

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 1st OF JULY, 2023

MISC. PETITION No. 336 of 2020

BETWEEN:-

**MOHANLAL S/O LATE JAGANNATH RATHORE,
AGED ABOUT 48 YEARS, OCCUPATION:
BUSINESS HOSPITAL ROAD DAHOD ROAD
ALIRAJPUR (MADHYA PRADESH)**

.....PETITIONER

(BY SHRI AKSHAT PAHADIA, ADVOCATE)

AND

**1. RAMESHWAR S/O LATE JAGANNATH
RATHORE, AGED ABOUT 57 YEARS,
OCCUPATION: SERVICE 10, SARDAR PATEL
RAOD ALIRAJPUR (MADHYA PRADESH)**

**2. SHRIRAM S/O LATE JAGANNATH RATHORE,
AGED ABOUT 53 YEARS, OCCUPATION:
BUSINESS R/O: SARDAR PATEL ROAD,
ALLIRAJPUR , DISTRICT AALIRAJPUR
(MADHYA PRADESH)**

**3. SMT. GEETA BAI W/O RADHESHYAM
RATHORE D/O LATE JAGANNATH RATHORE
R/O: DEVISINGH ROAD, BEHIND MOTI MATA
MANDIR, BARWANI DISTRICT BARWANI
(MADHYA PRADESH)**

**4. SMT. SANTOSHI W/O BHAGWAN DAS
RATHORE D/O LATE JAGANNATH RATHORE
R/O: SADAR BAZAR , GANDHWANI, DISTRICT**

DHAR (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI PANKAJ AJMERA, ADVOCATE)

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This petition coming on for admission this day, the court passed the following:

ORDER

- 1] Heard finally with the consent of the parties.
- 2] This miscellaneous petition has been filed by the petitioner/plaintiff under Article 227 of the Constitution of India against the order dated 05.10.2019, passed in Civil Suit No.1A/2015 by Ist Civil Judge, Class-I, Alirajpur (M.P.) whereby the application filed by the petitioner/plaintiff under Order XVIII Rule 3 of CPC to defer his evidence till the defendants have led their evidence has been rejected.
- 3] In brief, the facts of the case are that the suit has been filed by the plaintiff for partition, possession and permanent injunction against the respondents, the issues have already been framed and the plaintiff is to lead his evidence, however, before commencing with his evidence, the plaintiff has filed an application under Order XVIII Rule 3 of CPC for deferring his evidence in respect of issues no. 5, 6, 7, 9 and 10 , which provides that *“the party beginning the evidence may at this option produce the evidence on those issues or reserve it by way of answer to the evidence produced by the other party the burden of proving the same lies*

on the other party.”

4] In brief, the facts of the case are that the suit has been filed by the petitioner/plaintiff for partition, possession and permanent injunction in which after the defendant filed their written statement, the learned Judge of the trial Court has framed as many as 11 issues, and the plaintiff is to lead his evidence. However, an application under Order XVIII Rule 3 of CPC has been filed by the plaintiff stating that the burden of proof to prove the issues Nos.5, 6, 7, 9 and 10 is on the defendants, hence the plaintiff desires to lead his evidence in respect of the aforesaid issues after the defendants have led their evidence in respect of the said issues. The aforesaid application is opposed by the defendants contending that whether the evidence is required to be given by the defendants in respect of issue Nos.5,6,7,9 and 10 cannot be decided at this stage and only after the plaintiff has led his evidence that the defendants shall lead their evidence, if so required. The learned Judge of the trial Court has rejected the application on the ground that the averments made by the defendants are in the nature of denial of the plaintiff's averments, hence, it cannot be presumed that the evidence is required to be led by the defendants in respect of those issues.

5] Counsel for the petitioner has submitted that as in their reply to the application under Order XVIII Rule 3 of CPC, the defendants have also stated that they might lead the evidence in

respect of those issues, after the evidence of the plaintiff is over, which clearly reveals that the issues have been framed at their instance only. Thus, it is submitted that the impugned order be set aside and the application filed by the plaintiff under Order XVIII Rule 3 of CPC be allowed.

6] Counsel for the respondents, on the other hand, has opposed the prayer and it is submitted that no illegality has been committed by the learned Judge of the trial Court as it is the defendants' right to lead evidence after the plaintiff has completed his evidence.

7] Heard counsel for the parties and perused the record.

8] So far as the provisions of Order XVIII Rule 3 of CPC is concerned, the relevant excerpts of the same read as under:-

**“Order XVIII Rule 3 of CPC
Hearing of the suit and examination of witnesses.**

1. XXXXXXXXXXXXXXXXXXXXXXXX

2. XXXXXXXXXXXXXXXXXXXXXXXX

3. EVIDENCE WHERE SEVERAL ISSUES.--

Where there are several issues, the burden of proving some of which lies on the 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.”

9] In the application filed by the plaintiff under Order XVIII Rule 3 of CPC, he has referred the issues No.5, 6, 7, 9 and 10

about which, according to the plaintiff, the burden of proof lies on the defendants. The trial Court has framed as many as 11 issues, which are as hereunder:-

“वादप्रश्न दिनांक 05.02.2016

01. क्या वादी स्व. जगन्नाथ के पुत्र नाते उनकी पेत्रक सम्पत्ति मकान न. 10, सरदार पटेल मार्ग मस्जिद मोहल्ला अलिराजपुर 15 गुणित 75 तथा एक मकान न. 09 सरदार पटेल मार्ग 15 गुणित 75 फिट एक मकान, अस्पताल मार्ग 15 गुणित 75 फिट का पक्का बना हुआ तथा ग्राम छकतला तहसील सोण्डवा अलिराजपुर के छकतला वार्ड क्रमांक पर एक मकान 20 गुणित 50 का, एक मकान ग्राम छकतला में बखतगढ मार्ग पर 20 गुणित 60 फिट का, तथा एक भूखण्ड छकतला में बखतगढ मार्ग पर 22 गुणित 60 फिट का में 1/5 हिस्से का स्वत्वधारी है।

02. क्या वादी जगन्नाथ के पुत्र नाते उसकी चल सम्पत्ति जिसमें –

(i) चांदी के जेवरात वजनी 10 किलो वर्तमान अनुमानित बाजार मुल्य लगभग 4,00,000/— (चार लॉख) रूपये है।

(ii) सोने के जेवरात वजनी 300 ग्राम अनुमानित वर्तमान बाजार मुल्य लगभग 8,00,000/— (आठ लाख) रूपये है। उक्त सोने-चाँदी के जेवरात भी प्रतिवादी क्रमांक 01 रामेश्वर के कब्जे में है।

(iii) जीवन बीमा पॉलिसी की धनराशि 1,00,000/— (एक लाख) रूपये।

(iv) नर्मदा ग्रामीण बैंक शाखा छकतला में जमा धनराशि रूपये 45,000/— (पैंतालिस हजार) रूपये।

(v) माता स्व. श्रीमती आन्नदीबाई के नाम बैंक ऑफ बड़ौदा शाखा सिलोटा में जमा धनराशि 1,00,000/— (एक लाख) रूपये।

(vi) बैंक ऑफ बड़ौदा शाखा अलिराजपुर में जमा राशि 45,000/— (पैंतालिस हजार) रूपये।

(vii) नर्मदा झाबुआ ग्रामीण बैंक शाखा अलिराजपुर के आर.डी. अकाउन्ट में जमा राशि रूपया 48,000/— (अड़तालिस हजार) इस प्रकार कुल राशि मय ब्याज के लगभग 6,00,000/— (छ लाख) रूपये उक्त समस्त राशि प्रतिवादी क्रमांक 01 रामेश्वर के कब्जे में है।

तथा इसी प्रकार ग्राम छकतला, कवाट रोड़ के मकान तथा नगर अलिराजपुर के सरदार पटेल मार्ग स्थित मकान नम्बर 09 का किराया अंतर्गमूत लाभ एवं मिन्स प्राफिट लगभग 16,00,000/— (सोलह लाख) रूपया होता है, इससे 1/5 हिस्से का स्वत्व पाने का अधिकारी है।

03. क्या प्रतिवादी रामेश्वर व प्रतिवादी श्रीराम द्वारा फर्जी वसीयत नामे के आधार पर उक्त वर्णित मकान व प्लाटो पर अवेध रूप से नामान्तरण कर स्वत्व प्राप्त कर लिया है।

04. क्या वादी प्रतिवादी रामेश्वर व श्रीराम से एक लाख रूपये की राशि वाद दिनांक से अन्तर्वर्तियलाभ के रूप में प्राप्त करने का अधिकारी है।

05. क्या प्रतिवादी क्रमांक 1 व 3 के पक्ष में दिनांक 01.08.1980 को नन्दा जी (स्व. जगन्नाथ जी के पिता जी) द्वारा प्रतिवादी क्रमांक 01 के पक्ष में वसीयत निष्पादित की थी।

06. क्या वादी ने मकान न. 09 सरदार पटेल मार्ग को हड़पने की नियत से

स्वयं के नाम से नकली वसीयत बनाई है।

07. क्या रामेश्वर द्वारा अपनी निजी कमाई से हास्पिटल रोड़ स्थित प्लाट अवयस्क होने के कारण अपने पिता के माध्यम से खरीदा था।

08. क्या वादी प्रतिवादी के विरुद्ध उक्त वर्णित सम्पत्ति में 1@5 हिस्से का अधिपत्य मिलने के पश्चात स्थाई निषेधाज्ञा पाने का अधिकारी हैं

09. क्या वाद में पक्षकारो के असंयोजन का दोष है।

10. क्या बटवारा दिनांक 23.11.2000 तथा 09.01.2004 का साक्ष में अग्राहि है।

11. सहायता एवं वे।”

10] From the perusal of issue Nos.5,6, 7, 9 and 10 viz.-a-viz., the special pleadings made by the defendants, it is apparent that the special pleadings are the facts, which the defendants have pleaded in rebuttal of the plaintiff's claim, which cannot be said to be the denial of the petitioner's plaint. In such circumstances, since the issue Nos.5,6,7, 9 and 10 have arisen out of the special pleadings of the defendants, this Court is of the considered opinion that the burden to prove the special pleadings is on the defendants only.

11] In such circumstances, this Court is of the considered opinion that the application filed by the plaintiff under Order XVIII Rule 3 of CPC ought to have been allowed by the learned Judge of the trial Court, thus, an error has apparently been committed by the learned Judge of the trial Court. Accordingly, the impugned order dated 05.10.2019 is hereby set aside, and the application filed by the plaintiff under Order XVIII Rule 3 of CPC is allowed and the learned Judge of the trial Court is requested to proceed further in the matter, in accordance with the provisions of Order XVIII Rule 3 of CPC.

12] Since the plaintiff is required to lead his evidence in respect of the other issues, and the stay order was in operation in the suit, the plaintiff is also directed to lead his evidence in respect of the other issues without further delay.

13] With the aforesaid directions, the petition stands **disposed of.**

(Subodh Abhyankar)
Judge

Pankaj