

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.9743 OF 2023

MIR. AJGHAR ALI KHALID NASIRI S/O MIR. AKBAR ALI NASRI AND
OTHERS
VERSUS
MIR. NASIR ALI MUJAHID NASIRI AND OTHERS

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Mr. P. R. Kathneshwarkar, Advocate h/f Mr. Anuj A. Fulfagar,
Advocate for Petitioners
Advocate for Respondent Nos.1 and 3 : Mr. N.L. Jadhav

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 23rd AUGUST, 2023

PER COURT :

1. Petitioners are aggrieved by the order passed by learned Civil Judge, Senior Division, Aurangabad, below Exhibit-217 in Special Civil Suit No.48/2013, thereby rejecting application filed by the petitioners/plaintiffs.

2. Petitioners/plaintiffs have filed the suit for partition, injunction and separate possession of the suit property against the respondents/defendants. Respondents appeared and opposed the suit by filing written statement. Trial Court at Exhibit-131 framed issue No.2 as "*Whether defendant No.1 proves that, father of plaintiffs and defendant Nos.1 and 2 executed registered will deed on 22-08-2008 in favour of defendant No.1?*" and issue No.3 as "*Whether defendant No.1 further proves that, plaintiffs executed*

the declaration cum consent deed and no objection certificate dated 15-01-2011 in respect of the above said will deed?”, along with five other issues. Plaintiffs led their evidence and filed pursis Exhibit-168 stating that, as per the issues framed burden to prove issue Nos.2 and 3 is upon defendants and therefore, at this stage plaintiff closes his evidence by reserving right to lead further evidence after the evidence of defendants. Thereafter, defendants led their evidence in support of their case. Then, plaintiffs filed application Exhibit-217 by titling it as “Application for permission to lead further/secondary evidence”, stating that, taking into consideration the evidence led by defendants, plaintiff No.1 may be permitted to lead further/secondary evidence as well as the witness summons to the Sub-Registrar, Charminar, Hyderabad, may be issued with a direction to appear before the Court along with relevant record in respect of sale deeds and Register of Bond Paper dated 13/01/2011, submitted by Stamp Vendor Sri. Mohammaed Abdul Quadeer before the Court. The said application was opposed by the defendants and the trial Court has rejected the same. Hence, the present petition.

3. Heard learned advocate for petitioners and learned advocate for respondent Nos.1 and 3. Perused the writ petition memo, annexures thereto, the impugned order, affidavit-in-reply

filed by respondent Nos.1 and 3 and the citation relied upon by learned advocate for petitioners.

4. Perusal of record shows that the trial Court has rejected the application filed by petitioners holding that, the burden is on the plaintiffs to prove issue Nos.1 and 4 to 6, and the burden to prove issue Nos.2 and 3 is on the defendants. Earlier application filed by the plaintiffs seeking direction to the defendants to lead the evidence first, was rejected by the Trial Court. Plaintiffs have not pleaded about the two sale deeds which are referred in the application. Once the plaintiffs have led their evidence and closed evidence by filing pursis and defendants have led their evidence, plaintiffs cannot be allowed again to lead evidence only for rebuttal of the evidence led by defendants. If the application is allowed, old matter would be prolonged and prejudice will be caused to the defendants.

5. Rule 3 of Order 18 of the Code of Civil Procedure reads thus:-

"3. Evidence where several issues.- Where there are several issues, the burden of proving some of which lies on the party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the

party beginning; but the party beginning will then be entitled to reply generally on the whole case."

6. In ***Nipendraghandra Bid Vs. Rajaramka Pulp and Paper Mills Ltd., 1979 Mh.L.J. 220***, learned Single Judge of this Court has held;

"9. ...The plaintiff is entitled to express his reservation to adduce evidence by way of rebuttal after the completion of the evidence on the side of the plaintiff and before the commencement of the evidence for the defendant under Order 18, Rule 3, in respect of issues of which onus lies on the defendant. The option given to the party, contemplated under Order 18, Rule 3 is to be exercised only at or before the time when the other party that has got right to lead evidence, begins, and not afterwards.

11. If various rules of Order 18 of the Code of Civil Procedure are read together, it is quite clear that from the provisions of Order 18, Rule 3, that where the burden of proving some of the issues lies on one of the parties, it is open to the party leading evidence, if chooses, to reserve his evidence by way of rebuttal to the evidence to be produced by the other party. In the case before me it is the plaintiff who had made a claim for arrears of rent and has, therefore, filed the suit. Therefore, the burden to prove the claim made by the plaintiff is upon the plaintiff itself. It is no doubt true that the option contemplated by Order 18, Rule 3, Code of Civil Procedure, could be waived by the plaintiff and it could lead its own evidence even without exercising such an option. The law does not prescribe any particular stage at which the option is to be exercised. In this case such an option was exercised before the defendant began his evidence. Therefore, in my opinion, it cannot be said that it was not open to the plaintiff to exercise such an option after it has examined a witness in support of its claim. In the present case it could be said that there was sufficient compliance with the provisions of Order 18, Rule 3, Code of Civil Procedure, as the option was given by the plaintiff of reserving its

right to adduce evidence in rebuttal even before the other party had began his evidence. Sufficient notice was given to the defendant that the plaintiff intends or reserves its right to adduce evidence in rebuttal. Therefore, in my opinion, it cannot be said that the interpretation put forward by the learned Judge upon the provisions of Order 18, Rule 3, Code of Civil Procedure, so far as the present case is concerned is any way erroneous."

The aforesaid observations are squarely applicable to the case of the petitioners.

7. Coming to the facts of the present case, admittedly, the plaintiffs have filed pursis reserving their right to lead evidence after defendants lead their evidence on issue Nos.2 and 3. Though the application Exhibit-217 filed by petitioners/plaintiffs is not happily worded, the tenor of application shows that it is in fact filed for exercising right under Rule 3 of Order 18. By rejecting said application, trial Court has denied reasonable and fair opportunity to the plaintiffs to lead evidence in support of their case on merit. Trial Court has also ignored the fact that even if petitioners lead further evidence, defendants will be entitled to cross-examine the witnesses and challenge the said evidence.

8. In the light of above, impugned order cannot be sustained. Hence the following order:-

ORDER

(I) Writ petition is allowed.

- (II) Impugned order passed by learned Civil Judge, Senior Division, Aurangabad, below Exhibit-217 in Special Civil Suit No.48/2013, is quashed and set aside. Application Exhibit-217 is allowed.
- (III) Trial Court is directed to complete hearing of the suit within a period of six months from the date of receipt of writ of this order.

It is made clear that observations made in this order are *prima facie* and trial Court shall not be influenced by the same at the time of deciding the suit on merit. Defendants are at liberty to challenge the admissibility and relevancy of evidence led by the plaintiffs, at the time of final adjudication of suit.

(NITIN B. SURYAWANSHI, J.)