rule 1 and the plaintiff disputes existence of such a right, the Court will have to decide the question whether the defendant has acquired a right to begin.

17. In view of the settled position of law as reflected from the aforesaid decisions, the learned trial Judge could not have granted prayer clause (b) of the Notices of Motion. Therefore, the impugned order insofar as it grants prayer clause (b) will have to be quashed and set aside.”

12 This Court in the case of *Sandip Sankarlal Kedia Vs. Pooja Sandip Kedia* (supra) relied upon by the learned counsel for Respondent, has taken a view that the procedure under Order XVIII Rules 1 and 2 is not an empty formality, by referring the earlier views of this Court as mentioned above, in paragraphs 58, 59 and 60 has made the following observations:

“**58.** In this case the Court has in some detail dealt with Order 18, Rule 3 of the Civil Procedure Code also. Though that does not apply to the facts of this case as there would be the only issue relating to the repayment of consideration by the husband, it would be a guiding factor in appreciating who must lead evidence first. Order 18, Rule 3 of the Civil Procedure Code deals with cases of several issues, the burden of proving some of them lies on one party and some on the other. The party beginning evidence is allowed to lead evidence only on those issues for which the burden lies upon him and reserve the

evidence on the other issues by way of rebuttal to the evidence produced by the other party. Such party is then allowed to produce evidence on those issues after the other party has produced all his evidence. This specified procedure also reflects and manifests the need to give evidence as per burden which lies upon the party. It does not require only the Plaintiff to give all evidence first. In view of the fact that admitted facts need not require to be proved, no plaintiff need give evidence of any admitted fact. The distinction in the actual tendering of evidence, therefore, becomes very stark when one sees the case of many issues. After the plaintiff has to lead evidence upon all the issues, the burden of which lies upon him to prove and not the other issues and the defendant is enjoined to give evidence upon all the issues, the burden of which lies upon him to prove, allowing the plaintiff the right of rebuttal thereafter.

59. The same analogy has to be applied in case of single issue.

60. The same procedure has to be followed in case of one issue of the plaintiff and one issue of the defendant. If the facts stated by the plaintiff are admitted and there is no issue of the plaintiff there is none for the plaintiff to prove. Of course, if the plaintiff has to prove a single issue because the fact stated by the plaintiff is denied by the defendant, he would certainly have right (i.e. obligation) to begin; not otherwise.”

13 This Court has taken a consistent view in the cases relied upon by the learned counsel for Petitioners that it is only when the Defendant claims right to begin under Rule 1 and the Plaintiff disputes existence of such a right, the Court will have to decide the question whether the Defendant has acquired a right to begin. In the instant case, the Trial Court has framed as many as six issues at Exhibit 36 and in that view of the matter, in terms of the provisions of Rule 3 of Order XVIII of the Code of Civil Procedure, the Respondent / Plaintiff may file a pursis or may make a statement before the Trial Court reserving his right thereby to lead the evidence in rebuttal after the Defendants led their evidence. It is for the Petitioners / Defendants to decide whether they want to lead the evidence. In any case, the Court has no power to issue directions to the Petitioners / Defendants compelling them to lead their evidence before the Plaintiff adduces his evidence. In this case, the Petitioners / Defendants have not claimed right to begin under Rule 1 and as such, there was no occasion for the Plaintiff to dispute the existence of such a right. Consequently, the question does not arise for consideration in terms of the provisions of Rule 1 of Order XVIII of the Code of Civil Procedure before the Trial Court whether the Defendants have acquired a right

to begin.

14 In view of the above discussion, the impugned order is not sustainable and the same is liable to be quashed and set aside. However, the Respondent / Plaintiff is at liberty to file a pursis or make a statement before the Trial Court about his reserving right to lead evidence in rebuttal after the Defendants led their evidence and it is for the Petitioners / Defendants to decide whether they want to lead their evidence or not. If the Petitioners / Defendants decide to lead the evidence, the Respondent / Plaintiff can lead his evidence in rebuttal. Hence, I proceed to pass the following order:

ORDER

- I. The writ petition is hereby partly allowed. No costs.
- II. The impugned order dated 10th July, 2013 passed below Exhibit 37 in Special Civil Suit No.102 of 2012 by the 3rd Joint Civil Judge Senior Division, Aurangabad, is hereby quashed and set aside.

- III. The Respondent / original Plaintiff is at liberty to exercise the option in terms of the provisions of Rule 3 of Order XVIII of the Code of Civil Procedure.
- IV. The Trial Court shall dispose of the suit as expeditiously as possible preferably within a period of six months from the date of this order.
- V. Writ petition is accordingly disposed of.

[V. K. JADHAV, J.]

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