

(2018) 11 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition No.12117 Of 2018

**Shivaji Laxman Palaskar And Others APPELLANT @Hash Kamal Raosaheb
Shipalkar And Others**

Date of Decision : 01-11-2018

Acts Referred:

Evidence Act, 1872 — Section 111

Code of Civil Procedure, 1908 — Order 18 Rule 1, Order 18 Rule 2

Citation : (2018) 11 BOM CK 0028

Hon'ble Judges : Ravindra V. Ghuge, J

Bench : Single Bench

Advocate : S.P.Salgar, N.V.Gaware, A.K.Gawali,

Final Decision : Allowed

Judgement

Ravindra V. Ghuge, J

Â 1.Â The learned Advocate for the Petitioners seeks leave to delete the non contesting Respondent Nos.2 to 9, who are the original Defendants in

RCS No.273/2013 and are not interested in the dispute between the Petitioners and Respondent No.1/ original Plaintiff. Leave to delete the said

Respondents is granted at the risk of the Petitioners. Deletion be carried out forthwith.

2.Â RULE.

3.Â Rule made returnable forthwith and heard finally by the consent of the parties.

4.Â The Petitioners are the original Defendant Nos.1, 2 and 3 in RCS No.273/2013. They have filed a common written statement. After the issues

were cast on 25.09.2018, there was a recasting of issues on 15.10.2018. Pursuant thereto, the Plaintiff preferred the application Exhibit 80 seeking a

direction from the Trial Court under Order 18 Rule 1 of the Code of Civil

Procedure to direct the Petitioners/ Defendants to commence the recording of their evidence before the Plaintiff steps into the witness box. The application Exhibit 80 has been allowed by the Trial Court by the impugned order dated 22.10.2018 and by invoking its powers under Order 18 Rule 1, has directed the Petitioners/ Defendants to lead evidence first by concluding that the Defendants will have a right to begin.

I have considered the strenuous submissions of the learned Advocates for the respective sides.

6. The learned Advocate for the Petitioners relies upon the following judgments :

(a) The judgment of this Court dated 15.09.2017 delivered in Zainabee Mohammad Bashir and others vs. Shivkumar and others, 2018(2) Mh.L.J.

634 : 2018(3) ALL MR 799.

(b) Metafield Coil Pvt. Ltd. vs. Nikivik Tube Industries Pvt. Ltd., 2012 (1) Mh.L.J. 289.

7. The learned Advocate for Respondent No.1/ Plaintiff relies upon the judgment of this Court in the matter of Sandip Sankarlal Kedia vs.

Smt.Pooja Sandip Kedia, AIR 2014 Bombay 26.

8 After considering the submissions of the learned Advocates and upon going through the contentions of the parties, I deem it appropriate to reproduce

the issues finally cast by the Trial Court on 15.10.2018, as under :

1. Whether plaintiffs prove that she is having 1/2 share in the suit property as prayed?

2. Whether defendant proves that there is previous partition took place between them as prayed?

3. Whether defendant proves that she has relinquished her share on payment of Rs.10,000/ as prayed?

4. Whether the plaintiff proves that she is entitled for partition and separate possession of suit property as prayed?

5. Whether the defendant proves that the suit is barred by limitation?

6. Whether the suit is bad for non joinder of necessary parties?

7. Whether defendant proves that all properties are not included in hotchpotch?

8. Whether defendant no.1 proves that house property no.644 is self acquired property?

9. What order and decree?

9. Order 18 Rules 1 and 2 of the Code of Civil Procedure read as under :

ORDER XVIII

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

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.

2. Statement and production of evidence :

(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, 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.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

(3A) Any party may address oral arguments in a case, and shall, before he concludes the oral arguments, if any, submit if the Court so permits

concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record.

(3B) A copy of such written arguments shall be simultaneously furnished to the opposite party.

(3C) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing,

considers it necessary to grant such adjournment.

(3D) The Court shall fix such time limits for the oral arguments by either of the parties in a case, as it thinks fit.

10. The issue primarily raised before me is as to whether, the Trial Court could order the Defendant on an application made by the Plaintiff under

Order 18 Rule 1 or even under Order 18 Rule 2, to lead evidence first.

11. It requires no debate that Rule 18 pertains to hearing of the suits and examination of the witnesses. Rule 1 of Order 18 pertains to the right to

begin. Rule 2 thereof is consequent to Order 18 Rule 1 meaning thereby, that

once the right to begin is established under Order 18 Rule 1, the party, who is supposed to begin, has to step into the witness box.

12.Â The learned Advocate for the Plaintiff has relied upon Sandip Kedia (supra) to buttress his submission that the earlier judgments of this Court

were under Order 18 Rule 1 and this Court, in Sandip Kedia (supra), has dealt with Order 18 Rule 2 and concluded that the defendant can be directed

to produce his evidence considering the phraseology used in Order 18 Rule 2. The learned Advocate for the Plaintiff, therefore, strenuously submits

that the final conclusion arrived at in paragraph 68 in Sandip Kedia (supra) relying on Order 18 Rule 2 that the Court has the power and duty to issue a

direction to the defendant to lead evidence first, is the correct position of law.

13.Â The observations in paragraphs 51, 55, 56, 57, 58 and 68 of Sandip Kedia (supra) read as under :Â?

51.Â It is upon such dispute that the parties would have a dispute. It would be the material proposition of that fact upon which the issue would be

framed. It would be for the Court to ascertain what the parties admitted and denied. It would be for the Defendant alone to lead evidence about the

return of the amount of consideration under such document. The Plaintiff would require to give evidence, if at all, only if the Defendant's evidence is

led. The Defendant would have the obligation, responsibility, duty and liability to prove that material proposition or fact made by him as an additional

fact in his written statement. It is this obligation, responsibility, duty and liability which is termed the ""right"" to begin. The expression ""right to begin"" in

the sub title of Order 18 Rule 1 of the CPC and in its contents is, therefore, not a right such as a privilege which can be reserved or waived. It would

have to be exercised if the additional fact alleged by the Defendant upon which the issue has to be framed has to be proved by the Defendant for the

issue to be determined by the Court. It is, therefore, that this enjoinder is laid down in Order 18 Rule 2 of the CPC. In such a suit on the date of the

hearing under that provision the Defendant who has ""the right to begin"" is enjoined to state his case and produce his evidence in support of the issue

which he is bound to prove if he would get the Plaintiff non suited. The expression ""shall"" in Order 18 Rule 2 of the CPC makes this abundantly clear.

Hence Order 18 Rule 1 of the CPC lays down the situation in which the party would have a right (which is actually his obligation to begin his

evidence.) Order 18 Rule 2 of the CPC lays down that that party shall produce such evidence to prove an issue arising from the facts alleged by him.

55.Â In the case of Gouri Good Products, Nagpur Vs. Priya Trading Co., Nagpur, 2002 (4) Mh.L.J. 880 also upon reference to the case of M/s.

Haran Bidi (Supra) it has been held that Order 18 Rule 1 is only an enabling provision for granting the Defendant to right to begin and that it does not

confer power upon a Court to direct the Defendant to begin such evidence. That was the case of recovery of money under an agreement. The

Defendant made a part payment and the Plaintiff sued for the balance. The Defendant accepted and admitted the execution of the agreement as also

the payment of part amount by two installments. The Defendant, however, alleged undue influence and coercion. The Defendant had the burden of

proving that allegation. The Court observed that it would be appropriate to considered the purport of Order 18 Rule 1 and 2 of the CPC. However, it

considered Rule 1 but not Rule 2. In fact the Court observed that Order 18 Rule 2 was not attracted. The Court observed that Order 18 Rule 1 of the

CPC does not speak of the power to be exercised by the Court in the regard. However, the Court has not considered that the mandate under Order

18 Rule 2 of the CPC directs the Defendant to produce his evidence by the word ""shall"" and consequently the Court has not only the power but the

duty to call upon the Defendant to do what the procedure demands.

56.Â Again in paragraph 12 of the Judgment after citing Order 18 Rule 1 and 2 of the CPC the Court has considered the right of the Defendant

under Order 18 Rule 1 of the CPC without the corresponding power of the Court thereunder for issuing the necessary directions. In fact the Court has

observed that the analogy of the right under Order 18 Rule 1 of the CPC cannot be stretched further to hold that the Court also had the power to issue

directions though that sounded ""little harsh"". The Court, however, also considered the inherent power of the Court U/s. 151 in paragraph 12 of the

judgment.

57.Â Needless to state that the procedure under Order 18 Rules 1 and 2 of the CPC is not empty formality. It is for true and clear management and

administration of the case before the Court. It is for leading only the most relevant and necessary evidence by the party upon whom the burden of

proving an issue, upon his own allegations denied by the other party, lies.

58.Â In this case the Court has in some detail dealt with Order 18 Rule 3 of the CPC also. Though that does not apply to the facts of this case as

there would be the only issue relating to the repayment of consideration by the husband, it would be a guiding factor in appreciating who must lead

evidence first. Order 18 Rule 3 of the CPC deals with cases of several issues, the burden of proving some of them lies on one party and some on the

other. The party beginning evidence is allowed to lead evidence only on those issues for which the burden lies upon him and reserve the evidence on

the other issues by way of rebuttal to the evidence produced by the other party. Such party is then allowed to produce evidence on those issues after

the other party has produced all his evidence. This specified procedure also reflects and manifests the need to give evidence as per burden which lies

upon the party. It does not require only the Plaintiff to give all evidence first. In view of the fact that admitted facts need not require to be proved, no

plaintiff need give evidence of any admitted fact. The distinction in the actual tendering of evidence, therefore, becomes very stark when one sees the

case of many issues. After the Plaintiff has to lead evidence upon all the issues, the burden of which lies upon him to prove and not the other issues

and the Defendant is enjoined to give evidence upon all the issues, the burden of which lies upon him to prove, allowing the Plaintiff the right of

rebuttal thereafter.

68.Â An evidence is a statement of disputed material facts and nothing more. An evidence is not an essay. It does not require to bear an

introduction, a main body and a conclusion. It only must show relevant disputed facts which the Court must appreciate to accept or reject such oral

evidence. Hence recording of evidence requires the protocol under Order 18 Rule 1 of the CPC and the mandate under Order 18 Rules 1 and 2 of the

CPC to be followed. The Courts, duty is, therefore, to see that it is so followed. The Court, therefore, has the power and the duty to pass directions

upon the application of any of the parties as also by itself upon considering the separate averments of the parties in the pleadings to efficiently direct

the order of leading of evidence as the legislated discipline of work.

14.Â The learned Advocate for the Petitioners/ Defendants submits that this Court has, from no where, introduced the concept under Order

18.Â Rule 2 in Sandip Kedia (supra) that the defendant can be directed by the

Trial Court to lead evidence first.

15. I find from the observations of this Court in Sandip Kedia (supra) in paragraphs 51 and 55 reproduced above, that the entire law on this point

needs to be revisited once again. In Haran Bidi Suppliers and another vs. M/s V.M. & Co., Bhandara, 2001(4) Mh.L.J. 112, this Court has considered

the scope of Order 18 Rule 1 and has concluded that it is an enabling provision, which may entitle the defendant to make a request to the Trial Court

to begin first. It was, therefore, interpreted that the Trial Court may consider the request of the defendant to begin first and would then hold, if the

plaintiff does not oppose, that the right to begin will be of the defendant.

16. In the said judgment in Haran Bidi Suppliers (supra), this Court has concluded in paragraph 1 as under :

1. Heard both sides. By consent revision application heard finally.

Only question involved in this revision application is whether the trial Court was right in directing the defendants to enter the witness box in the first

instance, by the impugned order dated 28th February, 1996. The order is very short which reads thus:

Heard Shri Hundra for defendants, Shri Bhadu Pote for plaintiff.

There are about 14 issues. Only Issue No. 4 casts burden on the plaintiff. It is the case of the defendant in view of certain arrangements they are

utilizing the trade mark of the plaintiff. Considering the onus, I direct the defendants to enter in the witness box and plaintiff would be rebutting.

Application is allowed.

The only reason indicated in the said order is that burden is cast on the plaintiff to prove only four issues out of total 14 issues and, therefore, the

defendants have been directed to enter the witness box. According to the non-applicant/plaintiff, the said order was in terms of Order 18, Rule 1.

Order 18, Rule 1 reads thus:

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.

On the plain language of the said provision, 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.

17. It is, thus, crystal clear that this Court has concluded that Order 18 Rule 1 cannot be interpreted to mean that the court would be competent or would have the power to direct the defendant to enter the witness box before the plaintiff could do so.

18. It cannot be ignored that Rule 1 of Order 18 deals with the right to begin and it is a creation of the statute that the plaintiff will have the right to begin. This right to begin can be altered only if the defendant makes a request to the Trial Court that he desires to begin. If the plaintiff does not oppose, the right to begin shall then vest in the defendant and the plaintiff would thereafter, lead evidence in rebuttal, if he notices that he is required to disprove a particular aspect.

19. The judgment of this Court in Haran Bidi Suppliers (supra) was considered in Sandip Kedia (supra). However, in Sandip Kedia (supra), this Court concluded that Order 18 Rule 2 of the Code of Civil Procedure is a clear provision and it enables the Trial Court to pass an order on an application made by the plaintiff to direct the defendant to lead evidence first. Though this Court has observed that Order 18 Rule 2 of the Code of Civil Procedure was not considered by this Court in Haran Bidi Suppliers (supra) and that Order 18 Rule 2 of the Code of Civil Procedure directs the defendant to produce his evidence by the word "shall", the interpretation by the learned Advocate for the Plaintiff in the case in hand that this means that the court can direct the defendant to begin evidence first instead of the plaintiff and that too on the request of the plaintiff, is an unsustainable submission.

20. I do not find from Order 18 Rule 2 that the Trial Court can direct the defendant to produce his evidence before the plaintiff could record his evidence, much less on an application made by the plaintiff that the defendant be directed to begin first. I do not find that this Court has concluded in Sandip Kedia (supra) that if the plaintiff makes an application to the Trial Court to direct the defendant to lead evidence first, the Trial Court can

ignore Order 18 Rule 1 and can pass an order under Order 18 Rule 2 and grant the defendant ""the right to begin first"".

21.Â In fact, this Court in Sandip Kedia (supra) has not laid down any such law which would run counter to Haran Bidi Suppliers (supra) and

Bhagirath Shankar Somani and another vs. Rameshchandra Daulal Soni and another, 2007 (5) Mh.L.J. 508 : 2007 (4) Bom CR 87. In paragraph 58 of

Sandip Kedia (supra), this Court considered Order 18 Rule 2 and concluded that the party beginning evidence first, can be allowed to lead evidence

only on those issues for which the burden lies on him and reserve the evidence on the other issues by way of rebuttal to the evidence produced by the

other party. Such party is then allowed to produce evidence on those issues after the other party has produced all his evidence. This specified

procedure also reflects and manifests the need to give evidence as per the burden which lies upon the party. It is further held that in a given case and

on admitted facts by the defendant, the admitted facts need not be proved and no plaintiff needs to lead evidence on admitted facts. After the plaintiff

has led evidence on the issues regarding which the burden lies upon him to prove and not the other issues, the defendant is then enjoined to give

evidence on all the issues regarding which the burden lies upon him to prove, allowing the plaintiff to avail the right of rebuttal thereafter.

22.Â In Metafield Coil Pvt. Ltd. (supra), this Court considered the right to begin the trial by leading evidence and upon considering the judgments of

this Court in Haran Bidi Suppliers (supra) and Bhagirath Shankar Somani (supra) and by relying upon Keshavlal Durlabhasinbhai's firm vs. Shri

Jalaram Pulse Mills, AIR 1995 Gujarat 166 and Mrs.Bama vs. Mrs.Rukiyal Bivi, AIR 2004 Madras 243, has concluded in paragraphs 6 to 9 as under

:Â?

6.Â The issue involved in the matter is no more res integra and is covered by the decision rendered by learned single Judge of this Court in the

matter of Haran Bidi Suppliers v. V.M. And Company, Bhandara, 2001 (4) Mh.L.J. 113. It is observed in the judgment by the learned single Judge as

under:

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.

7. The observations made by the Gujarat High Court in the case of Keshavlal Durlabhasinbhai's firm v. Shri Jalaram Pulse Mills, AIR 1995 Guj 166

are also relevant. The Gujarat High Court has opined that the provision is enabling one entitling the defendant of right to begin, however, nothing in the

provision confers any power on the Court under this rule to direct the defendant to adduce evidence first in the suit if the defendant himself is not

claiming such right in view of the contingencies mentioned in rule 1.

8. Learned Single Judge of this Court in the case of Bhagirth Shankar Somani v. Rameshchandra Daulal Soni, 2007 4 All MR 614, has dealt with

the question in detail and observed in paragraph 16 of the order as below:

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.

9. Reliance is placed by the respondent on the judgment of Madras High Court

in the case of Mrs.Bama v. Mrs.Rukiyal Bivi, AIR 2004 Mad 243;

wherein the Madras High Court has issued direction in the facts and circumstances of the case to the defendant to begin with the case. Firstly, the

judgment cited is an order passed by the Madras High Court and is not a judgment. Secondly, in view of the pronouncement of the Bombay High

Court, reference to which is made in the above noted paragraph, I do not deem it appropriate to follow the precedent of the Madras High Court.

23. I had an occasion to deal with the similar issue in Zainabee Mohammad Bashir (supra). After considering the facts of the case and upon

considering the scope of Order 18 Rule 1 of the Code of Civil Procedure r/w Section 111 of the Evidence Act in view of the judgment delivered by

the Honourable Supreme Court in Krishna Mohan Kul @ Nani Charan Kul and another vs. Pratima Maity and others, (2004) 9 SCC 468 : AIR

2003 SC 4351 and the judgment delivered by the Gauhati High Court in Mustt.Jubeda Khatun vs. Sulaiman Khan, AIR 1986 Gauhati 71, it was

concluded in paragraphs 20 to 23 as under :

20. In Bhagirath Shankar Somani vs. Rameshchandra Daulal Soni, 2007 (5) Mh.L.J. 508 : 2007(4) ALL MR 514, this Court concluded that if the

Defendant decides to lead evidence first and is so permitted by the Court, the Plaintiff can always lead evidence in rebuttal. The Trial Court does not

have the power to issue a direction to the Defendant compelling him to lead his evidence before the Plaintiff adduces his evidence under Order 18

Rule 1. Only when the Defendant claims a right to begin under Rule 1 and the Plaintiff disputes existence of such right, the Court will have to decide

the question whether, the Defendant has acquired a right to begin.

21. This Court, in Dattatray Namdeo Patil vs. Ram Namdeo Patil and others, 2010(3) Mh.L.J. 801, dealt with a similar issue and concluded in

paragraphs 3 and 4 that Rules 1 and 2 of Order 18 of the Code of Civil Procedure would entitle the Defendant, who admits the fact, to begin the

recording of his evidence first. It is an enabling provision. If the Defendant applies and makes a request or claims such a right, the Court may pass an

order permitting the Defendant to step into the witness box first.

22. In Metafield Coil Private Limited vs. Nikivik Tube Industries Private Limited, 2012 (1) Mh.L.J. 289, while considering such an issue under

Order 18 Rule 1, this Court concluded that a consistent view taken by the courts

is that a direction against the Defendant to lead evidence before the Plaintiff leads his evidence, cannot be issued under Order 18 Rule 1. The scheme of law appears to be that of a normal rule and it would be a 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. After the Plaintiff exercises his option to lead evidence first, it is for the Defendant to decide whether, he would like to lead evidence and make such a formal request to the Court. If the Court permits the Defendant to lead evidence first, the Plaintiff can always lead evidence in rebuttal. The Court does not have the power to issue a direction to the Defendant so as to compel him to step into the witness box first and lead evidence.

23.Â In my view, the effect of Section 111 of the Indian Evidence Act will surely be considered by the Trial Court keeping in view the contentions that Tamizbee was a pardanashin lady and has contended that a fraud was played and her illiteracy has been exploited by the Defendants. All the male members of the Petitioners' family are now the Plaintiffs before the Trial Court. In some of the issues, the burden has been cast on the Plaintiffs and insofar as the Sale Deed of 29.12.1972 is concerned, the same has been cast upon the Defendants.

24.Â In view of the above, it is no longer res integra that the court does not have the power under Order 18 Rule 1, much less, under Order 18 Rule 2 to entertain an application of the plaintiff for issuance of directions to the defendant to lead evidence first. The right to begin will always be with the plaintiff unless the defendant makes a request to the court that he would like to exercise the right to begin before the plaintiff steps into the witness box and in which case, an application by the defendant could be considered if the plaintiff has any objection, thereby, inviting a judicial order. In short, the defendant may have the liberty to claim the right to begin.

25.Â In a given case, the plaintiff may enter a purshis to state that the onus and burden of proving any issue has not been cast on him and therefore, he would not like to begin. After such a purshis is entered and upon verifying the issues, if the court is convinced that the plaintiff does not desire to lead any evidence as no burden is cast on him, the court may record such a contention and then, the defendant could step into the witness box and lead evidence. However, the court cannot exercise the jurisdiction to entertain

the prayer of the plaintiff on an application to pass a judicial order

directing the defendant to lead evidence first. The court can only entertain the purshis of the plaintiff stating that he does not desire to lead evidence as

no burden is cast on him and if convinced, the court may accept the purshis and give liberty to the defendant to lead evidence first.

Â 26.Â In view of the above and upon considering that the burden has been cast on the plaintiff to prove a particular fact under Issue Nos.1 and 4,

this Writ Petition is allowed. The impugned order dated 22.10.2018 is rendered unsustainable, perverse and erroneous. The impugned order is,

therefore, quashed and set aside and the application Exhibit 80 stands rejected. The plaintiff will, therefore, have to exercise the right to begin in view

of Issue Nos.1 and 4 unless the plaintiff enters a purshis in the light of the law in paragraph 58 in Sandip Kedia (supra).

27.Â Rule is made absolute in the above terms.