

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.7490 of 2017
Date of Decision-14.08.2018

Suresh Kumar

... Petitioner

Versus

Brincoge Tools Pvt. Ltd. and others

... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Rakesh Chopra, Advocate
for the petitioner.

Mr. Briz Mohan, Advocate for
Mr. S.S. Sarwara, Advocate
for respondents No.1 and 2.

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed the order dated 06.10.2017 passed by Civil Judge (Junior Division), Fatehgarh Sahib vide which application for recasting of issues as per pleadings of the parties and for directing the defendants to lead their evidence first as per onus on proposed issues was dismissed.

[2]. Plaintiff/petitioner filed a suit for declaration to the effect that he is continuing to be the director of respondent No.1 and for permanent injunction, restraining the defendants from alienating the suit property.

[3]. In the written statement, defendants have raised objections that the plaintiff was removed from the office in the

meeting of shareholders held on 24.06.2006. Necessary intimation regarding removal of the plaintiff from the office of directorship of the company/defendant No.1 was also filed with the Registrar of Companies on 27.02.2006. Defendants relied upon Annexures A1 to A20. Plaintiff denied the stand of the defendants in his replication.

[4]. The factum of plaintiff being Director of defendant No.1 upto 24.06.2006 was admitted. However, defendants alleged that the plaintiff was removed from the office in the meeting held on 24.02.2006. Initial issues were framed on 25.01.2017 to the following effect:-

“1. Whether plaintiff is entitled to the relief of declaration as prayed for? OPP

2. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP

3. Whether the suit is not maintainable in the present form? OPD

4. Whether the plaintiff has not come to the Court with clean hands? OPD

5. Whether the Court has no jurisdiction to try and entertain the present suit? OPD

6. Whether the plaintiff has no cause of action or locus standi to file the present suit? OPD

7. Relief.”

[5]. Petitioner claimed that while framing the aforesaid issues, the trial Court has omitted to frame material issues arising

out of pleadings of the parties. Learned counsel for the petitioner submitted that onus to prove the alleged removal by way of following proper procedure was on the defendants. Plaintiff was admitted to be a Director and that entitles him to declaration and injunction unless his alleged removal is found to be on legal parameters. No issue has been framed in respect of removal of the plaintiff from the office of directorship of the company that whether the same was on account of legal parameters or otherwise.

[6]. Petitioner claimed recasting of issues in the following manner:-

“a) Whether the plaintiff has been removed from the office of Directorship by the share holders of defendant No.1 as alleged by the defendants in para No.1 on merits at page No.5 of the written statement? OPD

b) Whether defendants are maintaining regular books of account, minutes books and resolution? OPD

c) Whether the defendants have passed the resolutions as mentioned in the written statement? OPD

d) Whether the defendants No.2 and 3 have repaid the alleged loans to PSIDC as alleged by them in the written statement? OPD

e) Whether the defendants had sold the property of the defendant No.1 as mentioned in para No.7 of the written statement and for what price and what are the accounts therefor? OPD

f) Whether the plaintiff is entitled to the relief of declaration as prayed for? OPP

g) Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP

h) Whether the suit is not maintainable in the present form? OPD

i) Whether the plaintiff has not come to the Court with clean hands? OPD

j) Whether the Court has no jurisdiction to try and entertain the present suit? OPD

k) Whether the plaintiff has no cause of action or locus standi to file the present suit? OPD

l) Relief.”

[7]. Since the claim of the plaintiff is dependent upon removal of the plaintiff from the post of Director by way of legal or illegal procedure, therefore, the issue on being re-framed would obligate the defendants to lead evidence prior in point of time then the plaintiff, as the entire case would be dependent upon such finding of proposed issue No.a).

[8]. The application was contested by the defendants.

[9]. Trial Court vide impugned order dated 06.10.2017, dismissed the application.

[10]. Order 18 Rule 1 CPC provides for the right to begin with the evidence. 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 defendants, the plaintiff is not entitled to any part of the relief as claimed. A person who sets the law in motion and seeks a relief before the Court, must necessarily be in a position to prove his case and get the relief moulded by the law. The general rule of adducing evidence as contained in Order 18 Rule 1 CPC is that it is the plaintiff who has the right to begin evidence, unless the defendant admits the facts alleged by the plaintiff or contends some additional facts or points of law that the plaintiff is not entitled to the relief claimed. A distinction has to be drawn between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (b) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others.

[11]. Sections 101 and 102 of the Evidence Act would assume importance in the present context. Section 101 of the Evidence Act provides for initial burden of proof. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the

existence of any fact, it is said that the burden of proof lies on that person. If a person desires a Court to give judgment that another person be punished for a crime, then the first person must prove that the second person has committed the crime. Section 102 of the Evidence Act deals with the proposition on whom burden of proof lies. The initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[12]. In **Anil Rishi Vs. Gurbaksh Singh, 2006(3) RCR (Civil) 347**, it was held by the Hon'ble Apex Court that the initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. The elementary Rule in terms of Section 101 of the Act is inflexible. In terms of Section 102 of the Act, the initial onus is always on the plaintiff and if plaintiff discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

[13]. In **Bajaj Auto Ltd. Vs. TVS Motor Company Ltd. (Madras High Court), 2010(36) RCR (Civil) 447**, it was held that 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 led. Onus of proof by a party would cease when the 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 the same in affirmative. When he produces evidence in support of his statement, onus would shift to the opposite party to adduce evidence in rebuttal to meet the case made out by the other party. In civil cases, onus of proof is never fixed permanently, but it keeps on fluctuating very frequently.

[14]. In **Mirza Niamat Baig and another Vs. Sk. Abdul Sayeed and others (Orissa High Court), 2008(2) Ori. Law Rev. 566**, it was observed that the law is well settled that a person who sets the law in motion and seeks a relief before the Court, must necessarily be in a position to prove his case and get the relief moulded by the law. The right to begin is to be determined by the rules of evidence. As a general rule, the party on whom the burden of proof rests should begin. In no case, the plaintiff can be allowed to take any due advantage over the defendant, whatever may be the position or stand the defendant takes, for the very reason that the defendant is expected to answer the claim made by the plaintiff in the suit. In the wording “unless the defendant

admits the facts alleged” occurring in Order 18 Rule 1 CPC, the word “facts’ means all the material facts. Thus, where a defendant admits only some of the facts alleged by the plaintiff, there the plaintiff should begin.

[15]. In **Bama Vs. Rukiyal Bivi (Madras High Court), 2004 AIR (Madras) 243**, it was held that under Section 102 of the Evidence Act, the burden of proof rests on the party, who would fail, if no evidence at all were given on either side. When a person seeks aid of a Court of equity to enable him to get rid of the effect of deed which he has executed, the burden of proof is on him to make out a case, such as imposition or any other reason for such intervention.

[16]. In **Abdul Hussain Vs. Shahjahan Ali (Gauhati High Court) 1992(1) GauLR 185**, it was noticed that Order 18 Rules 1, 2 and 3 CPC together shows that the right to begin is to be determined by the rules of evidence, namely burden of proof. The party on whom the burden of proof lies has to begin the case. “Material facts” under Order 18 Rule 1 CPC are facts which if established would give the plaintiff the relief asked for.

[17]. The whole question that hinges for consideration in this case is as to whether defendants have to establish removal of the plaintiff from Directorship by way of resolution passed in the meeting dated 24.02.2006. The factum of plaintiff being the Director prior to his alleged removal in the meeting dated

24.02.2006 is an admitted fact. The sole controversy is dependent upon validity or genuineness of the removal of the plaintiff in the meeting dated 24.02.2006 and thereafter, plaintiff has to prove that he is entitled to declaration as prayed for under original issue No.1. The recasting of issues as prayed for would obligate the defendants to lead evidence in respect of validity of removal of the plaintiff from the office of Directorship. The right to begin is not the same as adducing of evidence in support of a party's case. It has to be appreciated that a party who would fail in case of leading no evidence, such party has a right to begin.

[18]. In the instant case, the plaintiff has sought declaration that he is continuing to be the Director of defendant No.1 and also sought permanent injunction for restraining the defendants from alienating the suit property. Defendants have asserted that the plaintiff was removed from the office of Directorship in the meeting of shareholders dated 24.02.2006. The factum of plaintiff being Director prior to 24.02.2006 has been virtually admitted. In case, the factum of removal of the plaintiff in the meeting dated 24.02.2006 is not proved by the defendants, then the plaintiff will succeed and the defendants are to loose. If neither party adduce evidence, the burden is on the defendants to prove removal of the plaintiff from the post of Directorship vide resolution of the shareholders meeting on 24.02.2006. It will be only when the defendants adduce evidence, the plaintiff would be obligated to lead evidence to rebut the same. Inescapable conclusion is that

the defendants shall begin first. If the defendants adduce their evidence to prove removal of the plaintiff, the plaintiff shall lead his evidence to rebut the same.

[19]. For the reasons recorded hereinabove, the present revision petition is allowed to the extent of recasting of issues No.a to c of para No.6 of the present order. Impugned order dated 06.10.2017 passed by Civil Judge (Junior Division), Fatehgarh Sahib is hereby set aside. Normal consequences to follow.

(RAJ MOHAN SINGH)
JUDGE

14.08.2018

Prince

Whether Reasoned/Speaking

Yes/No

Whether Reportable

Yes/No