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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 01.07.2019

Pronounced on: 25.07.2019

+ **CM(M) 282/2019 & CM APPL. 7818/2019**

OM PRAKASH Petitioner

Through: Mr. V.K. Kalra, Advocate.

versus

AMIT CHOUDHARY & ORS Respondents

Through: Mr. Digvijay Singh, Advocate.

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. This petition under Article 227 of the Constitution of India is directed against an order dated 19.11.2018 passed by the Additional District Judge-09 (Central), Tis Hazari Courts, Delhi, in CS No. 1202/2017. By the said order, the Trial Court dismissed the application of the petitioner/plaintiff under Order XVIII Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC"), seeking a direction upon the defendants to lead their evidence first.

Facts

2. The plaintiff filed the suit against the defendants for recovery of a sum of ₹30,40,000/- alongwith interest thereupon. The plaintiff's

case is that the defendants entered into a Collaboration Agreement dated 26.03.2014 with him for development and construction of a building on the suit property (property measuring 160 sq. yards, bearing property no. 11377-11378, Singhara Chowk, Nabi Karim, Idgah Road, Delhi). The plaintiff claims to have paid ₹10,00,000/- out of the agreed consideration. The allegation of the plaintiff is that the defendants did not deliver possession of the suit property which was, in fact, sealed by municipal authorities. In addition to the refund of ₹10,00,000/- claimed by him alongwith interest, the plaintiff claimed damages in the sum of ₹15,00,000/-.

3. In the written statement filed by the defendants, it is contended that although the Collaboration Agreement was executed, it was not intended to be acted upon. The plaintiff set up the defence that the sum of ₹ 10,00,000/-, paid by the plaintiff to the defendants, was by way of a loan, and the Collaboration Agreement was intended to secure the repayment of the loan amount. The defendants have further averred that the suit property had already been fully developed, and that the defendant no. 1 had attempted to repay the loan amount which had not been accepted by the plaintiff. The averments contained in the plaint regarding the amount of damages and interest have also been disputed in the written statement. At this stage, the plaintiff filed the application under consideration under Order XVIII Rule 1 of the CPC. It is contended therein that in view of the defendants' admission regarding the execution of the Collaboration Agreement, the defendants ought to

be directed to lead evidence first. The application was contested by the defendants, reiterating the contents of the written statement.

4. By the impugned order dated 19.11.2018, the Trial Court held that the plaintiff was not entitled to the direction sought, and that a direction under Order XVIII Rule 1 of the CPC can be passed only on an application made by the defendants. It was further observed that as a general rule, the plaintiff has to prove his claim by positive proof.

Order XVIII Rule 1 of the CPC

5. Before recording the contentions of the parties, Order XVIII Rule 1 of the CPC is set out below: -

“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.”

Submissions

6. Learned counsel for the petitioner submitted that a proper reading of the written statement reveals that the defendants admitted the execution of the Collaboration Agreement but raised additional pleas to the effect that the agreement was not intended to be acted upon and the amount of ₹10,00,000/- was given by the plaintiff to the defendants as a loan. In these circumstances, he submitted that the consequence of Order XVIII Rule 1 of the CPC is to require the defendants to lead evidence in respect of the additional facts upon

which they seek to rely, and that it is only thereafter that the plaintiff can be required to lead evidence to meet the case set up by the defendants.

7. Learned counsel for the defendants, on the other hand, submitted that Order XVIII Rule 1 of the CPC applies only to a situation where the facts stated in the plaint are admitted by the defendants in full. He further submitted that a holistic reading of the written statement would reveal that the plaintiff's case was entirely disputed on facts. Further, the plaintiff's claim for damages for ₹15,00,000/-, according to learned counsel for defendants, was not even borne out of the Collaboration Agreement, and was required to be proved in accordance with law.

Analysis

8. Order XVIII Rule 1 of the CPC recognizes the general rule that the plaintiff in a suit must prove his case. This is in consonance with Sections 101 to 114 of the Indian Evidence Act, 1872. The defendant is given "the right to begin" only in a situation where the facts alleged by the plaintiff are admitted but the plaintiff's entitlement to relief is contested in law or on the basis of additional facts asserted by the defendant. The condition that the facts pleaded by the plaintiff must be admitted by the defendant is of great significance. It implies that the facts necessary for proving the plaintiff's case must be entirely, or at least very substantially, admitted by the defendant. It is by reason of the defendant's admission that the plaintiff is absolved from its duty to prove its case before the defendant is called upon to give evidence. On

a proper interpretation, the second part of Order XVIII Rule 1 therefore is applicable in a situation where, but for the additional facts pleaded or legal defences raised by the defendant, the plaintiff would have been entitled to a decree upon admission.

9. This issue was considered by this Court in *Sabiha Sultana & Ors. vs. Ahmad Aziz & Anr.* (CS(OS) 2958/2011, decided on 31.08.2017), wherein this Court relied upon several authorities to hold that in the absence of admission of facts pleaded by the plaintiff, asking the defendant to lead evidence first could well be disadvantageous to the defendant. Paragraph 8 of the judgment, to that effect, is reproduced below:-

“8. In terms of the procedure stipulated in CPC and the aforesaid precedents, it is clear that as a general rule the party which set up a claim must prove the burden cast upon it. The plaintiff has a right to begin and so he must because the burden of proof rests upon one who pleads. It is for the plaintiff to lead evidence first. It is only when the defendant admits to the facts pleaded by the plaintiff that the latter would be relieved of this burden, but in the absence of any such admission, asking the defendant to lead evidence first could well be disadvantageous to the defendant. Order 18 Rule 1 of CPC prescribes “right to begin” the recording of evidence wherein the plaintiff would lead evidence first but the defendant may be permitted to lead evidence if after having admitted to the facts pleaded by the plaintiff, he so seeks to do. In the absence of these two qualifying circumstances, the Court would not direct the defendant to lead evidence first.”

10. The judgment of Orissa High Court in *Mirza Niamat Baig vs. Sk. Abdul Sayeed*, 2008(II) OLR 566, also indicates that the facts

admitted by the defendant must include all the material facts.

Paragraphs 4 and 5 of the said judgment are reproduced below:-

“4. 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 undue 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, C.P.C., the word "facts" means all the materials facts. Thus, where a defendant admits only some of the facts alleged by the plaintiff, there the plaintiff should begin.

5. As the plaintiff has raised the question of fraud to have been practised on him, it is he who should begin first, as per the provision contained in Order 18, Rule 1 C.P.C. In the present case, the defendants have taken the plea of previous partition, In order to prove their plea, they have to begin first and thereafter the plaintiff is to adduce rebuttal evidence. In the present case as the plaintiff-opposite parties have alleged fraud, they have to first establish that fraud had been practised and thereafter the defendant has to adduce rebuttal evidence. The defendants only admit a part of the allegation of the plaintiff regarding earlier partition.”

11. It also appears from the authorities cited in *Sabiha Sultana* (supra) that the provision is an enabling one – the defendant can choose whether to exercise the right to begin or not. Reference in this connection may be made to the judgments of the Bombay High Court

in *Dattatray Namdeo Patil vs. Ram Namdeo Patil* (2010) 3 Mah LJ 801, and *Haran Bidi Suppliers vs. V. M. and Co.* (2001) 4 Mah LJ 112, and the Patna High Court in *Mohammad Jahangir vs. Sajda Khatoon* (2007) 4 PLJR 100. In the judgment of the Bombay High Court in *Zainabee vs. Shivkumar* (2018) 2 Mah LJ 634, the earlier judgments of the Court were considered and it was held that the Court does not have the power to issue a direction to a defendant to lead evidence first, which is reproduced below:-

“20. In Bhagirath Shankar Somani v. Rameshchandra Daulal Soni, 2007 (5) Mh.L.J. 508 : 2007 (4) ALL MR 514, this Court concluded that if the defendant decides to lead evidence first and is so permitted by the Court, the plaintiff can always lead evidence in rebuttal. The trial Court does not have the power to issue a direction to the defendant compelling him to lead his evidence before the plaintiff adduces his evidence under Order 18, Rule 1. Only when the defendant claims a right to begin under Rule 1 and the plaintiff disputes existence of such right, the Court will have to decide the question whether, the defendant has acquired a right to begin.

21. This Court, in Dattatray Namdeo Patil v. Ram Namdeo Patil, 2010 (3) Mh.L.J. 801, dealt with a similar issue and concluded in paragraphs 3 and 4 that Rules 1 and 2 of Order 18 of the Code of Civil Procedure would entitle the defendant, who admits the fact, to begin the recording of his evidence first. It is an enabling provision. If the defendant applies and makes a request or claims such a right, the Court may pass an order permitting the defendant to step into the witness box first.

22. In Metafield Coil Private Limited v. Nikivik Tube Industries Private Limited, 2012 (1) Mh.L.J. 289, while considering such an issue under Order 18, Rule 1, this Court concluded that a consistent view taken by the

Courts is that a direction against the defendant to lead evidence before the plaintiff leads his evidence, cannot be issued under Order 18, Rule 1. The scheme of law appears to be that of a normal rule and it would be a 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. After the plaintiff exercises his option to lead evidence first, it is for the defendant to decide whether, he would like to lead evidence and make such a formal request to the Court. If the Court permits the defendant to lead evidence first, the plaintiff can always lead evidence in rebuttal. The Court does not have the power to issue a direction to the defendant so as to compel him to step into the witness box first and lead evidence.”

12. Learned counsel for the petitioner relied upon the decision in *Vikram Kaushik & Anr. vs. Vivek Kaushik* (CS(OS) No. 1848/2009, decided on 13.12.2011) wherein, in a partition suit, the defendant was required to lead the evidence first, as the ownership of the property by the predecessor in interest of the parties had been admitted. It was held that the defendant would then be required to first establish the additional fact pleaded by him that the property in question had been orally partitioned during the lifetime of the predecessor in interest. The facts of this judgment are not similar to the present case. The facts show that the only disputed issues concerned the oral partition, which was asserted by the defendant. In any event, it is settled law that in a suit for partition, the status of the parties is not of great relevance- each party is a plaintiff in respect of their share of the suit property, and a defendant in respect of the shares of the others. (See *Chandramohan Ramchandra Patil and Ors. vs. Bapu Koyappa Patil*

(Dead) Through LRs and Ors. (2003) 3 SCC 552, [Paragraph 13]; *Loke Nath Saha and Ors. vs. Radha Gobinda Shaha and Ors.* AIR 1926 Cal 184, [Paragraph 2]; *Mahender Kr. Lamba vs. Satender Prakash Lamba* (2007) 99 DRJ 288, [Paragraph 47]).

13. The judgment of this Court in *Manoj Gupta vs. Munna Lal Sadh* 2017 (166) DRJ 379 has also been cited by the petitioner. While deciding a regular first appeal, the Court has noted that, in that case, the documents in question were admitted, and onus of proof for their purpose was placed upon the defendant, who was required to lead evidence first. This judgment is of no assistance to the petitioner, as the point has been noted in the course of narrating the proceedings, out of which the appeal arose. This Court was not called upon the stage of a regular first appeal in the case of a decree to decide whether Order XVIII Rule 1 had been correctly interpreted.

14. The respondents, on the other hand, relied upon the judgment of the Division Bench of Orissa High Court in *Balakrishna Kar vs. H. K. Mahatab*, AIR 1954 Ori 191, wherein the Court overturned the order of the Trial Court placing the burden upon the defendant to lead evidence first in a defamation suit. The Division Bench held that the admission of publication of the allegedly defamatory articles was insufficient for this purpose as the defendant had not admitted that the articles constituted libel on the character of the plaintiff. It was held that in such circumstances, the onus lies on the plaintiff to establish his case.

15. In the facts of the present case, Order XVIII Rule 1 is not applicable. The defendants have not sought to exercise the right to begin which, in view of the authorities above, is a choice for him to make and not for the plaintiff to force upon him. In any event, the substantive condition that the facts alleged by the plaintiff must be admitted by the defendants is also not satisfied. Merely because the execution of the Collaboration Agreement is admitted, does not imply that the defendants have admitted the facts alleged by the plaintiff. In contractual disputes, it is often the case – perhaps in a majority of cases – that the execution of the contract is admitted by the defendant, but other facts establishing the plaintiff’s claims are not. In the present case, for example, the quantum of damages assessed by the plaintiff has been expressly and unequivocally disputed in the written statement. It is settled law that pleadings are to be read as a whole, and admissions cannot be considered in isolation. Reference may be made to the judgment of the Supreme Court in *Udhav Singh vs. Madhav Rao Scindia*, (1977) 1 SCC 511, wherein it has been held as follows:-

“33. We are afraid, this ingenious method of construction after compartmentalisation, dissection, segregation and inversion of the language of the paragraph, suggested by Counsel, runs counter to the cardinal canon of interpretation, according to which, a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context, in isolation.

Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention

of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole.”

The later judgments of the Supreme Court in *Sopan Sukhdeo Sable vs. Asstt. Charity Commr.* (2004) 3 SCC 137 [Paragraph 15] and *Des Raj vs. Bhagat Ram* (2007) 9 SCC 641 [Paragraph 17] also lay down the above principle. On a holistic reading of the written statement filed by the defendants in the present case, it is not possible to conclude that the defence rests on additional facts or points of law, the facts pleaded by the plaintiff being admitted.

Conclusion

16. For the reasons aforesaid, the impugned order of the Trial Court does not call for any interference under Article 227 of the Constitution of India. The petition is therefore dismissed, alongwith the pending application.

JULY 25, 2019
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PRATEEK JALAN, J.