

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 19.12.2022

Pronounced on: 23.12.2022

CM(M) No.123/2022

KHALIDA SALMAN

... PETITIONER(S)

Through: - Mr. Wali Mohammad, Advocate

Vs.

SAHIL AHMAD DAR

...RESPONDENT(S)

Through: - Mr. Tasaduq Hussain, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has challenged order dated 13.07.2022 passed by learned Sub Judge (City Judge), Srinagar, whereby application of the petitioner (hereinafter referred to as the plaintiff) for producing evidence in rebuttal has been dismissed.

2) It appears that the plaintiff has filed a suit before the trial court seeking a decree of eviction of the respondent (hereinafter referred to as the defendant) from the shop measuring 130 Sqft. situated at 224, Jawahar Nagar, Srinagar. In the plaint it has been claimed by the plaintiff that she is owner of the shop in question and the same has been leased out by her to the defendant who has violated

the terms and conditions of the lease agreement. The plaintiff has alleged a number of acts and omissions on the part of the defendant which, according to her, constitute violation of the lease agreement on the basis of which she is entitled to a decree of possession against the defendant.

3) The defendant contested the suit by filing a written statement. In his written statement, the defendant, while admitting the relationship of landlord and tenant between the parties, denied having violated any condition of the lease agreement and has contended that the suit has been filed by the plaintiff just to pressurize him to vacate the demised premises.

4) On the basis of the pleadings of the parties, the following issues came to be framed by the trial court:

1. *Whether the defendant has violated any of the conditions enumerated in compromise dt.09-05-2017 submitted in the Court of Rent Control (Chief Judicial Magistrate) by the parties? ...OPP*
2. *Whether the defendant has occupied further 5 Sqft of shop in addition to 125 Sqft as agreed by the parties? ...OPP*
3. *Whether the defendant has sublet the shop premises in favour of any person/s in contravention of the compromise Agreement? ...OPP*
4. *Whether the defendant is running the same business in the shop premises which he used to run earlier before execution of compromise agreement between the parties or he has changed the nature of business? ...OPP*
5. *Whether the defendant is using the water tape connection for Poultry purpose without the consent of the plaintiff or the same is being used by the defendant from decades? ...OPP*

6. *Whether the compromise agreement dt.09-05-2017, affirmed by 1st Additional District Judge Srinagar on 20-11-2018 is being violated by the plaintiff?* ...**OPP**
7. *Whether the compromise agreement between the parties if violated by the plaintiff is binding on the defendant or not?...OPP*
8. *Whether the defendant is liable to be ejected?* ...**OPP**
9. *Relief:- To what relief the parties are entitled.* ...**OPP**

3) After the framing of issues, the plaintiff led her evidence and the same was closed by her in terms of order dated 21.08.2021, whereafter the defendant was asked to lead evidence in support of his case.

4) It appears that when the defendant concluded the evidence, the plaintiff made an application under Order 18 Rule 3 of the Code of Civil Procedure, whereby she expressed her intention to lead evidence in rebuttal by producing one witness, namely, Mehraj-ud-din. The application was objected to by the defendant by filing a reply thereto. The learned trial court after hearing the parties dismissed the application of the plaintiff on the ground that the plaintiff has not spelled out in the application as to on which of the issues, she intends to lead evidence in rebuttal. It has been further held by the trial court that the plaintiff cannot be allowed to lead evidence at this stage in respect of those issues the onus of which lies on her. Accordingly, the application of the plaintiff has been dismissed and it is this order which is under challenge by way of the present petition.

5) The petitioner has challenged the impugned order on the ground that the trial court has not interpreted the provisions contained in Order 18 Rule 3 of CPC in its right perspective. It has been further contended that while closing her evidence, the plaintiff has reserved her right to lead evidence in rebuttal and in spite of this, she has not been allowed to lead evidence in rebuttal, which is against the law. It has been further contended that if the impugned order is allowed to stand, it will cause grave prejudice to the interests of the plaintiff.

6) I have heard learned counsel for the parties and perused the record of the case.

7) A perusal of the trial court record reveals that when plaintiff closed her evidence on 21.08.2021, she did so subject to her right to produce evidence in rebuttal under Order 18 Rule 3 of CPC. This has been specifically recorded in order dated 21.08.2021 passed by the trial court. As is clear from the issues framed in the suit, as quoted above, regarding some of the issues, the onus of proof has been placed on the plaintiff whereas regarding certain other issues, the onus of proof has been placed on the defendant. The question that falls for determination is as to on which issues the plaintiff is entitled to lead evidence in rebuttal once it is shown that she had reserved her right to do so. In

this regard, it would be apt to notice the provisions contained in Order 18 Rule 3 of CPC. It reads as under:

3. 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) From a perusal of the aforesaid provision, it is clear that when there are several issues, the burden of proving some of which lies on other party, the party beginning may reserve its right to produce evidence by way of answer to the evidence produced by the other party and in case that is done, the party beginning may produce evidence on those issues, after the other party has produced the evidence. Thus, it is clear that if the plaintiff reserves his/her right to lead evidence on those issues regarding which burden of proof has been placed upon the defendant, then he/she has a right to produce evidence only on those issues regarding which burden of proof has been placed on the defendant.

9) A Division Bench of the Punjab & Haryana High Court in the case of **Surjit Singh and others vs. Jagtar Singh and others**, AIR 2007 P&H 1, has, while answering a reference

regarding scope and ambit of the right of the plaintiff to lead evidence in rebuttal on issues, the onus of proof of which is on the plaintiff, observed as under:

“In our opinion, the learned single Judge has misconstrued the observations made by the Division Bench in the case of Smt. Jaswant Kaur (supra). In the case of Narender Singh v. Randhir Singh CR No. 1767 of 2004 decided on 25.2.2005, Hemant Gupta, J. has followed the law laid down in the case of Smt. Kashmir Kaur (supra) and M/s. Punjab Steel Corporation (supra) and held that the plaintiff is entitled to lead evidence in rebuttal, even on issues where the onus of proof is on the plaintiff. We are unable to read into the aforesaid judgments any implied reservation of the right to lead evidence in rebuttal. We are also unable to read into Order 18, Rule 3 of the CPC any inherent right in the plaintiff to lead evidence in rebuttal on issues in which the onus of proof is on the plaintiff. For the aforesaid reasons, we are unable to agree with the view expressed by the learned single Judges in the cases of Kashmir Kaur (supra), Punjab Steel Corporation (supra) and Narender Singh (supra).”

(emphasis supplied)

10) Again, a Division Bench of Punjab & Haryana High Court in the case of **Avtar Singh & another vs. Baldev Singh** (CR No.2203 of 2010 decided on 21.11.2014), has held that the provision of Order 18 Rule 3 of the CPC is not to be construed that it means that the plaintiff has a right to lead evidence in rebuttal after the defendant has rendered his response to the whole case. The relevant observations of the Court in the aforesaid judgement are reproduced as under:

“Firstly, the difference one needs to bear in mind is that the provisions of Order 18 Rule 2 CPC do not contemplate a situation where there are several issues involved and the burden of proof some of which lies on

the defendant. Rather, what the provision takes within its sweep is a situation where on the date fixed for hearing of the suit, the party having the right to begin shall state his case and lead evidence on the issues he is bound to prove. Ex facie, the provision only caters to a situation where the burden of proof of all the issues is upon the party beginning. Thereafter, the other party i.e., defendant shall state his case and produce his evidence (if any). Meaning thereby, the provision of Order 18 Rule 2(2) only postulates a right to the defendant to lead evidence in rebuttal to the evidence led by the plaintiff. The expression "if any" denotes rebuttal evidence by the defendant. The afore-reproduced provision does not contemplate a situation, where the burden of proof of some of the issues lies upon the defendant, and after he leads evidence on said issues, plaintiff would lead evidence in rebuttal. Therefore, the expression, "and may then address the Court generally on the whole case." and the expression occurring in Order 18 Rule 2(3), "the party beginning may then reply generally on the whole case." only signify that after the defendant has led evidence (if any), he has a right to address and advance submissions on the whole case and likewise, the party beginning i.e., generally the plaintiff, would also have a right to advance submissions and respond to the case on the whole. Provisions of Order 18 Rule 2(3) cannot be construed or constructed to mean that after defendant had rendered his response to the whole case, plaintiff could still have a right to lead evidence in rebuttal. Such an interpretation or construction of the provision would be distorting the provision beyond its content. This perception and understanding further finds complete resonance in the provision of Order 18 Rule 3 CPC, as only the said provision deals with a situation where there are several issues and the burden of proof some of which lies upon the defendant. That is how, Division Bench in Surjit Singh's case (supra) interpreted Order 18 Rule 3, to determine the scope and ambit of the right of the plaintiff to lead evidence in rebuttal, on issues the onus of proof of which is on the plaintiff. Thus, both the aforesaid provisions cannot be read in conjunction but independently and in isolation, as regards the right of the party beginning to lead rebuttal evidence."

11) From the foregoing enunciation of the law on the subject, it is clear that the plaintiff has a right to begin

unless the defendant admits the facts. It is also clear that under Rule 3 of Order 18 of the CPC, if out of several issues, burden to prove some of the issues lies on the other party, then the party can begin, at his option and either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party. In the latter case, the party beginning may produce the evidence in rebuttal to the evidence led by the other party only on those issues the burden of proof whereof lies on it. However, there is no provision in the Code of Civil Procedure which permits a party beginning to lead evidence in rebuttal on an issue, the onus of proof of which lies on it.

12) In view of the aforesaid discussion on the scope and ambit of Order 18 Rule 3 of CPC, the trial court has rightly observed in the impugned order that the plaintiff cannot be allowed to lead evidence in rebuttal on those issues, the onus of proof of which lies on her. However, the plaintiff can certainly lead evidence in rebuttal in respect of the issue the burden of proof of which is on the defendant.

13) As already noted in the instant case, there are certain issues the burden of proof of which is upon the defendant and the plaintiff had reserved her right to lead evidence in rebuttal. Thus, the plaintiff is entitled to lead evidence in rebuttal in respect of those issues. The learned trial court

has rejected the application of the plaintiff simply on the ground that she has not spelled out in the application as to on which issue, she intends to lead evidence in rebuttal. Merely because the plaintiff has not spelled out as to on which issue, she intends to lead evidence in rebuttal, her right to lead evidence in rebuttal should not have been shutout altogether. It would have been appropriate for the trial court to allow the plaintiff to call her witnesses and thereafter, after hearing the parties, rule out such pieces of evidence which it would have found to be not in rebuttal to the material brought by the defence witnesses in discharge of proof of those issues, the burden of proof whereof was on the defendant.

14) Without even allowing the plaintiff to lead evidence in rebuttal, regarding which she had reserved her right, the learned trial court has shutout her right even without ascertaining as to what type of evidence the plaintiff intended to lead in rebuttal. There is nothing in Order 18 Rule 3 CPC to show that a regular application has to be made to the court for the purposes of leading evidence in rebuttal. Once the plaintiff had reserved her right to lead evidence in rebuttal and the burden of proof of some of the issues was on the defendant, the plaintiff should have been allowed to lead her evidence and thereafter the trial court should have

taken a decision whether or not to permit such evidence. However, the trial court has landed itself into a gross error by shutting out the evidence of the plaintiff without even knowing what the plaintiff intended to produce before it.

15) For the foregoing reasons, this Court feels that this is a fit case where jurisdiction under Article 227 of the Constitution of India needs to be exercised to correct the gross illegality committed by the trial court while passing the impugned order.

16) Accordingly, the petition is allowed and the impugned order dated 13.07.2022 passed by the trial court is set aside. The trial court is directed to permit the plaintiff to produce her evidence whereafter the trial court shall take a decision as to whether the evidence brought by the plaintiff is in rebuttal to the material brought by the defendant in discharge of his burden of proof on issues No.6 and 7.

17) A copy of the order be sent to the learned trial court for information and compliance.

(SANJAY DHAR)
JUDGE

Srinagar,
23.12.2022
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No