THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 30.01.2015

+ **FAO(OS) 45/2015**

Y.S. MANCHANDA ... Appellant

versus

JITENDER CHOPRA ... Respondent

Advocates who appeared in this case:
For the Appellant : Mr G. L. Rawal, Sr Advocate with
Mr Kuljeet Rawal and Mr Saurabh Malhotra
For the Respondent : Mr P. K. Agrawal with Ms Mercy Hussain

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)
CAV 95/2015

The learned counsel for the respondent/ caveator is present.

The caveat stands discharged.

CM 1594/2015

Allowed subject to all just exceptions.

FAO(OS) 45/2015 & CM 1593/2015

1. This appeal is directed against the order dated 01.12.2014 passed by a learned Single Judge of this Court in IA 13570/2014, which was filed in CS(OS) 523/2005. The said application IA 13570/2014 was one for recall

of the order dated 08.05.2014 passed by the Local Commissioner, by which, the Local Commissioner had granted leave to the plaintiff to lead evidence in rebuttal with regard to issue No. 3.

2. It is the case of Mr Rawal, the learned senior counsel appearing on behalf of the appellant/ defendant, that the respondent/ plaintiff had no right to lead evidence in rebuttal inasmuch as the respondent/ plaintiff had already produced his evidence on issue No. 3. Although, Mr Rawal submits that the right to reserve evidence in rebuttal can be made at the beginning or towards the end or before the other party commences his evidence, this is subject to the rider that such party should not have led any evidence on that issue. He placed reliance on Order XVIII Rule 3 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC') as also on a Division Bench decision of the Andhra Pradesh High Court in ***Nalajala Narasayya v. Nalajala Sitayya and Others: AIR 1992 AP 97***.

3. On the other hand, the learned counsel for the respondent/ plaintiff submitted that the order passed by the learned Single Judge in confirming the order passed by the Local Commissioner on 08.05.2014, does not suffer from any infirmity. He submitted that the learned counsel for the plaintiff had made a statement that he was closing his evidence in the affirmative

and this fact was also recorded in the order dated 23.07.2010 passed by the Joint Registrar of this Court, who was recording the evidence. Thus, according to the learned counsel for the respondent/ plaintiff, the latter had reserved his right to produce evidence by way of answer to the evidence, which may be produced by the defendant in respect of issue No. 3.

4. It would be necessary to set out the issues which had been framed and, on which, evidence was to be led. The issues were framed on 25.01.2006 and were as under:-

> "1. Whether the agreement to sell dated 10/09/2004 in respect of the property in suit was arrived at between the plaintiff and defendant and, if so, to what effect? OPP
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> 2. Whether the plaintiff has paid Rs.1,10,00,000/- the defendant towards the part payment of the agreement to sell? OPP
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> 3. Whether the receipt dated 10/09/2004 and pages 4 & 5 of the agreement to sell dated 10/09/2004 are forged documents? OPD
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> 4. Whether the plaintiff at all material time had been ready and willing to perform his part of the contract? OPP
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> 5. Whether the plaintiff is entitled to the relief of specific performance on any ground as alleged in the written statement?
>
> 6. Whether the plaintiff is entitled to damages in the alternative and, if so, to what amount? OPP

7. Whether the defendant has paid requisite court fee on the counter claim preferred by the defendant? OPD

8. Whether the defendant is entitled to any damages as claimed in the counter claim?

9. Relief?"

5. It will be seen from the above that the burden of proving, *inter alia*, issue Nos. 1 and 2 is on the plaintiff, whereas the burden of proving issue No. 3 is on the defendant. While leading the evidence, the plaintiff has sought to give evidence on the existence of the agreement to sell dated 10.09.2004 as well as on the payments made by the plaintiff to the defendant to the extent of Rs 1,10,00,000/-. It may be seen that the alleged receipt dated 10.09.2004 has been challenged by the defendant as being a forged document. The said receipt pertains to an alleged payment of Rs 45 lacs in cash. The pages 4 and 5 of the agreement to sell also form part of the purported agreement to sell dated 10.09.2004 and which are alleged by the defendant to have been forged by the plaintiff.

6. It is the case of the appellant that the respondent/ plaintiff has produced evidence even on issue No. 3 and, therefore, he does not have the right to produce evidence in rebuttal insofar as that issue is concerned. The learned counsel placed reliance, as mentioned above, on the decision of a

Division Bench of the Andhra Pradesh High Court in ***Nalajala Narasayya*** *(supra)*. In particular, he referred to paragraphs 7 and 8, which read as under:-

> "7. O. XVIII, R. 3, CPC reads as follows:
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> > "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."
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> The abovesaid rule lays down the procedure as to how the evidence has to be adduced whenever the burden of proof on some issues is on one party and on other issues on the opposite party. As to who is entitled to begin, O. XVIII, R. 1 states that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either on the point of law or on some additional facts urged 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. O. XVIII, R. 3, however, does not mention in what manner the option, either to adduce evidence or to reserve, has to be exercised by a party or as to when such a reservation is to be made. Questions have naturally arisen before the Courts on these matters of procedure. In several cases, it has been held that the option has to be exercised by the party intending to begin, at the time when he commences the evidence on his side. In some other cases, it has been held that he should exercise the said option after closure of the evidence on his side and before the opposite party begins his

evidence. In some cases again it has been held that there should be express reservation of the right to adduce rebuttal evidence and in some other cases it has been held that it need not be expressly reserved and that the reservation could be implied from the facts and circumstances of the case. If, however, there is no express reservation, nor any such reservation which could be implied from the facts and circumstances of the case, the party would not be entitled to adduce rebuttal evidence. In our High Court Kondaiah, J. (as he then was), in I. Nookalamma v. I. Simchachalam, AIR1969 Andh Pra 82, held that the plaintiff is entitled to express his reservation to adduce evidence by way of rebuttal after the completion of the evidence on the side of the plaintiff and before the commencement of the evidence for the defendant under O. XVIII, R. 3 in respect of issues on which onus lies on the defendant. The option given to the party, contemplated under O. XVIII, R. 3, is to be exercised only at or before the time when the other party that has got the right to lead evidence begins, and not afterwards. The abovesaid view of the learned Judge that the option could be exercised by the party beginning, at or before the time when the opposite party starts his evidence, has been followed by Jagarmath Shetty, J. (as he then was) of the Mysore High Court in S. Chandra Keerti v. Abdul Gaffar AIR 1971 Mysore 17. The learned Judge, however, observed that, on the facts of the case, the party who began the case, namely, the defendant, could not be said to have intended or reserved his right to adduce rebuttal evidence. In that context, the learned Judge observed that it is reasonable that the right of reservation under O. XVIII, R. 3 should be exercised either before the party begins his evidence or, in any event, before the other party begins his evidence so that it might be borne in mind that the party beginning has not closed the evidence. The learned Judge also considered that the case was not a fit case for exercising power under O. XVIII, R. 2, CPC. Rajasthan High Court in Inderjeet Singh v. Maharaj Raghunath Singh, AIR 1970 Rajasthan 278 has also taken the same view. It was held that the rule does not prescribe the stage at which the Court should be informed about the exercise of the option therein. It is sufficient if the party leading evidence does so (provided it has not led any

evidence on the issue covered by the option) before the other party begins its evidence. The learned Judge dissented from the decisions of the Saurashtra High Court in Motibhai v. Umedchand AIR 1956 Saurashtra 52, and also with the decision of the Vindhya Pradesh High Court in Nanhey Raja v. Kedar Nath AIR 1953 Vindh Pra 34 wherein it was observed that the option should be exercised by the party who begins his evidence, before starting the evidence on his side. The Delhi High Court had also expressed a similar view in Kaviraj Ganpat Lal Sidhwani v. Om Parkash, (1975) 77 Pun LR (D)10.

8. All these decisions were considered by a Division Bench of the Punjab and Haryana High Court in Jasvvant Kaur v. Devinder Singh, AIR 1983 Punj and Har 210 by S. S. Sandhawalia, C. J. and S. P. Goyal, J. The learned Judges observed that on the language of O. XVIII, R. 3, CPC, on principle, and on the weight of precedent, the last stage for exercising the option to reserve The right of rebuttal can well be before the other party begins its evidence. The learned Judges followed the abovesaid decisions and dissented from the decision of the Saurashtra High Court. They also dissented from the decision of the Madhya Pradesh High Court in Laxmi Narain v. Baburam, AIR 1977 Madh Pra 191, wherein a view similar to the view of the Saurashtra High Court was taken. We are in entire agreement with the view expressed by Kondaiah, J. in Nookalama's Case (AIR 1969 Andh Pra 82) (supra) and with the similar views expressed by the Mysore, Rajasthan, Delhi and the Punjab and Haryana High Courts and we respectfully dissent from the views expressed by the Saurashtra, Vindhya Pradesh and Madhya Pradesh High Court. We are of the view that on the language of Order XVIII, Rule 3, CPC, on principle, and on the weight of precedent, the last stage for exercising the option to reserve the right of rebuttal can well be before the other party begins his evidence."

(underlining added)

7. Mr Rawal particularly focused on the portion in paragraph 7 where, while referring to the decision of the Rajasthan High Court in ***Inderjeet***

Singh v. Maharaj Raghunath Singh*: *AIR 1970 Rajasthan 278, the High Court of Andhra Pradesh observed that "It was held that the rule does not prescribe the stage at which the Court should be informed about the exercise of the option therein. It is sufficient if the party leading evidence does so (**provided it has not led any evidence on the issue covered by the option**) before the other party begins its evidence". It is the specific case of Mr Rawal that the plaintiff had led evidence on issue No. 3. He is not denying that the option of rebuttal could be exercised at any stage prior to the other party beginning his evidence, provided he has not led any evidence on the issue covered by the option. According to Mr Rawal, the plaintiff, while producing his evidence in chief, has sought to prove the agreement in the following manner:-

> "I may, however, point out that although the payment of Rs 10 lakhs, Rs 5 lakhs and Rs 10 lakhs were made on 22nd August, 2004, 29th August, 2004 and 4th September, 2004 respectively and the said receipts were prepared on the respective dates yet the same were signed by Shri Y. S. Manchanda only on the 10th of September, 2004 when the Agreement to Sell was executed in my favour."

He also referred to the following portion of the examination-in-chief of the plaintiff:-

> "The Agreement dated 10th September, 2004 is Exh. PW-1/5. Each page of the said Agreement to Sell is signed by the

> Defendant and by me as the parties to the said Agreement. The said Agreement is witnessed by Shri Sachin Manchanda, son of the Defendant and by Shri S. Narula, property broker.

8. The learned counsel for the respondent/ plaintiff points out that the receipts referred to in the first quotation, which has been extracted above, are not the subject matter of issue No. 3. What is in contention in issue No. 3 is referred to in paragraph 6 of the affidavit by way of evidence, which refers to payment of Rs 45 lacs in cash and which indicates that the receipt was executed by the defendant in the presence of the plaintiff on 10.09.2004.

9. In any event, on going through the above extracts, it is evident that the respondent/ plaintiff has only led affirmative evidence with regard to, *inter alia*, issue Nos. 1 and 2, which deal with the agreement to sell as well as the payment of Rs 1,10,00,000/-, which includes the payment of Rs 45 lacs for which the receipt dated 10.09.2004 has purportedly been issued. It cannot be said that the respondent/ plaintiff had led evidence or produced evidence on the specific issue of forgery contained in issue No. 3 and for which the burden lay on the appellant/ defendant. Therefore, in our view, there is no violation of the principles set out in Order XVIII Rule 3 of the CPC and that the learned Single Judge did not commit any error in

permitting the respondent/ plaintiff to lead evidence in rebuttal in respect of issue No. 3.

10. The appeal is, therefore, liable to be dismissed. It is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

JANUARY 30, 2015 **SANJEEV SACHDEVA, J**
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