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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision : 23rd February, 2022**

+ **CS(OS) 332/2021**

RAJNISH GUPTA & ANR.

..... Plaintiffs

Through: Mr. Mohit Chaudhary, Mr. Kunal Sachdeva and Ms. Anubha Surana, Advocates.

versus

MUKESH GARG

..... Defendant

Through: Mr. Amit Vohra, Advocate.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J. (ORAL)

[VIA VIDEO CONFERENCING]

I.A. No. 3026/2022 (of the defendant u/O-XVIII R-1 of the CPC)

1. The present application has been filed on behalf of the applicant/defendant under Order XVIII Rule 1 of the Code of Civil Procedure, 1908 (CPC) seeking a direction that the non-applicants/plaintiffs be directed to lead the evidence in terms of Order XVIII Rule 1 of the CPC.

2. Issue notice.

3. Notice is accepted by the counsel appearing on behalf of the non-applicants/plaintiffs, on advance notice. He further submits that he does not

wish to file a reply to the said application and has argued the matter straightway.

4. Accordingly, arguments of both the counsels have been heard.

5. On 14th February, 2022, the following issues were framed in the case:

(i) Whether the suit is bad on account of misjoinder of parties?

OPD

(ii) Whether the suit is bad on account of misjoinder of causes of action? **OPD**

(iii) Whether the defendant has pledged any ancestral gold and diamond jewellery worth Rs.4,40,00,000/- with the plaintiffs?

OPD

(iv) Whether there is any delivery note dated 11th July, 2018 in existence signed by the plaintiff No. 1? **OPD**

(v) Whether the plaintiffs are entitled for a recovery of Rs.4,00,00,000/- along with interest against the defendant as prayed for? **OPP**

(vi) If so, whether the plaintiffs are entitled for any interest, if yes, for what period and at what rate? **OPP**

(vii) Relief.

6. Taking into account that in most of the substantive issues, the burden to prove is on the applicant/defendant, it was directed that the applicant/defendant would lead the evidence.

7. At the outset, reference may be made to Order XVIII Rule 1 of the CPC as under:

“1. Right to begin.—The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contents 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.”

8. The counsel for the applicant/defendant places reliance on Order XVIII Rule 1 of the CPC aforesaid to contend that it is the choice of the defendant to begin the evidence or not and if the defendant chooses not to begin, the plaintiff has to begin his evidence first. It is further contended that the Court does not have the power to direct the defendant to lead the evidence first. In this regard reliance has been placed on the judgment of Co-ordinate Benches of this Court in ***Om Prakash Vs. Amit Choudhary & Ors.***, 2019 (177) DRJ 93 and ***Sabiha Sultana & Ors. Vs. Ahmad Aziz & Anr.***, 2017 SCC OnLine Del 10229.

9. On the other hand, it is contended on behalf of the counsel for the non-applicants/plaintiffs that in terms of Order XVIII Rule 1 of the CPC, in the event that the defendant admits the facts alleged by the plaintiff and alleges additional facts on account on which plaintiff is not entitled to the reliefs claimed in the suit, in such an event, the defendant has to begin the evidence. In the present case, admission has been made by the non-applicant/defendant of the material factum of the defendant receiving the sum of Rs.4,00,00,000/- from the non-applicants/plaintiffs and which is noted in the order dated 27th January, 2022 passed by the Court. Therefore, in the facts and circumstances of the present case, it is the non-applicant/defendant who should begin the evidence. Reliance is placed on Sections 102 and 103 of the Indian Evidence Act, 1872. Reliance is also placed on the judgment dated 22nd August, 2008 of the Division Bench of this Court in FAO (OS) No.44/2008 titled ***N.K. Tomar Vs. Viraj Impex Ltd.***

and judgment of the Co-ordinate Bench of this Court in *Achala Mohan Vs. Jayashree Singh* MANU/DE/0798/2020 [SLP (C) No.7360/2020 preferred whereagainst was dismissed on 16th November, 2020].

10. I have heard the counsels for the parties. Let me first deal with the judgments cited on behalf of the parties.

11. Counsel for the applicant/defendant relies upon paragraph 8 of the judgment in *Sabiha Sultana* (supra) which is set out below:

“8. In terms of the procedure stipulated in CPC and the aforesaid precedents, it is clear that as a general rule the party which set up a claim must prove the burden cast upon it. The plaintiff has a right to begin and so he must because the burden of proof rests upon one who pleads. It is for the plaintiff to lead evidence first. It is only when the defendant admits to the facts pleaded by the plaintiff that the latter would be relieved of this burden, but in the absence of any such admission, asking the defendant to lead evidence first could well be disadvantageous to the defendant. Order 18 Rule 1 of CPC prescribes “right to begin” in recording of evidence wherein the plaintiff would lead evidence first but the defendant may be permitted to lead evidence if after having admitted to the facts pleaded by the plaintiff, he so seeks to do. In the absence of these two qualifying circumstances, the Court would not direct the defendant to lead evidence first.”

In the paragraph quoted above, it has been observed that as per Order XVIII Rule 1 of the CPC, it is the general rule that the plaintiff must lead evidence first, however, when the defendant admits to the facts pleaded by the plaintiff, the plaintiff could be relieved of such burden. Therefore, given the facts and circumstances of the present case, the judgment in *Sabiha Sultana* (supra) does not come to the aid of the applicant/defendant.

12. The judgment in *Sabiha Sultana* (supra) was relied upon by a Coordinate Bench of this Court in *Om Prakash* (supra) and it was observed as under in paragraph 15 of the said judgment:

“15. In the facts of the present case, Order XVIII Rule 1 is not applicable. The defendants have not sought to exercise the right to begin which, in view of the authorities above, is a choice for him to make and not for the plaintiff to force upon him. In any event, the substantive condition that the facts alleged by the plaintiff must be admitted by the defendants is also not satisfied. Merely because the execution of the Collaboration Agreement is admitted, does not imply that the defendants have admitted the facts alleged by the plaintiff. In contractual disputes, it is often the case - perhaps in a majority of cases - that the execution of the contract is admitted by the defendant, but other facts establishing the plaintiff's claims are not. In the present case, for example, the quantum of damages assessed by the plaintiff has been expressly and unequivocally disputed in the written statement. It is settled law that pleadings are to be read as a whole, and admissions cannot be considered in isolation...”

13. In the aforesaid judgment in *Om Prakash* (supra), this Court came to a conclusion that merely because the defendants had admitted to a collaboration agreement would not mean that defendants had admitted the other facts alleged in the plaint. Notably, the plaintiff had claimed damages in the aforesaid suit, which was denied by the defendants in its written statement. Accordingly, in the facts of that case, the Court upheld the order of the Trial Court dismissing the application of the plaintiff seeking a direction to the defendants to begin the evidence.

14. The aforesaid judgment in *Om Prakash* (supra) does not advance the case of the applicant/defendant in the present case, as in the present case, no damages are being claimed by the plaintiff. The suit is based on recovery of

amounts paid by the non-applicants/plaintiffs to the applicant/defendant for the purchase of property and the receipt of consideration has not been denied by the applicant/defendant.

15. On the other hand, the non-applicants/plaintiffs have placed reliance on the judgment of this Court in *N.K. Tomar* (supra). In the said case, in the written statement filed by the defendant, the defendant had admitted the receipt of the amount in respect of which the suit for recovery was filed by the plaintiff. Like in the present case, in respect of all the substantial issues, the burden of proving was placed on the defendant. Based on the aforesaid factual background, this Court came to the conclusion that since the burden of proving most of the issues was on the defendant and the said issues arose from the additional facts pleaded by the defendant in the written statement, therefore, the onus was on the defendant to prove these issues. Accordingly, it was observed that in a case like this it would have been more appropriate for the defendant to lead evidence in the first instance.

16. The interpretation of Order XVIII Rule 1 of the CPC was once again the subject matter before this Court in *Achala Mohan* (supra). After analysing the various judgment cited by the parties therein, including *Sabiha Sultana* (supra) and *Om Prakash* (supra), this Court came to the following conclusion:

“19. Thus, the consistent view has been that if the Defendant sets up a case, the proving of which, would completely decide the issues which have been raised in the suit itself, then the Defendant under Order XVIII Rule 1 CPC can be directed to lead evidence first.”

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25. *The ld. counsel for the Defendant submits that unless and until the Defendant voluntarily opts for leading evidence first, the Court would not have the power to direct so. This would not be in accordance with law inasmuch as the Court has the power to curtail the trial of any suit at the time of framing of issues. The manner in which the issues have been framed in the present case shows that insofar as the issue no. 1 and issue no. 2, the onus has been cast clearly on the Defendant. If the Defendant is able to prove or not prove these issues, the decision in the suit would get quite expedited.*

26. *Under these circumstances, it is not necessary that in every suit, unless and until, the Defendant opts, the Court cannot direct the Defendant to lead evidence first. The question as to whether who should lead evidence first, would have to be decided by the Court after ascertaining the respective stands of the parties and after seeing as to what are the actual issues which arise for adjudication in the suit itself.*”

17. The non-applicants/plaintiffs have filed the present suit for recovery of Rs.4,00,00,000/- along with interest against applicant/defendant premised on the fact that a loan of Rs.4,00,00,000/- was given by the non-applicants/plaintiffs to the applicant/defendant and the applicant/defendant failed to return the said amount. The factum of receipt of the aforesaid amount has been admitted by the applicant/defendant in its written statement. However, the applicant/defendant has pleaded additional facts in the written statement that the said amount of Rs.4,00,00,000/- was in respect of old ancestral jewellery transactions, which were given by the defendant to the plaintiff No.1.

18. Based on the aforesaid pleadings, issues were framed in the suit on 14th February, 2022 and as can be seen from the issues, the onus of proving issues No.(i) to (iv) were on the applicant/defendant. The only issues, which are to be proved by the non-applicants/plaintiffs is whether the non-applicants/plaintiffs are entitled to recovery of the amount of Rs.4,00,00,000/- along with interest. The substantive issues in the present suit would be issues No.(iii) and (iv), which are completely based on the additional facts pleaded by the applicant/defendant in its written statement and, therefore, the onus of proving the same is on the applicant/defendant.

19. In the light of the dictas of this Court in *N.K. Tomar* (supra) and *Achala Mohan* (supra), there is no merit in the submission of the applicant/defendant that unless the applicant/defendant voluntarily opted for leading evidence in the first instance, the Court cannot direct the applicant/defendant to do so. In *Achala Mohan* (supra), it has been observed that the consistent view of the Courts has been that if the defendant sets up a case, the proving of which, would completely decide the issues, which have been raised in the suit itself, then the defendant under Order XVIII Rule 1 CPC can be directed to lead evidence first.

20. I concur with the aforesaid observations of this Court in *Achala Mohan* (supra). In my view, the Court has full power in terms of Order XVIII Rule 1 to direct the applicant/defendant to lead evidence in the event the conditions prescribed in Order XVIII Rule 1 are satisfied. In view of the aforesaid, it cannot be said that the Court, after considering the overall view of the matter, cannot direct the defendant to lead evidence in the first instance, unless the defendant is agreeable to do so. Undoubtedly, the general rule is that the plaintiff would lead evidence first. However, that

does not mean that in an appropriate case, based on the facts and circumstances of the case and the issues framed therein, the Court cannot direct the defendant to lead evidence first.

21. Therefore, in the facts and circumstances of this case, it was correctly observed in the order dated 14th February, 2022 that the evidence would be led, at first, by the applicant/defendant.

22. In light of the aforesaid, this Court finds no merit in the application and the same is dismissed.

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23. Parties are permitted to file hard copies of the entire record of the suit for the purpose of recording of evidence.

FEBRUARY 23, 2022

Sakshi R./dk

AMIT BANSAL, J

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