

(1992) 04 GUJ CK 0008
In the Gujarat High Court

Chandrakant Chimanlal Shah

APPELLANT

Vs

Chimanlal Ambalal Shah and Others

RESPONDENT

Date of Decision : 16-04-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 1, Order 18 Rule 2, Order 18 Rule 2, Order 18 Rule 2
Evidence Act, 1872 — Section 137, 137, 138, 138

Citation : (1993) 2 CivCC 536 : (1992) 2 GLR 1411

Hon'ble Judges : R.K. Abichandani, J

Bench : Single Bench

Judgement

R.K. Abichandani, J.—The petitioner seeks to challenge the impugned order of the learned City Civil Judge, Ahmedabad, passed on 18th July, 1989 rejecting the application at Exh. 163 made by the petitioner-original defendant No. 1 requesting the Court that defendant No. 2 may be called upon to adduce the oral evidence in view of the fact that defendant No. 2 was supporting the plaintiff's case.

2. At the hearing of this Revision Application, the petitioner, who has appeared as party in person has not disputed the fact that respondent No. 2, i.e., the defendant No. 2 was supporting his case. There is no dispute about the fact that the respondent No. 2 had filed written statement supporting the case of the plaintiff challenging the validity of the decree passed in H. M.P. No. 141 of 1976. It is in the above background and the admitted fact that the question whether the respondent No. 2 should be asked to lead her evidence before the respondent No. 1 has to be decided. In *Hiralal v. M.G. Pathak*, (reported in (1964) 5 GLR 327), a similar question arose in context of the provisions of Order 18 Rule 2 of the CPC and it was observed that, if all the defendants completely oppose the plaintiff's case, then the question of order of leading evidence amongst the defendants is immaterial. However, when they are divided into two groups, one consisting of those supporting the plaintiffs case in part and the other consisting of defendants who do not support the plaintiffs case at all, then

the question of order of leading evidence assumes importance. this Court then proceeded to fix the order of leading evidence in such cases as follows:

- (1) Those defendants who fully support the case of the plaintiff.
- (2) Those defendants who partly support the case of the plaintiff.
- (3) Those defendants who do not support the case of the plaintiff in any

3. In the instant case, undisputedly, the respondent No. 2 fully supported the case of the original plaintiff who is the respondent No. 1 herein. Therefore, in the order of leading the evidence, the trial Court ought to have directed the respondent No. 2 to lead evidence before the petitioner defendant No. 1 could lead his evidence. The ratio of Hiralal's case, (supra) fully supported the case of the petitioner in his application for seeking a direction on the respondent No. 2 to lead her evidence before he could lead his evidence. There is absolutely no cogent reason given by the trial Court for departing from the aforesaid sequence of leading evidence indicated by the decision of the Court in Hiralal's case (supra).

4. u/s 135 of the Indian Evidence Act, 1872, it has been provided that the order in which witnesses are produced and examined would be regulated by the law for the time being in force relating to Civil and Criminal Procedure respectively and in absence of any such law by the discretion of the Court. Order 18 Rule 1 refers to right to begin which ordinarily is with the plaintiff as indicated therein and Rule 2 lays down that the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove on the day fixed for the hearing of the suit or on any other adjourned day and thereafter the other party shall state his case and produce his evidence. Sub-rule (2) of Rule 2 of Order 18 does not provide for the order in which the other party has to lead evidence when there are more than one defendants. Thus, when there is no specific provision on this aspect, the matter would rest on the discretion of the Court as provided in Section 135 of the Evidence Act and that discretion, obviously, has to be exercised on sound judicial principles, which, in the instant case, are reflected in the decision of this Court in Hiralal's case (supra). The principles laid down in that decision have already been adhered to by the Courts in Orissa as can be seen from the decision in Jhumpa Bewa and Others Vs. Sahadeb Rout and Others, . After referring to the order of leading evidence indicated by this Court in Hiralal's case (supra), the Orissa High Court observed that these principles are adhered to by all the Courts in the State of Orissa. It was observed that the Courts in such cases cannot merely act as a passive agent and as a master of Court proceedings, the Presiding Officer shall guide the trial of a suit being fully aware of the pleadings and the nature of evidence that the parties are expected to adduce before the Court. A similar view was taken by the Andhra Pradesh High Court in Bommidi Vasudeva Murthy v. Bommidi Bhasker Rao and Ors., (reported in ILR 1975 AP 307, 308)].

5. The provisions of Order 18 Rules 1 and 2 and Sections 137, 138 of the

Evidence Act would indicate that when the plaintiff's case is fully supported by some of the defendants, these defendants are not adverse party and it would be just and proper for the Court to ask them to initially cross-examine the plaintiff and then ask the contesting defendants (adverse party) to cross-examine the plaintiff particularly when the adverse party so desires. Therefore, it would not be appropriate to direct the real contesting party to first disclose his defence and then keep in a reserve the defendants supporting the plaintiff to destroy his defence. Prudence clearly demands that the supporting defendants should be considered on the side of the plaintiff and their leading evidence must immediately follow the plaintiffs' evidence so that the contesting defendants can meaningfully exercise their right of leading evidence in accordance with the provisions of Order 18 Rules 1 and 2 of the Civil Procedure Code. In other words, it would be in consonance with the scheme of those provisions to require the supporting defendants to lead their evidence immediately on the completion of the evidence of the plaintiff because the supporting defendants would not be, in true sense, the other party that is the adverse party. In this view of the matter, it is clear that the trial Court has committed an error in exercise of its jurisdiction in not issuing direction as sought for by the petitioner in his application Exh. 167 by asking the respondent No. 2 to lead evidence before the petitioner could lead his evidence. This Revision Application is, therefore, allowed and the impugned order dated 18th July, 1989 passed below Exh. 163 by the trial Court is hereby set aside and the application Exh. 163 is granted by directing the respondent No. 2 to lead evidence in the suit if she so desires before the petitioner could lead his evidence.

Rule is made absolute accordingly with no order as to costs.