
(2007) 07 AHC CK 0075
In the Allahabad High Court

Rajni Kant Tiwari and Another

APPELLANT

Vs

Smt. Chandrawati and Others

RESPONDENT

Date of Decision : 19-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 3, 24

Citation : (2007) 4 AWC 4219

Hon'ble Judges : S.U. Khan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.U. Khan, J.—At the time of hearing, no one appeared for the respondents, hence only the arguments of the learned Counsel for the applicant were heard.

2. Revision is withdrawn/treated to be withdrawn to this Court u/s 24, C.P.C. This revision has been filed by the plaintiffs and is directed against order dated 10.9.1990 passed by Civil Judge, Basti in O.S. No. 26 of 1964. Through the said order, two applications given by plaintiffs/applicants numbered as 589ga and 590ga have been rejected. Through the first application, an earlier order dated 11.5.1990 was sought to be recalled.

3. In the suit several issues were framed. The burden to prove the issues No. 2A, 2B and 4 was upon the defendants. Accordingly, defendants adduced the evidence on the said issues. Thereafter on 11.5.1990, plaintiffs were directed to lead evidence and defendants were permitted to lead evidence in rebuttal of the evidence of plaintiffs after closer/completion of evidence of plaintiffs. The situation is covered by Order XVIII, Rule 3 C.P.C, which is quoted below:

3. Evidence where several issues.--Where there are several issues, the burden of proving some of which lies on the other 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.

Through Allahabad High Court, Amendment dated 20.6.1936, the said rule was substituted by following:

3. (1) Where there are several issues the burden of proving some of which lies on the other party, the party beginning may at his option, either state his case in the manner aforesaid and produce his evidence on those issues or reserve the statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party; and in the latter case, the party beginning may state his case in the manner aforesaid and produce evidence on those issues after the other party has produced all his evidence.

(2) After both parties have produced their evidence, the party beginning may address the Court on the whole case ; the other party may then address the Court on the whole case; and the party beginning may reply generally on the whole case, provided that in doing so he shall not, without the leave of the Court, raise questions which have been raised in the opening address.

4. In the aforesaid rule, firstly, it is not provided that specific permission of the Court must be sought for reserving the right to produce evidence ; secondly, the direction of the Court to the plaintiffs to adduce evidence was sufficient permission by the Court to the defendants to lead evidence on the remaining issues after the closure of the evidence of plaintiffs upon the said issues.

Moreover, the question that which party must first lead evidence on a particular issue can hardly be said to be a question of jurisdiction.

5. It has been held in *Nalajala Narasayya Vs. Nalajala Sitayya and others*, that option has to be exercised before other party begins its evidence, so that it might clearly note that the first party has not really finished. In the same authority, it has also been held that the party, who desires to exercise the option could either submit an application in writing or intimate to the Court orally about its intention to reserve the right of rebuttal. The argument of learned Counsel for the plaintiffs that permission to reserve the right should have been sought by the defendants before start of their (defendants) evidence is therefore, not tenable. In a later authority of the same High Court in *Dr. Syed Afzal Vs. Syed Hamza and Others*, it has been held that what is required under the rule is jurisdiction (sic intimation) to the Court as to the option of the party but not permission of the Court to reserve his right to lead rebuttal evidence. However, it is always open to the Court to disallow a party to lead rebuttal evidence in the absence of an issue in respect of which the burden of proof lies on the other side. AIR Manual Vith Edition, Vol. 6, p. 13, Note 11).

6. It has been held in *Motibhai Probhubhai, v. Umedchand Kasalchand* AIR 1956 Sau 52 that there is nothing in Rule 3, Order XVIII, C.P.C. to show that a regular

application has to be made to the Court for the purpose. It has been held in Setho Das and Another Vs. Paro Devi and Others, , that order under the said rule does not amount to "case decided".

7. Learned Counsel for the plaintiffs has cited an authority of Rajasthan High Court in Inderjeet Singh Vs. Maharaj Raghunath Singh and Others, In the said authority, the above authority of AIR 1956 Sau. 52, has been dissented from. However, in the Rajasthan High Court authority also it has been held that the option under Order XVIII, Rule 3, C.P.C, is to be exercised before other party enters evidence (Para 13).

8. It may also be remembered that burden to prove is distinct from onus of proof vide Anil Rishi Vs. Gurbaksh Singh, Burden of proof loses its importance when both the parties have led the evidence.

9. Through the second part of the impugned order plaintiffs' Application No. 590 was rejected. Through the said application, it had been prayed that Smt. Rama Devi, defendant No. 9 was aged about 75 years and patient of arthritis, hence her evidence should be taken on commission. The court below rejected the said application on the ground that part evidence of the said witness had already been recorded in Court. The Court further observed that if the witness felt some difficulty, in standing while giving evidence then she could be permitted to give evidence sitting on a chair. In my opinion, there is no error in the said part of the order. However, if Smt. Rama Devi is still alive, then fresh application for her examination on commission may be filed on the basis of her present physical condition. If such an application is filed, then the same shall be decided keeping in view the present physical condition of the witness.

10. Accordingly, there is no merit in the revision, hence, it is dismissed.

11. As suit is of 1964, hence, trial court is directed to decide the suit as expeditiously as possible after giving notice to the defendants respondents as no one has appeared on their behalf in this revision.