

**Jami Venkata Suryaprabha & Anr.**

v.

**Tarini Prasad Nayak & Ors.**

(Special Leave Petition (Civil) No. 29045 of 2024)

09 December 2024

**[J.B. Pardiwala and R. Mahadevan, JJ.]**

#### **Issue for Consideration**

Issue arose as regards the right of plaintiff to ask the defendant to lead the evidence.

#### **Headnotes<sup>†</sup>**

**Code of Civil Procedure, 1908 – Ord. XVIII r.1 – Hearing of suit and examination of witnesses – Right to begin – Defendants be asked to lead the oral evidence – When:**

**Held:** Ord. XVIII speaks of the ‘hearing’ of a suit which is only a part of the trial of the suit – Determination of the question as to which party has a right to begin is an integral part of the hearing itself – Ord. XVIII r. 1 indeed provides for plaintiff’s right to begin the evidence but not the court’s obligation to ask the plaintiffs to begin first – No impediment for the court to call upon either party to lead evidence first, depending upon the facts and circumstances of the case and the nature of the issues framed – Neither party can insist that the other one should be asked to lead it first – Where the court finds that defendant’s plea strikes at the root of the case, no hitch in asking him/her to prove such plea first which can lead to disposal of the case – All rules of procedure are designed and directed to achieve and secure ends of justice – On facts, the trial court rejected the application filed by the petitioners u/Ord. XVIII r. 1 that as defendants are not disputing the agreement of sale, the defendant be asked to begin to lead oral evidence, and the High Court also declined to interfere – High Court rightly held that although the defence has admitted the existence of a document “agreement of sale”, yet they have specifically said that the same is a sham transaction – Averments made in the written statement sought to be relied upon by the plaintiff does not ipso facto be construed to be admission of materials facts in the alleged plaint – Thus, no reason to interfere with the impugned order passed by the High Court. [Paras 5, 7, 17-19]

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Code of Civil Procedure, 1908.

**List of Keywords**

Right of plaintiff to ask defendant to lead the evidence; Hearing of suit and examination of witnesses; Right to begin; Hearing of a suit; Trial of the suit.

**Case Arising From**

EXTRAORDINARY APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 29045 of 2024

From the Judgment and Order dated 23.09.2024 of the High Court of Orissa at Cuttack in CMP Nos. 1019 of 2024

**Appearances for Parties**

Mrs. Prabhati Nayak, Umakant Misra, Debabrata Dash, Ms. Apoorva Sharma, Ms. Shivangi Gupta, Niranjan Sahu, Advs. for the Petitioners.

**Judgment / Order of the Supreme Court****Order**

1. This petition arises from the order passed by the High Court of Orissa in CMP No.1019 of 2024 (original jurisdiction case) dated 23<sup>rd</sup> September, 2024 by which the petition filed by the petitioners herein seeking to challenge the order passed by the Civil Judge (Senior Division), Paralakhemundi came to be rejected thereby affirming the order passed by the Civil Judge rejecting the application filed by the petitioners herein in the capacity of being a plaintiff under Order XVIII Rule 1 of the Civil Procedure Code, 1908.
2. The petitioners herein are the original plaintiffs and the respondents herein are the original defendants.
3. The petitioners have instituted a suit for specific performance of contract based on an agreement of sale dated 1st September, 2019, said to have been executed by the respondents(defendants) in their favour.
4. The respondents herein filed their written statement stating in para 6 thereof as under:-

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“(6) That the averments in Para 6 of the Plaintiff that defendants though received the said letter dated 25/11/2019 sent by ordinary post, and knowing well in advance the contents of the Redg. Letter and the letter sent by courier they refused to receive are all dales and concocted stories of the plaintiff only to make a cause of action for the present proceedings. However when Plaintiffs and others tried to spread that the sale of the suit property has been finalized and Plaintiffs going to purchase it came to Knowledge of Defendants, they preferred to inform in writing about the cancelation of the said sham sale agreement dated 01/09/2019 about which well appraised before to Jami Polichetty and his son as aforementioned. As such the averments in Para 6 of the Plaintiff that but soon all the Defendants in response to said letter of Plaintiffs sent a joint letter by Redg post A/D to the Plaintiffs are is conceived and placed with a malafide intension and accordingly not correct. As the Defendants with ulterior motive began to insist creating gossips about sale agreement and sale of the property, the Defendants preferred to give the letter in writing to the Plaintiffs Instead of acting in good faith as initially the matter arose but could not take shape of actual agreement as placed above and coming forward to take refund of the token amount kept with Defendants, the Plaintiffs preferred to play foul with it”

5. In view of the specific stance of the defendants in their written statement referred to above, the petitioners herein as plaintiffs preferred an application before the trial court under Order XVIII Rule 1 of the Civil Procedure Code, 1908 (for short the “CPC”) with a prayer that as the defendants are not disputing the agreement of sale, the defendant should be asked to begin to lead oral evidence.
6. The trial court rejected the application.
7. The petitioners herein being dissatisfied with the order passed by the trial court, rejecting such application invoked the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India. The High Court also declined to interfere.
8. In such circumstances, the petitioners are here before this court with the present petition.

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9. We have heard Mr. Niranjan Sahu, the learned counsel appearing for the petitioners.

10. Order XVIII Rule 1 of the CPC reads thus:-

“The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends 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.”

11. As a general rule, according to the procedural law, no doubt it is the plaintiff who has to prove his claim by positive proof, for the court has to see whether there is a proof of claim before it needs to enquire, as to the truth or otherwise of the defence. It is open to the plaintiff to say that although he has the right to begin, yet he may rest content with relying upon the averments made in the written statement. Yet evidence need not always be led by the party who has the right to begin and on whom lies the burden of proof; it is open to him to sustain the onus by facts which he may elicit in cross examination of the other party or his witnesses. In order to come to the conclusion, concerning on whom the legal burden of proof rests, in addition to the substantive law, the pleadings of the parties coupled with documents that they produced & the admissions, if any concerning such documents have to be taken into account.

12. The High Court looked into the averments made in the plaint, it also looked into the averments made in the written statement and ultimately observed in para 4. The paras 4 and 4.1 read as under:-

“4. Considering the submission made by Mr. Mishra, learned counsel for the Plaintiffs/Petitioners and on perusal of the record more particularly the plaint and written statement, it is apparent that although the-defendants have admitted the existence of a document called ‘agreement for sale’, but they have specifically stated that it was a sham transaction and pleadings in tire written statement clearly show that they had never agreed to sell the property. Of course, they have accepted certain amount which they agreed to refund.

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4.1 The aforesaid fact does not ipso facto be construed to be admission of material facts alleged in the plaint. The Defendants have categorically denied that in the written statement they have never agreed to sell the property, which is held by learned trial Court in the impugned order. There is also denial of other averments made in the plaint. In that view of the matter. This Court is of the considered opinion: that the provision of Order XVIII Rule 1 CPC is not applicable to the instant case. Hence, I find no infirmity in the impugned order.”

13. The High Court seems to have taken the view and, in our opinion, rightly that although the defence has admitted the existence of a document that is “agreement of sale”, yet they have specifically said that the same is a sham transaction.
14. The High Court is right in saying that the averments made in the written statement sought to be relied upon by the plaintiff does not ipso facto be construed to be admission of materials facts in the alleged plaint.
15. Section 102 of the Evidence Act states that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
16. Under Section 102 of the Evidence Act, the burden of proof rests on the party who would fail if no evidence at all were given on either side. Where the defendant admits the facts alleged by the plaintiff but contends that the plaintiff is not entitled to any part of the relief which he seeks, it is the defendant who gets the right to begin.
17. Order XVIII of the Code of Civil Procedure in terms speaks of the ‘hearing’ of a suit and not the trial of the suit. A court is concerned with the trial of a suit from the time when it is instituted. The hearing of a suit is only a part of the trial of the suit. The determination of the question as to which party has a right to begin is an integral part of the hearing itself.
18. Order XVIII Rule 1 indeed provides for plaintiff’s right to begin the evidence but not the court’s obligation to ask the plaintiffs to begin first. There is no impediment for the court to call upon either party to lead evidence first, depending upon the facts and circumstances

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of the case and the nature of the issues framed. Neither party can insist that the other one should be asked to lead it first. It all depends upon what the Court deems proper in the circumstances. Where it finds that defendant's plea strikes at the root of the case, there would be no hitch in asking him/her to prove such plea first which can lead to disposal of the case. There can be no watertight compartmentalisation in matters of justice and all rules of procedure are designed and directed to achieve and secure ends of justice.

19. In such circumstances, we see no reason to interfere with the impugned order passed by the High Court.
20. With these observations, the SLP stands disposed of.
21. Pending application(s), if any, stand disposed of.

*Result of the case:* SLP disposed of.

<sup>†</sup>*Headnotes prepared by:* Nidhi Jain