JUDGMENT

MUHAMMAD RASHID----Petitioner

Versus

MAZHAR HUSSAIN MIRZA and 2 others----Respondents

Writ Petition No.4093 of 2013

ATHAR MINALLAH, J.---The facts, in brief, are that the petitioner had filed a suit for specific performance and permanent injunction. The said suit was instituted on 17-12-2003. In the light of the divergent pleadings, as many as six issues were framed on 06-11-2012. The petitioner's affirmative evidence was closed, and the right to answer to the evidence produced by the other party was reserved on 16-11-2012. The evidence of respondent No.1 was closed on 01-04-2013. An application was filed on behalf of the petitioner for re-examining witnesses with respect to an undertaking dated 24-10-2002, which was exhibited as Exh D.1. (hereinafter referred to as the "Undertaking"). The application was dismissed by the learned trial Court vide order dated 12-12-2012. The Civil Revision against the order dated 12-12-2012 was also dismissed vide order dated 09-02-2013, passed by the learned District Judge (West), Islamabad. Another application under Order XIV Rule 5 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'C.P.C.') was filed by the petitioner/plaintiff seeking the framing of an additional issue regarding the Undertaking. The application was dismissed by the learned trial Court vide order dated 22-04-2013. The Civil Revision filed by the petitioner/plaintiff was partially allowed to the extent of framing of an additional issue. It is noted that the learned Additional District and Sessions Judge, Islamabad, while partially allowing the Civil Revision specifically held as follows:

> "...It was, therefore, incumbent upon the learned trial court to determine the scope/effect of the contents of the document of undertaking and for that matter, framing of an additional issue was a sine qua non to determine the real controversy between the parties. However, at this stage I would not incline to allow the parties to lead any more evidence on this issue. The reason is that the undertaking is an admitted document and even the contents thereof are not disputed besides, the applicant at an earlier time had failed to make out a case for re-examination, and lost the same till revisional stage. It is only the effect/ scope of the contents of the undertaking, for self and on the entire controversy between the parties, that is required to be determined, thus, to put the parties again in the witness-box would be nothing but a redundant exercise."

The additional issue No.4-A framed pursuant to the passing of the above order is in the following language.-

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"4-A Whether the undertaking dated 24.10.2002 was executed by the plaintiff, if so, what is its effect? OPD"

2. The above issue was framed on 05-06-2013. It was further ordered that the suit shall come up for evidence in rebuttal on 18-06-2013. On 05-07-2013 the statements of the petitioner/plaintiff and another witness who had earlier appeared as PW-3 were recorded. Furthermore, an application was filed by the respondent / defendant. The said application was allowed, and the evidence of the petitioner/plaintiff and the other witness recorded on 05-07-2013 was ordered to be discarded. The petitioner / plaintiff filed a Revision Petition, assailing the order dated 10-09-2013, and the same was dismissed vide order dated 08-10-2013 by the learned Additional District Judge, Islamabad. Through the instant petition, orders dated 08-10-2013 and 10-09-2013, passed by the learned Additional District Judge and the trial Court, respectively, have been challenged.

3. The learned counsel for the petitioner has contended that; the learned trial Court and the learned Revisional Court were not justified in refusing to allow the petitioner to lead evidence in rebuttal; the right of rebuttal was reserved by the petitioner and the same could not have been denied; a right is vested in the petitioner under Rule 3 of Order XVIII of the C.P.C.; pursuant to the right vested under Rule 3 of Order XVIII of the C.P.C. the petitioner has reserved the right; the witnesses earlier examined in the affirmative can be re-examined again in rebuttal; reliance has been placed on the case of 'Barrister Ch. Muhammad Abdus Saleem and 4 others v. Mst. Tanveer Mirza and 3 others' [1996 SCMR 351]; there is no provision in the C.P.C. which can stand in the way of the petitioner producing evidence in rebuttal to the evidence already produced by the respondent; reliance has been placed on the case of 'Ghulam Nabi v. Brig. Muhammad Akram and others' [1990 CLC 664]; the undertaking dated 24-10-2002 (Exh.D-1) was produced for the first time by the respondent No.1 during the cross-examination of the witnesses of the petitioner; the witnesses examined on behalf of the petitioner admitted their signatures on the undertaking, however, the same was in ignorance of the law and, therefore, cannot have a binding effect; reliance has been placed on the case of 'Ahmad Khan v. Rasul Shah and others' [PLD 1975 SC 311]; the dismissal of the earlier application filed by the petitioner for the re-examination of witnesses cannot be made a basis for denying the right of rebuttal to the petitioner; the framing of the additional issue made it mandatory that the parties be allowed to lead evidence.

4. On the other hand, the learned counsel for the respondent has contended that; the suit was filed on 16-12-2003; the petitioner/plaintiff has been resorting to various tactics so as to delay the litigation; the undertaking, dated 24-10-2002, was specifically mentioned in paragraph-3 of the written statement filed on behalf of the respondent/defendant; the petitioner/plaintiff was not, therefore, taken by surprise; the undertaking, dated 24-10-2002 (Exh.D-1), was unambiguously admitted by PW-1 and PW-3; not only the signatures but the

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contents of the undertaking Exh.D-1 were also admitted.

5. The learned counsels have been heard and the record perused with their able assistance.

6. It is not in dispute that the additional issue was framed vide order dated 05-06-2013. It is also not in dispute that the signatures and execution of the said undertaking were admitted by the witnesses appearing on behalf of the plaintiff. It is also not disputed that the petitioner/plaintiff had applied for the re-examination of the witnesses, and that the said application as well as the Civil Revision were dismissed. It is also admitted that the Civil Revision against order dated 22-04-2013 was partially allowed, and the additional issue was ordered to be framed. However, it was unambiguously ordered that the parties shall not be allowed to lead any more evidence on the additional issue framed. The order dated 23-05-2013 was not challenged and it, therefore, attained finality. It is also not in dispute that the signatures on the undertaking (Exh.D-1) were unequivocally admitted by the witnesses when they were confronted during the cross-examination. The petitioner was examined as PW-1, and during the cross-examination admitted the undertaking as well as the signatures thereon as follows:-

7. The controversy between the parties relates to the interpretation and scope of Order XVIII, Rule 3 of the C.P.C. The petitioner/plaintiff claims a right of rebuttal in respect of the additional issue framed on 05-06-2013, pursuant to the right of rebuttal reserved on 16-11-2012 i.e much before the framing of the issue. This is challenged by the respondents/defendants. Order XVIII, Rule 3 of the C.P.C. runs as follows.-

> "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."

8. Order XVIII prescribes the procedure for the hearing of the suit. Rule 1 determines whether the plaintiff or the defendant has the right to commence. It provides that the 'right to begin' is that of the plaintiff, except when the defendant admits the facts alleged by the plaintiff and contends that either on a point of law, or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief sought. In the case of the latter the defendant has a right to begin. This is in consonance with the general rule that the person on whom the burden of proof lies begins. Rule 2 provides that on the day fixed for the hearing the party having the right to begin shall state his/her case and produce evidence. The other party may then produce its evidence. In such a case the party beginning may then reply generally on the

whole case. It is obvious that Rule 2 applies when the onus of proof is on one party.

9. Rule 3 relates to a situation where there are several issues, and the burden of proving some is on the plaintiff while others is on the defendant. A party determined under Rule 1 as having the right to begin, may exercise an option i.e. either to produce evidence, even on those issues on which the burden of proof is on the other party, or to abstain from producing evidence on such issues and reserve the right to answer after the evidence has been produced by the other party. In case the latter option is exercised, then after the other party has produced evidence, the party which had exercised its option to abstain shall produce evidence.

10. Rule 3 does not provide as to which stage is the party entitled to exercise its option to reserve its right to answer. In the case of 'Inderjeet Singh v. Maharaj Raghunath Singh and others' [AIR 1970 Rajasthan 278] it has been held as follows.-

> "It does not prescribe the stage at which the party leading evidence should apprise the Court of its exercising the option under Order XVIII, Rule 3. Although the Code contemplates that the party leading evidence should state his case, this is not done in actual practice. I am of the opinion that the provision under the above rule is sufficiently complied with if the party in question states before the other party begins its evidence that it is reserving its right to adduce evidence in rebuttal on the other issues. This it can do only if it has actually not led any evidence on those issues."

The above view appears to be in conformity with the intent of Rule 3, as would be explained later.

11. The party which has the right to begin may not be entitled to exercise the option to reserve its right to answer if it has spoken on the facts covered by that issue in its evidence already recorded. Reference may be made to the case titled 'T.R.S. Mani Sastrigal alias Mari Sastrical T.R. Suryanarayanan' [AIR 1996 Mad 152].

12. It is obvious from the plain reading of Rule 3 that it is attracted when there are several issues, and the onus of proof is not on the same party. The party beginning has to exercise an option in the case of those issues the burden of proving which is on the other party. Exercising an option essentially means application of conscious mind. As a corollary, in order to exercise the option, the issues must have been framed and known to the parties otherwise reserving the right to answer by abstaining from producing evidence on a particular issue would be a futile and mechanical exercise. The use of the expression 'option' is critical. Option means to choose between two or more alternatives or things. Option, therefore, can neither be exercised without knowledge of the alternatives or things nor when such alternatives or things are not in existence. Rule 3, therefore, inter alia, contemplates that (a) there are several issues framed at the time when the option is to be exercised, (b) it should be known to the parties as on which

party the onus to prove lies, (c) the option is exercised before the other party begins producing its evidence and (d) the option so exercised must be in relation to a specifically identified and already framed issue. The option can obviously not be exercised without application of the mind or in a mechanical or perfunctory manner. It is, therefore, implicit in the language of Rule 3 that at the stage of exercising the option the relevant issue ought to have been framed and known to the party.

13. In the instant case the additional issue 4-A was framed on 5-5-2013 while the right to answer was reserved by the petitioner/plaintiff on 16-11-2012. The option exercised was obviously not in respect of the additional issue which was framed much later. By no stretch of the imagination can the option exercised by the petitioner/plaintiff be extended to the additional issue framed on 05-06-2013. The contention raised by the learned counsel for the petitioner that the right exercised under Order XVIII, Rule 3 cannot be denied in the case of the additional issue 4-A is misconceived. Moreover, the petitioner/plaintiff appearing as PW-1 had clearly admitted the Undertaking and the signatures when confronted therewith during his cross-examination. The additional issue 4-A was framed pursuant to the order dated 23-05-2013, passed in the Civil Revision filed by the petitioner/plaintiff. It was specifically ordered that "However, at this stage I would not incline to allow the parties to lead any more evidence on this issue". This order was accepted by the petitioner/plaintiff as he did not assail it. The acquiescence on the part of the petitioner/plaintiff is obvious. No legal infirmity has been pointed out so as to interfere with the impugned order.

14. The foregoing discussion renders the instant petition without merit and is, therefore, accordingly dismissed

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