

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 6.7.2021.

CORAM

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

C.R.P.(PD) No.641 of 2017

and

C.M.P.No.3250 of 2017

Periyasamy

Petitioner

vs.

Soliammal

Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the Fair and Decreetal order dated 3.12.2016 passed in I.A.No.291 of 2016 in O.S.No.251 of 2013 on the file of the I Additional District Judge, Erode.

For Petitioner : Mr.V.S.Kesavan

For Respondent : No appearance.

ORDER

The revision has been filed against the order passed in I.A.No.291 of 2016 in O.S.No.251 of 2013 on the file of the I Additional District Judge, Erode.

2. The revision petitioner is the defendant. The plaintiff and defendant are siblings.

3. For the purpose of convenience, the parties are referred as

they are arrayed in the Original Suit.

4. Brief facts of the case leading to filing of the civil revision petition is as under:-

(i) The plaintiff filed the suit for partition in respect of the suit properties, which, according to the plaintiff are both ancestral and self acquired properties of her father, who died intestate.

(ii) The defendant had filed a written statement denying the averments of the plaintiff and contended that his father Nallappa Gounder, during his life time, on 27.1.2000, executed a Will in his favour while he was in a sound and disposing state of mind.

(iii) The plaintiff filed a reply statement denying the execution of the Will in favour of the defendant.

(iv) The Trial Court framed issues and when the matter was taken up for trial, the plaintiff had filed I.A.No.291 of 2016 under Order XVIII Rule 1 and Section 151 CPC directing the defendant to begin with the case first.

(v) In the petition, it was contended by the plaintiff that the defendant had taken a stand in para 10(2) that their father had executed a Will on 27.1.2000 in favour of the defendant bequeathing the entire A schedule properties and items 1 to 3 of B schedule

properties and as far as items 4 and 5 of B schedule properties, he had purchased out of his own and that he had also pleaded ouster and adverse possession against the plaintiff, however, according to the plaintiff, the Will dated 27.1.2000 is a forged and not a true and genuine one and thereby the burden of proof heavily lies on the defendant to prove the existence of the Will and with regard to ouster and adverse possession by adducing appropriate evidence both oral and documentary.

(vi) The defendant filed a counter contending that as per Order XVIII Rule 1, the right to begin was given exclusively to the defendant which can be utilised by the defendant only on his own volition and the plaintiff cannot seek to enforce it to direct the defendant to begin the case first.

(vii) The Trial Court after hearing both the parties, had allowed the petition and held that the onus of proof lies heavily on the defendant that his father Nallappa Gounder had executed a Will in his favour and thereby directed the defendant to let in evidence first, against which, the present revision has been filed.

5. The learned counsel for the revision petitioner/defendant is present. Despite service of notice and printing of name of the

respondent, he neither appeared in person nor is represented by any counsel. This court directed the learned counsel for the petitioner to inform the learned counsel who appeared for the respondent herein before the court below and the learned counsel for the petitioner, after complying the said direction, reported before this court and produced necessary proof in this regard. Despite the matter being posted today and despite affidavit of service being filed, there is no representation for the respondent.

6. The learned counsel for the petitioner would submit that the provision under Order XVIII Rule 1 CPC confers a right only on the defendant in contingency referred therein, to begin which is, apparently, an enabling provision entitling of right to begin and it does not confer any power on the court or the plaintiff to compel the defendant to enter into the witness box first to adduce evidence in support of his claim before the plaintiff enters into the witness box. He would also submit that there is no specific provision under Order XVIII that the court can presume power to direct the defendant to let in evidence first and the right to begin conferred under Order XVIII Rule 1 is an exclusive right given only to the defendant and not to the plaintiff and only the defendant can exercise his right to let in evidence

and the court has to look into the pleadings and written statement in a whole and only in contingencies wherein the exercise of provision can be granted to the defendant, however, such a right cannot be exercised by the plaintiff or by the court. The Trial Court, without any powers conferred on it under Order XVIII Rule 1, had stretched the provisions, which is against the law.

7. The learned counsel for the petitioner further that Order XVIII Rule 1 CPC is concerned not only with the production of evidence but, it is a composite provision dealing with the right to begin the case in general and this includes the production of evidence as well as addressing the court by oral arguments. He would further submit that though Order XVIII Rule 1 CPC provides in general about the right to begin, Rule 2 of Order XVIII deals with opening the case and production of evidence. He, therefore, submitted that a combined reading of the provisions would show that the person, who has got a right to begin must lead the evidence first and as per the statutory scheme, the plaintiff is given right to begin the case, however, this right would not give a further right to compel the defendant to produce his evidence first and neither the plaintiff nor the court can compel the defendant to exercise such a right.

8. The learned counsel for the petitioner also submitted that the question of the defendant beginning a case would arise only in case wherein the defendant admits the facts alleged in the plaint and contends and claims that either on the point of law or on additional facts, the plaintiff is not entitled to any part of the relief which he seeks. The learned counsel would reiterate that such a right is a prerogative of the defendant alone and it is essentially a legal obligation to prove the case and in this case, though there is onus on the defendant to prove his case, but, the right to begin is an exclusive right given under Order XVIII Rule 1 which the defendant can exercise or not exercise. He, therefore, submitted that the Trial Court erroneously allowed the petition and had directed the revision petitioner/defendant to let in evidence which is against law and thereby seeks that the revision may be allowed and the order passed by the Trial Court be set aside.

9. In support of his contentions, the learned counsel for the petitioner would rely upon the following decisions:-

i) Bajaj Auto Limited v. TVS Motor Company Limited (2010 (6) CTC 225)

ii) Gouri Food Products v. Priya Trading Co. (2003(1) Civil

Court Cases 576 (Bom.)

iii) Bhagirath Shankar Somani & Others vs. Rameshchandra Daulal Soni and another (2007(4) Civil Court Cases 348 (Bom))

iv) P.Lingasamy v. B.Premavathy (2017(1) CTC 305)

10. Heard the learned counsel for the petitioner and perused the order passed by the court below.

11. The relevant portions of the decisions relied on by the learned counsel for the petitioner are extracted hereunder:-

(i) In **Bajaj Auto Limited v. TVS Motor Company Limited (2010 (6) CTC 225)**, a Division Bench has held as under:-

" 24. The issues raised in these appeals revolve around the interpretation of Order 18 Rule 1 and 2 CPC.

25. Order 18 (1) of CPC deals with hearing of the suit and examination of witnesses. The provision reads thus :-

"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."

26. The provisions of Order 18 CPC indicates the normal method of production of evidence and the arguments by either parties.

27. The term "right to begin" is not merely a right. It is rather a duty or legal obligation. It is so because the plaintiff has to win or lose the case on the basis of his own case and not on the weakness of the defendant's case.

28. Order 18 Rule 1 CPC is concerned not only with the production of evidence. It is a composite provision dealing with the right to begin a case in general. This includes the production of evidence as well as addressing the Court by oral arguments. Though Order 18 rule 1 CPC provides in general about the right to begin, Rule 2 of Order 18 deals with opening the case and production of evidence. A combined reading of Rules 1 and 2 of Order 18 CPC

would show that the person who got a right to begin must lead evidence first. As per the statutory scheme, the plaintiff is given the right to begin the case. This right would not give the plaintiff a further right to compel the defendant to produce his evidence at the first instance. The question of defendant beginning the case would arise only in cases wherein the defendant admits the facts alleged in the plaint and contends that either on point of law or on some additional facts alleged by him, the plaintiff is not entitled to any part of the relief which he seeks. It is only in such circumstances, the defendant gets the right to begin. Therefore, the "right", as defined in Rule 1 of Order 18 would not really be a "right" and is essentially a legal obligation to prove the case.

29. There are exceptions to this Rule like the case relating to promissory notes. In a suit on promissory notes, if the defendant admits execution, the burden would shift to him to prove the discharge.

Section 18 of the Negotiable Instruments Act provides

that until the contrary is proved, the Court shall presume that every negotiable instrument or debt was made or drawn as shown in the document. In such cases, the burden is on the opposite party to lead evidence that the negotiable instrument was made without consideration.

... ..

52. The general principle is that the plaintiff should win or lose his case on the basis of the case set up by him. The defendant got a right to insist that he should not be compelled to disclose his evidence first as otherwise the plaintiff would tune his case accordingly. Therefore, the defendant was right in insisting that the plaintiff should prove his case first before calling upon him to adduce evidence. When there is a deviation from the normal rule, naturally, it would result in injustice. Such injustice would give a cause of action to file an appeal."

(ii) In **Gouri Food Products v. Priya Trading Co. (2003(1) Civil Court Cases 576 (Bom.))**, the Bombay High Court has held as

under:-

"10. In the instant case, the applicant moved an application under Order 18 of the Civil Procedure Code seeking to exercise power under Order 18, Rule 1 and direct the defendant to begin the evidence, since the defendant in his Written Statement has admitted execution of agreement and the payment of two instalments made to the applicant (plaintiff) pursuant to the said agreement. It is further contended by the plaintiff that since the defendant has stated in his Written Statement that he has executed agreement under undue influence and coercion, the burden of proving this fact lies on the defendant, since the other aspects are admitted by him and, therefore, it is contended by the plaintiff that the trial Court ought to have allowed the application under Order 18, Rule 1 of the Civil Procedure Code.

11. On the backdrop of the above referred legal position, vis-a-vis Order 18, Rule 1 of the Civil Procedure Code, it is evident that it only confers a

right, in the contingencies referred to hereinabove, to begin, which is apparently an enabling provision entitling the defendant of right to begin, and does not confer any power on the court to direct the defendant to enter witness box and adduce evidence first in support of his claim before the plaintiff enters witness box. The contention advanced by the learned counsel for the applicant in this regard cannot be accepted. Similarly, as far as Order 18, Rule 2 of the Civil Procedure Code is concerned, the same is not attracted and does not help the cause of the applicant. The contention canvassed by the learned counsel for the applicant in this regard also needs to be rejected. The view taken by him is fortified by the Judgment of this Court in [Haran Bidi Suppliers and Anr. v. V. M. and Company, Bhandara](#), reported in 2001 (4) Mh.L.J. 112.

12. So far as the Judgment of the Gujarat High Court is concerned, the Hon'ble Judge has considered the aspect whether the court was entitled to record evidence of the parties before framing issues under

Order 14, Rule 11, read with Order 10, Rule 2 of the Code of Civil Procedure. Though there are some passing observations of a general nature made in the Judgment in regard to Order 18 of the Code of Civil Procedure, however, the court did not specifically face with the situation as regards the power of the court, vis-a-vis Order 18 of the Civil Procedure Code. In the instant case, the issue involved, adjudicated upon and considered pertains to the purport of Order 18, Rules 1 and 2 of the Civil Procedure Code, interpretation of the same and consequence thereof, vis-a-vis power of the Court, which emerges from Order 18, and after due consideration in regard on these aspects, it can safely be concluded that Order 18, Rule 1 of the Civil Procedure Code confers right on the defendant in view of the contingencies mentioned therein, and entitles him to begin the evidence. However, the analogy cannot be stretched further in order to hold that it also confers power on the court to issue necessary directions in this regard. It, no doubt, sounds little

harsh, however, in absence of a specific provision under Order 18 and its Sub-rules, it will not be proper to presume the existence of such power in the court. Such interpretation of Order 18 of the Code of Civil Procedure may not be valid. While dealing with the issue in question, this court has confined the debate/adjudication only in respect of purport of Order 18 of the Civil Procedure Code, and has not considered the inherent power of the court under Section 151 of the Civil Procedure Code."

(iii) In **Bhagirath Shankar Somani & Others vs. Rameshchandra Daulal Soni and another (2007(4) Civil Court Cases 348 (Bom))**, it has been held as under:-

"13. The first issue to be decided is whether by placing reliance on Rule 1 of Order XVIII of the said Code, the Court can give direction to the Defendant to enter the witness box before the Plaintiff leads his evidence. The said issue is no longer res integra. The learned single Judge of this Court in the case of Haran Bidi Suppliers and Anr. v. V.M and Company, Bhandara 2001(4)

Maharashtra Law Journal Page 113 had occasion to deal with the said issue. This Court was dealing with a revision Application where the challenge was to an order by which the trial Court had directed the Defendants to enter the witness box before the Plaintiff leads the evidence. This Court considered the provisions of Order XVIII of the said Code and in particular Rule 1 thereof. After considering Rule 1, the learned single Judge held thus:

On the plain language of the said provisions, it would appear that it is only an enabling provision entitling the defendant of right to begin. In my view, 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 its case. In the circumstances, the impugned order passed by the trial Court cannot be sustained in law.

There is one more decision of another

learned single Judge on this aspect. The said decision is rendered in the case of Gouri Food Products, Nagpur v. Priya Trading Company, Nagpur, 2003(1) Civil Court Cases 576 (Bombay). The same issue arose before this Court regarding power of the trial Court to give direction to the Defendant to lead evidence before the Plaintiff leads his evidence.

This Court considered the provisions of Order XVIII and in particular Rules 1 to 3 thereof. This Court also considered the decision of the Gujarat High Court in the case of M/s Keshavlal Durlabhasinbhai's Firm (supra) on which reliance has been placed by the learned Counsel for the first Respondent. In paragraph No.7, the learned single Judge held thus:

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.

In paragraph No.11 of the said decision, this Court referred to the decision of this Court in the case of Haran Bidi Suppliers (supra). The learned single Judge held in paragraph No.11 as under:

11. On the backdrop of the above referred legal position, vis-a-vis Order XVIII, Rule 1 of the Civil Procedure Code, it is evidence that it only confers a right, in the contingencies referred to hereinabove, to begin, which is apparently an enabling provision entitling the defendant of right to begin, and does not confer any power on the court to direct the defendant to enter witness box

and adduce evidence first in support of his claim before the plaintiff enters witness box. The contention advanced by the learned Counsel for the applicant in this regard cannot be accepted.

In paragraph No.12 this Court held thus:

It, no doubt, sounds little harsh, however, in absence of a specific provision under Order XVIII and its Sub-rules, it will not be proper to presume the existence of such power in the court. Such interpretation of Order XVIII of the Code of Civil Procedure may not be valid.

14. Reliance was placed by the learned Counsel appearing for the first Respondent on the decision of this Court in the case of Kumudini Damodar Magar (supra). It must be borne in mind that the issue which is involved in these Petitions, viz, "Whether the Court has power to issue directions under Rule 1 of Order XVIII of the said Code to the Defendant to lead his evidence before the Plaintiff leads evidence?" did not arise in the said case. This Court was concerned with

the issue whether a Defendant can be permitted to lead evidence prior to the recording of evidence of the Plaintiff. The right which was claimed by the Defendant in the said case was on the basis of Rule 3A of Order XVIII. In paragraph No.13 this Court held thus:

Thus, if the plaintiff wants to examine defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor on the ground that the prayer of the defendant for filing written statement had been rejected. In terms of the provision of Rule 1 of Order XVIII, the right or privilege to begin first and, thus, to examine the witness first depends on the pleadings of the parties. While ordinarily it is the plaintiff who begins first, in an appropriate case the defendant may claim such privilege or may be directed by the Court to do so bearing in mind the facts and circumstances of the case.

15. Apart from the fact that the issue which is involved in this Petition regarding the power of the Court to issue direction did not arise for consideration before the learned single Judge, the aforesaid two decisions of the learned single Judges of this Court in the case of Haran Bidi Suppliers and Gouri Food Products (supra) which were binding precedents were not brought to the notice of the learned single Judge. As the issue involved in this Petition never arose for consideration before the learned single Judge in the case of Kumudini Damodar Magar (supra), the observations made in paragraph No.13 which are referred to above cannot be read as a binding ratio or a binding precedent.

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 in so far as it grants prayer Clause (b) will have to be quashed and set aside."

(iv) In ***P.Lingasamy v. B.Premavathy (2017(1) CTC 305)***, this court has held as under:-

"2. The learned Trial Judge allowed the application on the ground that the petitioner in his written statement pleaded that there is a Will executed in his favour and as such, he is entitled to the property. The Trial Court was of the view that on account of the Will, the petitioner has to commence the evidence at the first instance.

3. The written statement filed by the petitioner in his capacity as first defendant in O.S.No.367 of 2008 indicates that the suit was resisted on multiple grounds.

The Will dated 05.09.1989 was also taken as a ground to demonstrate that the first respondent is not having any share in the property.

4. The learned Trial Judge was of the view that since the petitioner placed reliance on the Will, it is for him to prove his case.

5. While considering an application under Order 18 Rule 1 of CPC, the Court has to consider the plaint and the written statement in its entirety. It is not as if the petitioner placed reliance on the Will alone to non-suit the first respondent. Since several defences were taken by the petitioner in his written statement in O.S.No.367 of 2008, the Trial Court was not correct in directing him to lead evidence at the first instance. I am therefore of the view that the impugned order is liable to be set aside."

12. On consideration of the facts and circumstances of the present case in the light of the principles laid down in the above decisions, it is seen that in this case, the plaintiff had filed the suit for

partition. The revision petitioner/defendant filed written statement claiming that his father left a Will in his favour and apart from that the the revision petitioner/defendant also stated that the plaintiff is well aware of the Will executed by their father Nallappa Gounder and that after the demise of his father, the revision petitioner/defendant made huge improvements in the suit properties, levelled the lands, made improvements, constructed a terraced house in the B schedule property, laid pipelines for more than 3000 feet, got new electricity connection by spending huge amounts, got the revenue records mutated and planted 500 coconut trees and the plaintiff is ousted from the suit property and the defendant has also become absolute owner by adverse possession and he had also purchased items 4 and 5 of the suit B schedule properties in his name and spent huge amounts towards improvements.

13. Thus, while considering the Application under Order 18 Rule 1 CPC, the court has to consider the plaint and written statement in its entirety and it is not a case where the revision petitioner/defendant placed reliance on the Will alone. Since several other defences are taken in the written statement, the Trial Court was not correct in directing him to lead evidence at the first instance. This court is,

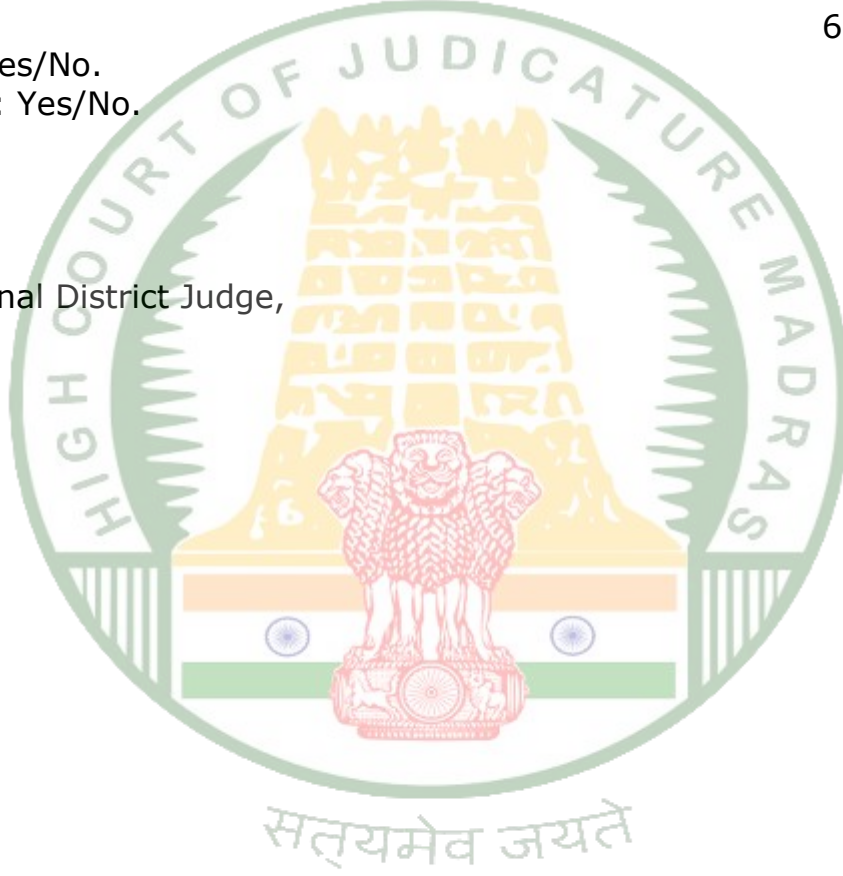
therefore, of the view that the impugned order is liable to be set aside. Accordingly, the civil revision petition is allowed. The order passed by the Trial Court is set aside. No costs. The connected Miscellaneous Petition is closed.

6.7.2021.

Index: Yes/No.
Internet: Yes/No.
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To

I Additional District Judge,
Erode.



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