

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7634 OF 2020.

Prabiyotsing S/o. Harvindra Sing Bindra
Age 26 years, Occ. Business,
R/o. Kranti Chowk,
Aurangabad.

.. Petitioner
 [Ori. Defendant]

Versus

Shrivallabh Ramgopal Ramchandrajji Darak
Age 40 years, Occ. Business,
R/o. Mr. Darak Traders,
14-15, Pranav Plaza, Opp. Aurangpura
Bhaji Market, Aurangpura,
Aurangabad.

.. Respondent
 [Ori. Plaintiff]

...
Mr. Anand P. Bhandari, Advocate for Petitioner
...

CORAM : ABHAY AHUJA, J.

ORDER RESERVED ON : 28th JANUARY, 2021
ORDER PRONOUNCED ON : 16th FEBRUARY, 2021

ORDER:-

This is a petition filed under Article 227 of the Constitution of India 1950, by the Original Defendant in Special Civil Suit No. 280 of 2017 (the “said suit”) assailing the order dated 3rd February 2020, passed by the 10th Joint Civil Judge (Senior Division)

Aurangabad, allowing the application by the Original Plaintiff Respondent for framing the following additional issue:

“Whether the defendant proves that the Tax invoices, the Delivery Challans are false, forged and fabricated document”.

2] It is the Plaintiff's case in the suit, that the Defendant, for the purposes of his restaurant was purchasing groceries referred to as kirana, from Plaintiff and therefore had business relation with him since 2014. That the kirana material was supplied as and when ordered by the Defendant as per the respective tax invoices and delivery challans and the payment was being made by the Defendant in part as a mutual running account. That supply of Kirana was recorded in the Ledger Account of the Defendant maintained by the Plaintiff in regular course of business showing details of the supply and of payment i.e. debit and credit having reference to tax invoice numbers and opening balance/ closing balance. It is submitted that accordingly, on 13th January, 2016, an amount of Rs. 8, 70,316/- was due. The Plaintiff claims to have sent notice on 04.03.2017 to the Defendant for recovery of the amount, which, despite correspondence and reminders remained unpaid. The said suit therefore came to be filed by the plaintiff for recovery of Rs.8,70,316/- along with interest at the rate of 18% per annum from the date of the suit till the recovery of the entire amount from the Defendant.

3] In the Written Statement filed by the Defendant, the claims made by the Plaintiff have been denied. The Defendant has denied that he knows the Plaintiff. It is stated that Defendant has no restaurant nor is he running any business. It is submitted that the Defendant has never purchased any kirana goods from the Plaintiff. The business relation/transaction with Plaintiff, the supply of Kirana by the Plaintiff or the receipt of tax invoices or delivery challans of the goods or any payment made to the Plaintiff, the recording of any ledger account containing any details of supply or payments has been completely denied as false. That there is no privity of contract nor there is any transaction between the Defendant and the Plaintiff. The notice or any correspondence between the Plaintiff and the Defendant or the suit claim of Rs. 8, 70,316/- is completely denied as false. It is submitted that there is no cause of action. Pertinently, it is stated in paragraph 11 of the Written Statement that the tax invoices and delivery challans are false, forged and fabricated. It is also submitted that the petitioner is not the Proprietor of "Hotel Balle Balle", nor does he have any concern with the said hotel. It is also submitted that the suit is false, fictitious. That the respondent/plaintiff is causing harassment mental and physical and creating false liability by filing the said suit that the said suit be dismissed with costs and compensatory cost of Rs. 25000/- be awarded to the Petitioner.

4] Learned counsel for the Petitioner, Mr. Bhandari has drawn the attention of this court to `Exhibit C' to the petition and submits that on 13th June 2019 the trial court at Aurangabad has framed issues in the suit. For the sake of convenience, the said issues are set out here under:-

“ISSUES :-

[1] Does plaintiff prove that, defendant used to purchase Kirana goods from his restaurant from him?

[2] Does plaintiff prove that, out of their business transaction on amount on Rs 8,70,316/- as on 13.01.2016 was due or outstanding to him from defendant ?

[3] Is plaintiff entitled for recovery of Rs. 8,70,316/- from defendant/ If yes at what rate of interest.

[4] Is defendant entitled for compensatory costs ?

[5] What order and decree.”

5] However, by application dated 20th July 2019, the Plaintiff, respondent herein sought the framing of the additional issue referred to above in view of the specific averment in paragraph 11 of the written statement filed by the Defendant, viz.

“The tax invoices and delivery challan are false, forged and fabricated.” It was submitted that in view of the specific defence of the Defendant, the burden of proving falsity, forgery is upon the Defendant and the proposed issue was necessary to be framed for the correct and final settlement of the controversy between the parties.

6] The Defendant submitted his Say opposing the said application and praying for dismissal of the said application. It was stated that it was settled law that when a question that whether a document is genuine or sham and bogus, the burden lies on a person who asserts the same as genuine and not on a person who alleges the same as sham, forged or bogus and that no negative issue can be framed. It was submitted that no burden lies on the defendant/petitioner of proving falsity, forgery nor that for the final settlement of the controversy between the parties, the proposed issue was necessary to be framed. It was further submitted that the issue No.1 as framed covers the proposed issue and if the plaintiff proves the issue No. 1, he will automatically succeed. It was submitted that the respondent/plaintiff instead of leading evidence has filed a meritless application to prolong the matter and that he has to prove his case by adducing evidence. Paragraph 3 of the say is quoted as under:

“3. With reference to para-3 of the petition, this Defendant denies that in view of defense of the Defendant any burden lies on the Defendant of proving falsity, forgery is upon the Defendant and issue to that effect is necessary to be framed for correct and final settlement of the controversy between the parties, the proposed issues is to be framed. It is settled Law that when a question that whether a document is genuine or sham and bogus, the burden lies on a person who asserts the same as genuine and not on a person who alleges the same as sham, forged and bogus. No negative issue can be framed. The issue No.1 is already

framed which covers the proposed issue. In case the Plaintiff proves this issue he will automatically succeed. The Plaintiff instead of leading evidence has filed meritless application to prolong matter. The Plaintiff has filed the suit and he has prove his case by adducing evidence”

7] By order dated 3rd February 2020, the said application for framing of additional issue was allowed by the 10th joint Civil Judge Senior Division, Aurangabad. Aggrieved by the said order, the defendant is before this court for quashing and setting aside of the said impugned order.

8] Learned counsel for the defendant, Mr. Bhandari, submits that the additional issue viz. *“whether the defendant proves that the Tax Invoices, Deliver Challans are false, forged and fabricated documents”*, would be covered by the first and second issues, as framed on 13th June, 2019, viz. (i) *Does plaintiff prove that, defendant used to purchase Kirana goods from his restaurant from him?* (ii) *Does plaintiff prove that, out of their business transaction on amount on Rs 8,70,316/- as on 13.01.2016 was due or outstanding to him from defendant ?* He submits that once, the plaintiff is able to prove the Tax invoices and Delivery Challans, there would be no necessity for the defendant to prove anything as once those documents are proved the question of falsity, forgery or fabrication of the said documents would not then arise. He submits that as per law, the burden of

proving the documents based on which the claim is made, is on the plaintiff and not on the defendant.

9] In support of his submission, learned counsel has relied upon the following 3 decisions :-

I] Areva T & D India Ltd. vs. R. Govindrajan and others reported in 2010(2) Bom.C.R. 535 (Bom. H.C.)

II] Shubhra Mukherjee and another vs. Bharat Coking Coal Ltd. And others, AIR 2000 SC 1203; and

III] Rangammal and another vs. Kuppuswami, reported in 2011 AIR(SC) 2344.

10] Relying upon the aforesaid decisions he submits that pursuant to section 101 of the Evidence Act, whosoever desires any court to give judgment as to any legal right or law 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. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party. He also refers to illustration (b) to section 102 to submit that the plaintiff would need to prove his case and once that is done, it

would not be necessary for the defendant to prove that the tax invoices and delivery challans were false, forged and fabricated documents. He therefore urges this Court to exercise its supervisory jurisdiction under Article 227 of the Constitution of India to set aside and quash the order dated 03.02.2020.

11] Learned counsel for the Petitioner has been heard at length. The papers and proceeding as well as the decisions cited by the learned counsel have also been perused.

12] For the sake of convenience, sections 101 and 102 of the Evidence Act are quoted as under.

101. 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.

Illustrations

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true.

A must prove the existence of those facts.

102. On whom burden of proof lies. 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.

Illustrations

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the Will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore, the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore, the burden of proof is on B.

13] No doubt the decisions cited by the learned counsel as well as Sections 101 and 102 of the Evidence Act lay down the fundamental principles and obviously, there cannot be two opinions about it. However, this court is unable to fathom as to how the reliance by the Learned counsel on these principles advances the case of the Petitioner. Yes indeed, who ever desires any Court to give any judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist, and when a person is bound to prove existence of any fact, it is said that the burden of proof lies on that person. True, that if A desires a Court to give judgment that he is entitled to certain land in possession of B, by reason of facts which he asserts and which B denies to be true, then, A must prove the existence of those facts. This is the general law of evidence and clearly, as in the facts of this case, if the plaintiff desires that the Court should give judgment that the defendant be directed to make payment of Rs.8,70,316/- alongwith interest, he would need to prove the facts which he

asserts, such as that the plaintiff supplied the grocery items to the defendant, that there was a genuine and bonafide business transaction/relation between them, that the supply was in fact made, that there existed genuine invoices and challans, ledger account, showing details of supply of payment, debit and credit with reference to tax invoices numbers, opening balance/closing balance etc; and which facts the defendant appears to have been denied in his written statement. It would in this context be relevant to quote paragraph 19 of the Supreme Court decision in the case of **Rangammal (supra)**:

“19.Application of Section 101 of the Evidence Act, 1872 thus came up for discussion in this matter and while discussing the law on the burden of proof in the context of dealing with the allegation of sham and bogus transaction, it was held that party which makes allegation must prove it. But the court was further pleased to hold wherein the question before the court was "whether the transaction in question was a bona fide and genuine one" so that the party/plaintiff relying on the transaction had to first of all prove its genuineness and only thereafter would the defendant be required to discharge the burden in order to dislodge such proof and establish that the transaction was sham and fictitious.”

14] Section 102 of the Indian Evidence Act provides as to on whom the burden of proof lies. 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. Learned counsel for the petitioner has relied upon illustration (b) of Section 102 of the Evidence Act in support of his contention that the plaintiff would need to prove his case and once that is done, it would not be necessary for the defendant to prove that the tax invoices and delivery challans were false, forged and fabricated documents. That does not appear to be the intendment of section 102 or illustration (b) thereto. What it says is that on an admitted execution of a bond on which fraud is alleged by B, if no evidence is given on either side and fraud is not proved, then A would succeed and therefore the burden of proof would be on B.

15] Those, however, are not the facts of the case at hand. The Defendant has denied the relation, transaction, supply, delivery, credit/debit ledger, the invoices, delivery challans, documents as well as the amount claimed. There is no admission of any fact in the case at hand. Therefore, reliance upon the said illustration by Learned Counsel for the Petitioner does not appear to lend any assistance to the case of the petitioner. Even otherwise, since the allegation of falsity, forgery and fabrication of documents are made by the Defendant, the burden of proving that would be on the Defendant and cannot be on the Plaintiff.

16] The above quoted observation in paragraph 19 of the Supreme Court decision in the case of **Rangammal (supra)** can be aptly relied upon in this matter. Unless the plaintiff, relying on the transaction, first proves his case, its genuineness or discharges his burden first, only thereafter the defendant will be required to discharge the burden in order to dislodge such proof and to establish that the documents were false, forged or fabricated. But, that does not mean that the trial court can be prevented from framing issues in the suit. No doubt, it is for the plaintiff to first prove issue nos. 1 and 2. Once that is done, the defendant will be required to dislodge it and prove that the documents are false, forged or fabricated. The following observation of the Supreme Court in paragraph 13 of the decision in the case of **Subhra Mukherjee (SC) (supra)** is also very pertinent:

“13. There can be no dispute that a person who attacks a transaction as sham, bogus and fictitious must prove the same. But a plain reading of question No.1 discloses that it is in two parts; the first part says, whether the transaction, in question, is bona fide and genuine one which has to be proved by the appellants. It is only when this has been done that the respondent has to dislodge it by proving that it is a sham and fictitious transaction.”

17] Having said so, what is important to appreciate is that, the principles and provisions of burden of proof come into play once the issues are framed. Issues in a suit are to be framed in accordance with Order XIV Rule 3 of the Code of Civil Procedure, 1908 on the basis of the pleadings of the respective parties. In this case, the trial court has on the basis of the pleadings of the contesting parties in the suit before it in the form of plaint and written statement, framed issues including the additional issue. It is only after the framing of issues that Section 101 and 102 of the Evidence Act would come into play, in order to determine, on whom, the burden lies for proving the issues which have been framed. This principle is set out in paragraphs 24 and 25 of the decision of the Supreme Court in the case of **Rangammal (supra)** and which are quoted as under:

“24. It is further well-settled that a suit has to be tried on the basis of the pleadings of the contesting parties which is filed in the suit before the trial court in the form of plaint and written statement and the nucleus of the case of the plaintiff and the contesting case of the defendant in the form of issues emerges out of that.

25. Thus, we are of the view, that the whole case out of which this appeal arises had been practically made a mess by missing the basic principle that the suit should be decided on the basis of the pleading of the contesting parties after which Section 101 of The Evidence Act would come into play in order to determine on whom the burden falls for proving the issues which have been determined.”

18] This is also not a case, where the trial court while allowing the application for framing additional issue has deleted the first two issues. There is no doubt that a person who attacks a transaction as sham, bogus or fictitious, must prove the same. But, first, the plaintiff has to prove whether the transaction in question is bonafide and genuine. It is only when this is done, that the respondent has to dislodge it by proving that it is a sham, bogus and fictitious transaction.

19] What is also important is that when a plea is taken in the written statement but an issue is not framed, the parties would be deprived of leading evidence. In this context, the observation of the Allahabad High Court in paragraph 29 of its decision in the case of **Debi Prasad vs. Lachhman Singh AIR 1978 All.366** is relevant and is quoted as under:

“29. A plea had been taken in paragraphs 16 and 17 of the written statement which should have led the trial court to frame an issue as to whether the transaction entered into by Hulasi was for the benefit of the family consisting of himself and his nephews. This was not done. As no proper issue was framed, both parties did not lead evidence on this question. An act of the court should not prejudice either party. In the circumstances, there is no option left but to set aside the decrees of the courts below and remand the matter to the trial court to decide it afresh after permitting the parties to clarify their pleadings and leading such evidence as they desire to lead.”

20] Also, if the falsity, forgery, fabrication of documents is pleaded then a proper issue in respect thereof needs to be framed. Paragraph 10 in the case of **Jatindra Natha Das vs. Jadaram and others reported in MANU/WB/0449/1975**, highlighting necessity of framing of issues in such cases appears to be relevant and is quoted as under :-

“10. Thus from the determination as referred to above it is clear that the first ground as urged by Mr. Chakravarty is of no substance and the defendant respondent was rightly found by the learned Courts below to be entitled to have the orders as made without having the judgment and decree in Title Suit No. 3 of 1960 set aside on the ground of fraud. But the second ground of Mr. Chakravarty viz., the learned Courts below, without a proper issue on fraud being framed, was not justified to make determinations on fraud seems to us, is of substance. In this case admittedly allegations of fraud were made or raised in the written statement. But no specific issue has been framed. But the Courts below have determined the said allegations of fraud. Such determination without a proper issue in our view was not only unjustified and improper but the same is contrary to the principles and the object of framing issues before the parties to a proceeding enters the trial. Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Such issues may be issues of fact or issues of law. Every material proposition affirmed by one party and denied by the other should form a subject of a distinct issue. The object of framing issues plays a very important and distinctive role in a suit. Such object is to direct the attention of the parties to the principal questions on which they are at variance. In a suit what a party has got to prove at the hearing is the existence or non existence of facts in issue and the same can be done by proof of facts, which are called evidentiary facts. Those evidentiary facts must of course be relevant facts or facts relevant to the facts in issue. Issue are, required to be framed for the purpose of having the material points in controversy rightly decided and to bring a finality in the litigation and as such it is the duty of the Court to frame due and proper issues on the basis of materials as referred to in Order XIV Rule 3 of the Code of Civil Procedure and while framing such issues, as has been held in *Konda v. Waghu*, A.I.R. 1950 P.C. 68, the Court must bear in mind that it is an absolute necessity that the determinations in a cause should be founded upon a case to be found in the pleadings or involved in or consistent with the case as made. As stated hereinbefore issues of law and of fact have got to be framed and such framing of issues under order XIV Rule 2 of the Code of Civil Procedure is mandatory. Unless proper issues are framed the provisions

of Order XIV Rules 1 and 2 of the Civil Procedure Code would be frustrated and a party who suffers a judgment on the basis of findings not based on proper issues may have a legitimate grievance to contend that because of such non framing of issues he has suffered and he has been denied the opportunity of leading proper evidence for rebutting the relevant facts. Here in the instant case, the plaintiff appellant can thus legitimately contend that in the absence of any specific issue regarding fraud he was not required to lead any evidence rebutting the allegations of fraud and as such he has not led such evidence. It cannot be disputed that the omission to frame an issue on fraud has become fatal in the instant; case and has caused great prejudice to the plaintiff appellant and that has caused failure of justice. So this appeal must be allowed on that ground and should be sent back on remand to the learned trial Court for a retrial after framing the necessary issue on the question of fraud in the following manner: --

Was the decree in Title Suit No. 3 of 1960 a fraudulent one and the same was a nullity and as such not binding on Nani Gopal and Bakul Rani and thus on the defendants ?

We hold that the framing of the above issue is necessary for an effective and final determination of the matter in issue on the pleadings of the parties and the said issue, as contended by Mr. Mitter, we are of the view is not covered by Issue Nos. 3 and 4 as framed. We further direct that the learned trial Court on remand and after re-framing the said issue should give opportunities to the parties to lead relevant evidence and then decide the same and also the question of onus to prove fraud and the incidental question of benami. We are further of the view that no interference in this appeal is required in respect of the determinations as made by the learned Courts below on the other issues. The appeal is thus allowed on the grounds as indicated above and as such the case is remanded to the learned Trial Court to have the necessary determination of the points as indicated above. There will, however, be no order for costs..”

21] In the case at hand, admittedly, the additional issue has been framed only on the basis of the pleadings and therefore the interlocutory order dated 03.2.2020 of the Trial Court cannot be faulted. In fact it is surprising that having made the allegation of forgery, fabrication of documents in the Written Statement, the

Defendant is opposing the framing of the additional issue pursuant to the said pleading.

22] In view of the above discussion, this court is of the view that there is no jurisdictional error on the part of the Trial Judge nor any illegality or perversity in the impugned order dated 3rd February, 2020 passed by the 10th Joint Civil Judge (Senior Division) Aurangabad in Special Civil Suit No. 280 of 2017 in framing the additional issue. Entertaining the prayers of the petitioner would result in interference of the trial. What the learned trial Judge has done, in my view, cannot be interfered with and I refrain from doing so. The Impugned Order is an interlocutory order. All the contentions/issues can always be asserted before the Trial Court. Needless to observe that, if the trial court gives a decision which is adverse to the interests of the Petitioner, the Petitioner can always agitate the same in first appeal.

23] Hence, the following order :-

[a] The writ petition is dismissed. There shall, however, be no orders as to costs.

[b] It is made clear that this court has not given any finding on the facts/merits of the said suit. The reasons given herein are only for the purposes of deciding the petition. All

contentions/issues are left open to be decided at the trial of the suit which the Trial Court shall decide on its own merits in accordance with law.

(ABHAY AHUJA)
JUDGE

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