

RAJASTHAN HIGH COURT

Akha Ram

Vs.

L. Rs. of Ram Sahal

C.W.P. No. 4208 of 2004

(Prakash Tatia, J.)

15.01.2009

ORDER

Prakash Tatia, J.

1. Heard learned counsel for the parties.
2. These two writ petitions Nos. 4208/ 2004 and 3708/2004 are decided by this common order because of the reason that core question of law involved in these writ petitions are the same.
3. In the trial Court plaintiffs Ram Sahal, Ram Nathi and Ratani Devi filed the suit for eviction against the defendants Ram Kuwar and Chuki Devi, which is subject matter in SBCWP No. 3693/2004/whereas the same plaintiffs filed another suit against defendants Akha Ram and Chuki Devi which is subject matter in SBCWP No. 4208/2004.
4. The facts of SBCWP No. 3693/2004 will cover the fact situation of other case for the purpose of deciding the legal question raised by the petitioner.
5. The above two suits were filed as stated above for eviction on the foundational fact that defendant No. 1 of each case is tenant in the premises in question and plaintiff sought relief of eviction of defendant No. 1 and impleaded Chuki Devi also as party. Chuki Devi is none-else than the mother of the plaintiff No. 1.
6. The defendant No. 1 - the alleged tenant and defendant No. 2, the mother of the plaintiff No. 1 both submitted separate written statement and on the basis of which, the following issues were framed by the trial Court :-

(Vernacular matter omitted.....Ed.)

7. The burden of issue No. 1 was upon the plaintiff and burden of issue No. 5 was upon the defendant. The defendant submitted an application under Order 14 Rule 5 Civil Procedure Code and prayed for amending of the issue No. 5 and proposed new issue, upon which after hearing both the parties, the trial Court observed that issue No. 1 has not been properly framed and in fact, issue Nos. 1 and 2 appears to be issues of relief only. The trial Court further observed that no issue with respect to the relationship of landlord and tenant has been framed. The issue No. 3 has already been deleted vide. Order dated 12th Oct., 1984. The issue No. 4 is with respect to the right of the plaintiffs Nos. 2 and 3 to file the suit. Issue No. 5 was with respect to the sale of the house by defendant No. 2 to defendant No. 1 and issue No. 6 was framed for claim of special Cost. The trial Court re-casted the issues, which are as under:-

(Vernacular matter omitted.....Ed.)

However, the trial Court lastly ordered as under:-

(Vernacular matter omitted.....Ed.)

8. The trial Court as mentioned above in spite of already framed a specific issue No. 5 on the basis of the plea of the defendants struck off the said issue No. 5 and observed that so far as of fact of sale of house by defendant No. 2 to defendant No. 1, that fact can be proved by the defendants in rebuttal evidence to the issue No. 1 though the issue No. 1 was only with respect to relationship of landlord and tenant between the plaintiff and defendant No. 1. The trial Court also observed that plaintiffs will be free to lead evidence with respect of the fact that whether the defendant No. 2 had right to sell the house to the defendant No. 1 or not along with the evidence on issue No. 1. It is not known why specific issue already framed by the trial Court for specific fact was deleted by the trial Court and the trial Court mixed it with Issue No. 1 and placed burden upon the plaintiff to first lead evidence to assail the sale in question before defendant could have opportunity to even set up the fact of sale between them? Be it as it may be, the order dated 8-1-1986 has not been challenged by both the parties. The question will survive, what is effect of this order dated 8-1-1986.

9. In the trial Court, plaintiffs closed their evidence on 6-8-2003 reserving their right to lead evidence in rebuttal. The defendants led their evidence thereafter and closed their evidence, upon which, the plaintiffs tried to lead evidence in rebuttal to rebut the evidence of the defendant about the sale of house by defendant No. 2 to defendant No. 1. Upon this, the objection has been raised by the defendants that there is no issue, burden of which is upon the defendants and, therefore, in view of the Order 18 Rule 3

Civil Procedure Code, the plaintiffs cannot lead any evidence in rebuttal. The defendants' said objection application was dismissed by the trial Court vide order dated 4-8-2004. Hence, these writ petitions have been preferred by the defendants.

10. Learned counsel for the petitioner vehemently submitted that the Order 8 Rule 3 Civil Procedure Code is very clear in its term and plaintiff can lead evidence in rebuttal only if burden of proving issue was upon the defendant otherwise, the plaintiff is bound to give his whole of the evidence on the issue of burden which was placed upon him. It is submitted that the plaintiffs themselves got the issue No. 5 deleted and yet wants to lead evidence to rebut the fact for which the defendants were permitted to lead evidence in rebuttal to the plaintiffs evidence on issue No. 1. It is also submitted by the learned counsel for the petitioner that the trial Court was fully conscious while deleting the issue No. 5 that how and when the evidence with respect to the sale deed of the defendant No. 1 can be led. The trial Court specifically held that the plaintiffs will be free to lead evidence with respect to the said sale deed while leading evidence on issue No. 1 and did not allow the plaintiff to lead evidence as rebuttal evidence after evidence of the defendants for the sale in question and, therefore, the issue for leading evidence and its sequence stand conclusively decided by the trial Court's order dated 8-1-1986. Contrary to this order, the trial Court vide impugned order has allowed the plaintiffs to lead evidence in rebuttal, though there is no issue framed to place burden upon the defendant.

11. Learned counsel for the respondents submitted that even when there is no issue placing burden upon the defendant yet the plaintiff can be allowed to lead evidence to rebut the evidence of the defendant. It is also submitted that in a case where issue is comprehensive or a consolidated issue having mixed facts, burden to prove some of the facts lies upon the plaintiffs and burden to prove some facts lies on the defendant then also, the Court can allow the plaintiffs to lead evidence in rebuttal. Learned counsel for the respondents also submitted that the plaintiffs closed their evidence by keeping their right reserved to lead evidence in rebuttal in the presence of the defendants and the defendants never objected to it, therefore, the plaintiffs have right to produce evidence in rebuttal. Learned counsel for the respondents relied upon the judgment of this Court delivered in the case of *LMR Precession Engineering Company (P) Ltd. v. Ram Narayan reported in ¹ (by me)* and judgment delivered in the case of *Gad Singh and Ors. v. Phpol Chand and Anr. reported in ²*

12. I considered the submissions of learned counsel for the parties and perused the facts of the case.

13. The issue No. 5 framed originally was framed on the basis of pleas taken by the defendants and it was an independent issue of fact. Burden to prove this issue No. 5 was upon the defendants as it could have been only on the defendants as the defendants took the plea that, Rs. 6,000/- with rent of Rs. 2,424/-, total Rs. 8,424/- was paid by the defendant Ram Kumar to defendant Chuki Devi on 28-2-1979 and as per the agreement executed by Gulab Devi, the defendant No. 2 Chuki Devi sold the house to the defendant No. 1 and executed the sale deed on 31st July, 1979 and! Therefore, the suit on the basis of the rent deed in question is not maintainable. The amended issue No. 1 is only that whether the defendant No. 1 took the house on rent from plaintiffs and defendant No. 2 for a rent of Rs. 60/- per month. The issue No. 1 is only that whether there is relationship of landlord and tenant between the plaintiffs and defendant No. 1. The deletion of Issue No. 5 and mixing it with issue No. 1 so as to make two questions of facts in one issue together resulted into this controversy. This Court (by me) had occasion to consider similar situation in the case of LMP Precision Engineering Company (P) Ltd. (supra) (AIR 2004 Rajasthan 37). The portion of the judgment is as under:-

"7. It will be worthwhile to mention here that the trial Court framed total six issues and burden to prove two issues was upon the plaintiff, which are i) whether the Court has jurisdiction to hear the suit and another is ii) whether the plaintiff is entitled for decree of rendition of account against the defendant. A bare perusal of the averments made in the plaint and particularly the relief claimed by the plaintiff in the suit, it is clear that the entire relief of the plaintiff is only that the plaintiff is entitled for the decree for rendition of account against the defendant and consequently, the plaintiff is entitled for the amount, which is found due in the defendant of the plaintiff. This issue covers the entire suit itself, which includes all the facts mentioned in plaint on the basis of which plaintiff becomes entitled to relief. It appears from the detail evidence of the plaintiff that the plaintiff led evidence in detail to prove this issue and in that sequence he narrated the entire sequence on the basis of which the plaintiff is claiming the relief against the defendant. When such a situation arise where there are two sets of issues; one putting burden upon the plaintiff to prove the issue and another putting burden upon the defendant and in that situation, if some of the subjects required to be covered to prove issue by the plaintiff by giving evidence or even for the purpose of making the evidence clear so that the case may be well understood by the Court and to make the things clear, if plaintiff leads evidence to prove his case, in all those cases, it is not possible to

hold that the plaintiff has touched the issues, burden of which was upon the defendant. It depends upon the facts of each case.

8. The proving of an issue by the defendant depends upon the specific plea taken in defense by the defendant and that burden can be discharged by the defendant by proving his case by his evidence and then the plaintiff can rebut those issues of the defendant by leading evidence. Sometime, it happens that one issue is framed placing burden upon the plaintiff and another issue may be an issue of rebuttal of the issue framed for plaintiff, then in that case, the plaintiff if leads evidence to prove his case, it is not necessary to say that he led evidence to meet with the defense of the defendant because of the reason that the plaintiff has right to prove his case and for that purpose he may not take risk of not proving his case on his assumption that the facts pleaded may be treated as admitted by the defendant by the Court, which may be disputed or may be interpreted subsequently in otherwise way on the basis of the pleas of the defendant. Therefore, what evidence the plaintiff has led in the issues and whether the plaintiff touched the issue of the defendant depends upon the facts of the case and no formula can be provided for deciding the matter.

9. Here in this case, after going through the evidence and in view of the very broad issue framed by the trial Court. If the plaintiff led evidence which after going through the evidence appears to be touching to his own case only, therefore, the trial Court was not wrong in holding that the plaintiff has right to lead evidence in rebuttal."

14. In the said judgment made it clear that when a broader issue is framed having mixed facts, some facts relating to the plaintiffs case and some facts relating to the defendant's case then in that situation, the plaintiff, to make his case more clear and to put the facts in sequence if touches the facts in evidence which may be related to the defendant's case then that does not mean that the plaintiff led evidence in rebuttal to the facts alleged by the defendant. The plaintiff cannot without knowing evidence of the defendant for the fact set up by the defendant can lead evidence in rebuttal as there is nothing to be rebutted by the plaintiff at the time of his evidence. Therefore, the Civil Procedure Code specifically, under sub-rules (3) and (4) of Rule 1 of Order 14 provided that Court shall frame distinct issues for each material proposition formed by one party and denied by other party and issues may be of two kinds; one issue of fact and another issue of law. If the Court would have applied its mind to said provision of law before deleting the originally framed issue No. 5, there would not have been any complication as has cropped up before us at present, because of mixing of two issues.

15. Even if the trial Court has mixed up the two separate and independent Issues, yet it appears from the order dated 8-1-1986 that rights of the parties for leading evidence have been taken note of by the trial Court in the same order dated 8-1-1986 itself and therefore, the trial Court held that both the parties shall be entitled to lead evidence on the fact as alleged by them in plaint and the written statement with respect to which, the issue No. 5 was framed. Confusion is with respect to time for producing evidence by the plaintiff. As is clear from the facts, the plaintiffs led their evidence on issue No. 1. The defendants led their evidence in rebuttal to issue No. 1 as well as on the pleas taken by them including for sale in question as they were allowed to do so by the trial Court by order dated 8-1-1986. Then the issue No. 1 is required to be read in conjunction of the last portion of the order dated 8-1-1986. The order dated 8-1-1986 required to be read as, that defendant shall have right to lead evidence for the sale and the subject covered by the earlier framed issue No. 5 in rebuttal to issue No. 1, burden of which was upon the plaintiff, then thereafter, the plaintiff will be free to lead evidence to rebut the evidence of the defendant. As observed above, the plaintiffs could have led evidence in rebuttal to the evidence which evidence would have been produced by the defendants.

16. The Order 18, Rule 3 Civil Procedure Code also provides that where there are several issues, the burden of proving the same 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 answer to the evidence produced by the other party. In this case, the burden to prove the fact about the sale deed set up by the defendants was upon the defendants and, therefore, the plaintiffs are entitled to lead evidence in rebuttal and, therefore, there is no illegality in the order passed by the trial Court allowing the plaintiffs to produce evidence in rebuttal to evidence of the defendant.

17. Learned counsel for the petitioner submitted that by this, the petitioner's case may be prejudice as the issue No. 5 was deleted, which was necessary issue and, therefore, the issue No. 5 may be re-framed and opportunity may be granted to the petitioner to lead evidence on issue No. 5.

18. The argument may be attractive but having no substance inasmuch as that the trial Court in its order dated 8-1-1986 permitted the defendants to lead evidence with respect to the fact of sale in their favor and they led the evidence in rebuttal.

19. In view of the above reasons, I do not find any illegality in the order passed by the trial Court. Hence, both the writ petitions are dismissed.

Petitions dismissed.

Cases Referred.

1. 2004 (1) WLC (Raj) 232: (AIR 2004 Raj 37)
2. RLW 1997 (3) Raj 2044