

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

906 WRIT PETITION NO. 356 OF 2009

1. Gangabai Shivadas Patil,
Age 69 Years, Occu. Household,
R/o. Budhgaon, Tq. Chopda,
District Jalgaon.
2. Kevalbai Vinayakrao Sonwane,
Age 57 Years, Occu. Household,
R/o. Budhgaon, Post Anwardhe,
Tq. Chopda, Dist. Jalgaon.
3. Suresh Digamber Patil,
Age 55 Years, Occu. Agril.,
R/o. Anandnagar, Deopur,
Dhule (For himself & Attorney
Holder of petitioner Nos. 1 and 2.) ... Petitioners
(Orig.Defts.Nos.3, 5 & 7)

Versus

1. Shantabai Jagannath Patil,
(Marathe), Age 78 Years,
Occu. Agril & Household,
R/o. Tamswadi, Tq. & Dist.
Dhule.
2. Bhagirathibai @ Ashabai Bhaidas Patil,
Age 75 Years, Occu. Agril
R/o. Tamaswadi, Tq. & Dist.
Dhule.
3. Digambar Harchand Patil,
Age 74 Years, Occu. Agril.,
R/o. Tamaswadi, Tq. & Dist.
Dhule.
4. Venubai Bhimrao Patil,
Age 63 Years, Occu. Household,

R/o. Chikhali, Post Harankheda,
Tq. Bhusawal, Dist. Jalgaon.

5. Satish Jagannath Patil,
Age 45 Years, Occu. Agril.
R/o. Tamaswadi, Tq. & Dist.
Dhule.

... Respondents
(R.No.1 Orig. Plff., Nos.2 to 5
Orig. Defendants)

.....
Advocate for Petitioners : Mr. Amol S. Sawant
Advocate for Respondent Nos. 1, 2 and 5 : Ms. Surekha S. Mahajan
.....

CORAM : V. K. JADHAV, J.
DATED : 25th FEBRUARY, 2020

ORAL JUDGMENT :-

1. Heard both sides.
2. The petitioners are the original defendant nos. 3, 5 and 7. Respondent no. 1/original plaintiff has instituted the suit bearing Special Civil Suit No. 84 of 1999 before Civil Judge, Senior Division, Dhule for partition and separate possession in respect of the suit property. During pendency of the suit and after the parties completed their pleadings, the trial court has re-casted the issues on its own. Before that, twice the issues were re-casted. By the impugned order dated 01.10.2008, after re-casting of the issues, the trial court has directed the petitioners/contesting defendants to begin with the trial of the suit. Being aggrieved by the said order,

when the petitioners have filed an application for adjournment so as to enable them to approach this Court by filing Writ Petition, by the impugned order dated 08.12.2008, the trial court has not only rejected the said application, but by a separate order dated 08.12.2008, forfeited the right to lead evidence of the petitioners. Hence this Writ Petition.

3. Learned counsel for the petitioners/original defendants submits that so far as the re-casting of the issues on 01.10.2008 by the trial court is concerned, by re-casting issue no.3, the trial court has casted negative burden on the petitioners/defendants. Learned counsel submits that earlier to that, the burden of the said issue was rightly casted on respondent no.1/plaintiff. However, the issues came to be re-casted on 01.10.2008. The petitioners are raising grievance in respect of the re-casting of issue no.3 only. Learned counsel submits that so far as the impugned order passed below Exhibit 1 dated 01.10.2008 directing the petitioners to begin with the trial of the suit is concerned, and to adduce the evidence first in support of their claim, the same is contrary to the provisions of Order XVIII Rule 1 of C.P.C. Learned counsel submits that in case of pleading by confession and avoidance, the petitioner/defendant would get a right to begin in view of the

provisions of Rule 1 of Order XVIII of C.P.C. However, the court is not empowered to exercise those powers. In terms of Rule 3 of Order XVIII of C.P.C., when the burden of proving some of the issues lies on one of the parties, it is open to the party leading evidence to reserve his evidence by way of rebuttal to the evidence to be produced by the other party. However, in the instant case, the court has *suo motu* directed the petitioners/defendants to adduce evidence first in support of their claim before the plaintiff enters the witness box. Learned counsel submits that even the trial court has forfeited the right to lead evidence of the petitioners since the petitioners failed to lead evidence as directed by the impugned order passed below Exhibit 1 dated 01.10.2008.

4. Learned counsel for the petitioners, in order to substantiate his contentions, placed reliance on the following two cases:

1. ***Gouri Food Products, Nagpur v. Priya Trading Co., Nagpur***, reported in 2002 (4) Mh.L.J. 880 and
2. ***Bhagirath Shankar Somani and Another v. Rameshchandra Daulal Soni and Another***, reported in 2007 (4) Bom. C.R. 87.

5. Learned counsel for respondent no.1/plaintiff, by pointing out the pleadings of the petitioners, submits that so far as the right to begin is concerned, the court can direct the petitioners/defendants to lead evidence first under the inherent power under Section 151 of C.P.C. Learned counsel submits that the petitioners/defendants have come with a specific case about the partition effected way back in the year 1944 and as such, the trial court by exercising the inherent power, has rightly directed the petitioners/defendants to adduce evidence first to substantiate the same. Learned counsel submits that as the petitioners/defendants failed to abide those directions given by the trial court vide the impugned order dated 01.10.2008, the trial court has rightly forfeited the right of the petitioners/defendants to adduce evidence. Learned counsel submits that the Writ Petition is liable to be dismissed to the extent of the order passed by the trial court below Exhibit 1 directing the petitioners to begin with the trial and so also forfeiture of the right to lead evidence.

6. So far as re-casting of the issues is concerned, it is plaintiff's assertion that as per the adoption deed dated 28.12.1998, the plaintiff adopted defendant no.6 as her son. The petitioners/defendants have denied the same specifically in their

written statement. According to them, the adoption, if any, is illegal for the reason that defendant no.6 at the time of so called adoption was a married person and as such, plaintiff could not have taken him in adoption. It appears that the learned Judge of the trial court has casted negative burden on the petitioners/defendants to prove that the adoption deed in question is invalid. However, it is for respondent no.1/plaintiff to prove the adoption in terms of the pleadings. It is part of record that initially the trial court has casted the burden on respondent no.1/plaintiff, but on 01.10.2008 without assigning any reason re-casted the issues and put the negative burden on the petitioners/defendants to prove that the adoption deed in question is invalid. So far as re-casting of the other issues as per the order dated 01.10.2008 is concerned, the counsel for the petitioner is not disputing the same. Thus, the writ petition deserves to be allowed to the extent of re-casting of issue no.3.

7. It further appears that after re-casting issues by order dated 01.10.2008, on the same day the trial court *suo motu* passed the order below Exhibit 1 directing the petitioners/defendants to begin with the trial of the suit. It is needless to repeat here that when the the petitioners/defendants have denied the material facts

constituting the cause of action, this is called pleading by traversal. However, the defendant if admits the principle facts constituting the cause of action, but avers some additional facts on proof of which the plaintiff would not be entitled to any relief, is called pleading by confession, and when the defendant puts forward a legal ground on which despite proof of the principle facts, the plaintiff would not be entitled to the relief sought, is called pleadings by avoidance. In case of the pleading by traversal, the plaintiff is to begin, however, in case of pleading by confession and avoidance, the defendant would get a right to begin in terms of the provisions of order XVIII Rule 1 of C.P.C. However, the court cannot exercise those powers.

8. In the case of ***Gouri Food Products, Nagpur v. Priya Trading Co., Nagpur*** (supra), this Court (Coram : D. D. Sinha, J.) at its Nagpur Bench, in paragraph nos. 7 and 8 of the order, has made the following observations:

“7. Considered the contentions canvassed by the learned counsel. Perused the provisions of Order 18, Rules 1 and 2, Civil Procedure Code, as well as the judgment cited by the learned counsel. It would be appropriate to consider the purport of Order 18, Rules 1

and 2, Civil Procedure Code, before adjudicating on the merits of the matter. Order 18 deals with hearing of suits and examination of witnesses. Rule 1 deals with a right to begin, and contemplates that 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 and in such situation, the defendant has a right to begin. The plain reading of Rule 1 would show that the plaintiff, undoubtedly, has a right to adduce evidence first in the suit. However, in view of certain contingencies mentioned in Rule 1, the defendant gets right to begin, and is entitled to adduce evidence first in the suit. This is, undoubtedly, an enabling provision entitling the defendant of right to begin. However, nothing in this provision confers any power on the Court under this Rule to direct defendant to adduce evidence first in the suit if the defendant himself has not claimed such right in view of the contingencies mentioned in Rule 1.

8. It needs to be borne in mind that when the defendant denies the material facts constituting the cause of action, this is called pleading by traversal. When the defendant admits principal facts constituting the cause of action, but avers some additional facts on proof of which plaintiff would not be entitled to any relief, is called pleading by confession, and when the defendant puts forward a legal ground on which despite proof of the

principal facts, the plaintiff would not be entitled to the relief sought, is called pleading by avoidance. In case of pleading by traversal, plaintiff is to begin. In case of pleading by confession and avoidance, the defendant would get a right to begin in view of provisions of Rule 1 of Order 18 of the Civil Procedure Code. However, the entire Rule 1 does not speak of a power to be exercised by the Court in this regard. Hence the defendant, in the abovereferred situation, can exercise his right to begin. However, I am afraid that under this Rule, Court may not be entitled to grant such relief if it is sought by the other side.”

9. In the case of *Bhagirath Shankar Somani and Another v. Rameshchandra Daulal Soni and Another* (Supra), this Court (Coram : A. S. Oka, J.), after referring various cases on this issue, in paragraph no. 16 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.”

10. Thus, the consistent view taken by this Court is that a directions against the defendant to lead evidence before the plaintiff leads his evidence cannot be issued under sub rule 1 of Order XVIII of C.P.C. Even in the given set of facts, no such directions are necessary by exercising inherent power by the trial court. In terms of Rule 3 of order XVIII of C.P.C., the plaintiff can

seek the option of reserving his evidence in rebuttal, if so desired. However, the impugned order passed below Exhibit 1 dated 01.10.2008 by the trial court is unwarranted and uncalled for. In view of the settled position as discussed above and in terms of the consistent view expressed by this Court in various cases as referred above, the impugned order directing the defendant to lead evidence first is liable to be quashed and set aside. In view of setting aside the order directing the petitioners/defendants to lead evidence first, the petitioners/defendants would certainly get the right to lead evidence after the plaintiff enters into the witness box or otherwise, if plaintiff seeks to exercise the option under Rule 3 Order XVIII. However, the impugned order dated 08.12.2008 forfeiting the right of the petitioners/defendants to lead evidence is liable to be quashed and set aside. In view of the above discussion, I proceed to pass the following order :

ORDER

- I. The Writ Petition is hereby partly allowed.
- II. The impugned order dated 01.10.2008 to the extent of re-casting of issue no.3 is hereby quashed and set aside. Needless to say that issue no.1 as per the issues framed on 04.03.2008 would

be substituted in place of issue no.3 of the order dated 01.10.2008. The rest of the issues in terms of the impugned order dated 01.10.2008 are not disturbed.

III. The impugned order dated 01.10.2008 passed below Exhibit 1 in Special Civil Suit No. 84 of 1999 is hereby quashed and set aside.

IV. The impugned order dated 08.12.2008, forfeiting the right of the petitioners/defendants to lead evidence, is hereby quashed and set aside.

V. The trial court is hereby directed to dispose off the suit as expeditiously as possible, preferably within a period of one year from the date of this order.

VI. The Writ Petition is accordingly disposed off. Rule is made absolute in the above terms.

(V. K. JADHAV, J.)

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