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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 11133 OF 2024

Vilas Sarjerao Sable & Anr

...Petitioners

Versus

Vikrant Gopal Mehandale & Anr

...Respondents

Mr. Nikhil Wadikar, with Amol Dumbre & Kastur Patil, i/b Nandu Pawar, for the Petitioners.

Ms. Gunjan Shah, for the Respondents.

CORAM: N. J. JAMADAR, J.

DATE: 9th JANUARY 2025

ORDER:-

- 1.** Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.
- 2.** The petitioners-defendants take exception to an Order dated 6th January 2024 passed by the learned Civil Judge, Senior Division, Satara on an Application (Exhibit “33”), preferred by the defendants for recast of issues, whereby the said Application came to be rejected.
- 3.** The defendants were running an Emu farm under the name and style of “SaiJyot Emu Farm and Hatcheries”. The defendants floated a “Corporate Emu Farming” scheme. On the representation of the defendants, the respondents-plaintiffs claimed to have invested a sum of Rs.4 lakhs. An Investment Agreement came to be executed on 18th

December 2008 incorporating the terms of the contract. The defendants had, *inter alia*, agreed to return a sum of Rs. 7 lakhs on the said investment, over a period of time, in the installments stipulated therein. The last installment of Rs. 2 lakhs was to be paid by the end of April 2015.

4. Asserting that the defendants committed defaults in repayment, in accordance with the terms of the aforesaid contract, the respondents instituted Suit, being Regular Civil Suit No. 138 of 2018, for recovery of the sum of Rs.11 lakhs and interest thereon. The defendants resisted the Suit by filing Written Statement. Upon perusal of the pleadings and the documents, the learned Civil Judge settled issues on 28th August 2020 including the following.

- 1] Do defendants prove that plaintiff committed breach of agreement dated 18th December 2008?
- 2] Do defendants prove that Suit is hit by the principles of estoppel, acquiescence and latches?
- 3] Is the Suit within limitation?

5. The defendants preferred an Application for recast of issues (Exhibit “19”). By an order dated 14th June 2022, the learned Judge rejected the Application to recast the issues and declined to frame the issues as proposed by the defendants. Undeterred, the defendants again preferred an Application for recast of the issues (Exhibit “33”) and proposed that the following issues be framed.

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- 1 Whether Plaintiff proves that Defendant have made a breach of terms and conditions of agreement?
- 2 Whether Plaintiff proves that Defendant has defrauded the Plaintiff?

6. The learned Civil Judge was persuaded to again reject the Application observing, *inter alia*, that the first Application for recast of issues came to be rejected and thereafter on a number of occasions the defendants had sought time to lead the evidence and the issues framed by the Court (extracted above), covered the entire dispute between the parties.

7. Being aggrieved by and dissatisfied with the aforesaid impugned order, the defendants have invoked the writ jurisdiction of this Court.

8. Mr. Nikhil Wadikar, learned Counsel for the Petitioners, strenuously submitted that the learned Civil Judge committed a manifest error, first, in casting the burden to establish the breach of contract, on the defendants, and, second, in directing the defendants to begin the evidence. The learned Judge has presumed the proof of contract between the parties, which is not the case. At any rate, calling upon the defendants to begin the evidence is against the well recognized principle that the burden to establish a case rests on the party who approaches the Court. Mr. Wadikar further submitted that the mere fact that the execution of the Agreement dated 18th December 2008 was admitted by defendants does not imply that the contents of

the said document were duly proved in evidence. Therefore, the impugned order deserves to be quashed and set aside.

9. Ms Gunjan Shah, learned Counsel for the respondents-plaintiffs, supported the impugned order. It was urged that after the first Application for recast of issues was rejected, the defendants sought time to lead evidence on one or the other pretext and, thereafter, preferred the instant Application (Exhibit “33”), again for the recast of issues. The second application for the very same prayer was plainly untenable. On merits, Ms. Shah would urge that the trial court was fully justified in framing Issue No.1 so as to cast burden of proof of breach of contract on the defendants, in view of clear and categorical admission by the defendants of the execution of the said Agreement. Thus, no interference is warranted in the impugned order.

10. I have given careful consideration to the rival submissions canvassed across the Bar. First and foremost, it is necessary to note, the petitioners first Application for recast of issues (Exhibit “19”) came to be rejected by an Order dated 14th June 2022. It seems, the petitioners sought time to lead the evidence and, eventually, filed another Application for recast of issues. The submission on behalf of the respondents-plaintiffs that the second Application was not maintainable cannot be brushed aside lightly. The issues proposed by way of second Application (Exhibit “33”) may have been worded in a slightly different

form, yet, the purport of the first and second Application, by and large, remains the same.

11. Secondly, from the perusal of the Written Statement (paragraph 13 (d)) it becomes explicitly clear that the defendants have admitted in no uncertain terms that the Investment Agreement dated 18th December 2008 was executed between the parties. However, according to the defendants, the plaintiffs did not perform their part of the promise contained in the said Agreement. The plaintiffs had committed breach of the contract and therefore they had no right to seek enforcement of the said contract.

12. In view of the aforesaid clear, categorical and unqualified admission as regards the execution of the Investment Agreement dated 18th August 2008, the learned Civil Judge was justified in casting the burden of proof of breach of the contract by the plaintiffs, on the defendants. The endeavor of Mr. Wadikar to explain away the clear and categorical admission that the Investment Agreement was duly executed, by asserting that admission of execution does not amount to admission of contents of the documents, does not merit acceptance.

13. The Court has the benefit of the Investment Agreement dated 18th December 2008 (Exhibit "A" to the Affidavit in Reply). The said Agreement hardly provides any other stipulation, apart from the Agreement to invest Rs. 4 lakhs, the manner in which the amount was

to be returned and the terms for continuation of the said Agreement beyond April 2015.

14. Mr. Wadikar, the learned Counsel for the petitioners, then urged that the direction to the defendants to begin the evidence, cannot be sustained, under any circumstances.

15. As regards the rights to begin, the provisions contained in Order XVIII, Rule 1 of the Code of Civil Procedure 1908 (“the Code”), govern the position. It reads as under:

“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.”

16. A plain reading of the aforesaid Rule would indicate that, ordinarily the plaintiff has the right to begin. However, in a case where the defendant admits the facts alleged by the plaintiffs and yet contends that on account of a legal prescription or other facts, the plaintiff is not entitled to the relief, the defendant has the right to begin. To appreciate the issue as to who has the right to begin, apart from the provisions contained in the Evidence Act, on the aspect of burden of proof, the pleadings of the parties and the documents are required to be examined. It is also necessary to note that the plaintiff may chose to

adduce evidence despite the case falling within the later part of Rule 1 of Order XVIII of the Code. Nor does the said Rule obligates the Court to compulsorily call upon a particular party to begin the evidence.

17. A useful reference in this context can be made to a recent judgment of the Supreme Court in the case of **Jami Venkata Suryaprabha & Anv Vs Tarini Prasad Nayak & Ors**¹ wherein the aspect as to who has to begin the evidence was considered and the following observations were made.

“16. Under Section 102 of the Evidence Act, the burden of proof rests on the party who would fail if no evidence at all were given on either side. Where the defendant admits the facts alleged by the plaintiff but contends that the plaintiff is not entitled to any part of the relief which he seeks, it is the defendant who gets the right to begin.

17. Order XVIII of the Code of Civil Procedure in terms speaks of the 'hearing' of a suit and not the trial of the suit. A court is concerned with the trial of a suit from the time when it is instituted. The hearing of a suit is only a part of the trial of the suit. The determination of the question as to which party has a right to begin is an integral part of the hearing itself.

18. Order XVIII Rule 1 indeed provides for plaintiff's right to begin the evidence but not the court's obligation to ask the plaintiffs to begin first. There is no impediment for the court to call upon either party to lead evidence first, depending upon the facts and circumstances of the case and the nature of the issues framed. Neither party can insist that the other one should be asked to lead it first. It all depends upon what the Court deems proper in the

¹ 2024 INSC 1001.

circumstances. Where it finds that defendant's plea strikes of the root of the case, there would be no hitch in asking him/her to prove such plea first which can lead to disposal of the case. There can be no watertight compartmentalisation in matters of justice and all rules of procedure are designed and directed to achieve and secure ends of justice.”

(emphasis supplied)

18. On the aforesaid touchstone, reverting to the facts of the case, it becomes abundantly clear that in the Written Statement, the defendants have admitted in clear and categorical terms that on 18th December 2008, a contract was executed between the plaintiffs and defendants. *Prima facie* what is admitted is factum of contract and not mere execution of agreement. Thereafter, the defendants have contended that the plaintiffs committed default in performing their obligation under the said contract. It is in this context, the learned Judge has framed the issues casting on the defendants the burden to establish that there was a breach of contract on the part of the plaintiffs and also asked the defendants to begin the evidence.

19. The aforesaid approach of the learned Civil Judge, appears justifiable. Having regard to the nature of the transaction, and the issues framed, learned Civil Judge has correctly exercised the discretion to direct the defendants to adduce the evidence first. Such discretion, in the circumstances of the case, appears to be to secure the ends of expeditious and just decision of the case.

20. For the forgoing reasons, this Court does not find any justifiable reason to interfere with the impugned order in exercise of the supervisory jurisdiction.

21. Thus the Petition deserves to be dismissed. Hence the following order.

(i) The Petition stands dismissed.

(ii) Rule discharged.

(iii) No costs.

[N. J. JAMADAR, J.]