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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(OS) 604/2021, I.A.14041/2022**
SUSHMA DHAWAN

..... Plaintiff

Through: Mr. S.K. Gandhi, Ms. Manjula
Gandhi and Mr. Yash Aggarwal,
Advocates through video
conferencing.

versus

NARESH KUMAR KHANNA & ORS.

..... Defendant

Through: Mr. Anil Sharma, Mr. Aman
Bhardwaj, Advocates for defendant
No.1.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

ORDER

% **01.09.2022**

I.A.12066/2022 (For Framing Additional Issue)

1. An application under **Order XIV Rule 5 read with Section 151 Code of Civil Procedure, 1908** (*hereinafter referred to as CPC*) has been filed on behalf of the plaintiff for framing of an additional issue and for correction in the issues framed on 12th July, 2022 .
2. It is submitted in the application that the issues have been framed on 12th July, 2022. Issue No.3 was framed as under:

(iii) Whether the Will dated 19.08.2012 executed in favour of defendant no. 1 by deceased father late Sh.Chaman Lal is void, illegal, fabricated and forged?OPP



3. A correction is sought in Issue No.3 to mention word "alleged" before the word "Will" since the genuineness of Will is under challenge.

4. It is further asserted that the entire controversy between the parties now revolves around the alleged Will dated 19th August, 2012 and whether it was executed by the deceased father voluntarily, in sound disposing mind and in the presence of attesting witness. The burden of proving the existence of Will dated 19th August, 2012 as such is on defendant No.1. Therefore, an additional issue may be framed as under:

a) *“ii (A): Whether the deceased father- Late Chaman Lal died leaving behind a validly executed alleged Will dated 19.08.2012, if so it's effect? OPD 1”*

5. A prayer is, thus, made that the necessary corrections may be made in Issue No.3 and an additional issue as (ii) (A) be framed.

6. The application is contested by defendant No.1 who in his **detailed reply** has submitted that the present suit is not maintainable as it has been filed with an intent to protract the trial knowing full well that Late Sh. Chaman Lal, while in sound mind, had executed his last and final Will dated 19th August, 2012. The issues have been framed correctly on the basis of the pleadings on 12th July, 2022.

7. It is further submitted that the plaintiff had claimed relief of declaration qua the Will by asserting that "*decree of declaration declaring the alleged Will dated 19th August, 2012 to be illegal, void, false, fabricated etc. and thus, enforceable in the eyes of law*" may be passed. Once an assertion has been made in the plaint itself, the onus is on the plaintiff primarily to prove that the Will is forged in terms of Section 101 and 102 of



Indian Evidence Act. The plaintiff cannot be now permitted to turn turtle and make accusations and claim that the evidence be led by the defendant. The primary onus is on the plaintiff and she must begin the evidence to dislodge the genuineness of the Will.

8. Order XVIII Rule 1 CPC postulates that the plaintiff has a right to begin unless the defendant admits the facts alleged by the plaintiff and contends either the point of law or some additional fact. As claimed by the defendant, the plaintiff is not entitled to any part of the relief which he seeks in which the defendant has a right to begin. Order XVIII Rule 4, therefore, mandates that the plaintiff as a general rule must prove her case and thereafter the onus shifts on the defendant.

9. Learned counsel for the defendant has relied upon Uddav Singh Vs. Madhav Rao Scindia (1971) 1 SCC 511. It is submitted that the application is liable to be dismissed.

10. **Submissions heard.**

11. Order XVIII Rule 1 CPC prescribes "right to begin" in recording of evidence. AS a general rule, the party which sets up the claims must prove the same and the burden is cast upon it. The plaintiff has a right to begin and so he must because the burden of proof rests upon the one who pleads. The plaintiff must lead the evidence first. In Sabiha Sultana & Ors. Vs. Ahmad Aziz & Anr. 2017 SCC OnLine Del 7655, it was explained that however, when the defendant admits to the facts pleaded by the plaintiff, the plaintiff could be relieved of such burden. But in the absence of any such admission, asking the defendant to lead evidence first could well be disadvantageous to the defendant. In the absence of these two qualifying circumstances, the Court would not direct the defendant to lead evidence first.



12. The Coordinate Bench of this Court in Om Prakash vs. Amit Choudhary & Ors. 2019 SCC OnLine Del 9311 succinctly brought out the distinction when the plaintiff must be asked to lead evidence and the circumstances where the defendant can be directed to first lead the evidence. It was observed that it is only when the facts as alleged by the plaintiff are admitted by the defendant and a defence either refuting the claim of the plaintiff or an alternate defence is pleaded by the defendant that he may be asked to adduce the evidence first. In the said case the dispute arose out of a Collaboration Agreement. It was explained that in contractual disputes merely because an Agreement or a Contract is admitted by the defendant would not be enough to shift the burden of opening the evidence on the defendant. It is still for the plaintiff to prove the breach of Contract or the quantum of damages which the defendant has expressly and unequivocally disputed in the written statement. It is a settled law that pleadings are to be read as a whole and admissions cannot be considered in isolation. It was thus, concluded that mere admission of a Collaboration Agreement does not mean that the defendant has admitted all the facts alleged in the plaint or that he can be asked to open the evidence.

13. In Achala Mohan vs. Jayashree Singh 2020 SCC OnLine Del 2538 [against which SLP (C) No.7360/2020 was preferred but was dismissed on 16th November, 2020], the principles enunciated in Sabiha Sultana (supra) and Om Prakash (supra) were further explained to say that if the defendant sets up a case on the basis of a Will, the proving of which would completely decide the issues which have been raised in the suit itself, the defendant under Order XVIII Rule 1 CPC can be directed to lead evidence first.

14. In a suit for partition every claimant is a plaintiff. Therefore, strict



distinction cannot be made in a suit for partition as regard the plaintiffs and the defendants. In a suit for partition, where the plaintiff claims that the father died intestate without leaving any Will, but the defendant in its written statement relies on a testamentary document and claims that in view of the Will, the plaintiff is completely non-suited, then it is the defendant who has put up a specific defence of a Will and unless the Will is proved, the partition amongst the plaintiff and the defendant is inevitable. In this sense, the facts pleaded by the plaintiff that the father owned an immovable property which was subject to division between all the legal heirs stands admitted and if the defendant wants to carve out a special right for himself by virtue of a Will, the burden is on the defendant to prove the Will. In case the Will is not proved, the property would be amenable to partition. In such circumstances, since a document was propounded by the defendant which would be determinative of a dispute between the parties, the evidence is necessarily required to be led first by the defendant. However, where the plaintiff is relying on certain disputed facts in the first instance, then obviously the burden to open the evidence shall be on the plaintiff.

15. In Vikram Kaushik and Ors. vs. Vivek Kaushik, CS(OS) 1848/2009 decided on 13th December, 2011, the learned Single Judge observed that where the defendant pleaded oral partition as its defence, the defendant ought to be directed to lead the evidence first. If the defendant is able to prove his defence, it would disentitle the plaintiff of any relief and in such circumstances the defendant may be directed to lead the evidence.

16. Similar view has been taken by the Madhya Pradesh High Court in Jagran vs. Basanti Bai, 2001 AIHC 1030 and Purastam @ Purosottam Gaigouria and Ors. Vs. Chatru @ Chatrubhuja Gaigouri 1992 (1) OLR 72



and by Madras High Court in Krishnakumar vs. Seethalakshmi 2013 SCC OnLine Mad 83.

17. It may thus be concluded from the aforesaid judgments that it is not necessary that in every suit until and unless the defendant opts or agrees to lead the evidence first, the court cannot direct either party to begin the evidence. It is for the Court to ascertain which party would lead the evidence first depending upon the issues which arise for adjudication in the suit.

18. In the present case, the plaintiff has filed a suit for Partition, Declaration, Rendition of Accounts and Permanent and Mandatory Injunction. She has made specific averments that the alleged Will dated 19th August, 2012 executed by the deceased father Late Chaman Lal S/o Late Shri Barkat Ram is a null and void and fraudulent Will and has sought declaration that Will dated 19th August, 2012 is null and void. It is her specific assertion in the plaint that the Will is forged and fabricated. Once, a fact is alleged by the plaintiff, the burden is on the plaintiff to prove the same.

19. It has been rightly argued on behalf of learned counsel for the defendant that it is the plaintiff's case challenging the Will and thus, it is she who has to first establish the Will to be a forged document. It is not a case where the alleged Will has been propounded by the defendant for the first time in his written statement but the plaintiff is the one seeking declaration in respect of the alleged Will. Hence, no additional issue in respect of the genuineness of the Will for which the burden may be placed on the defendant, is required to be framed as claimed by the plaintiff.. There cannot be an issue framed in respect of same Will in both positive as well as



negative form with onus being put on the respective parties. It is the plaintiff who has sought Declaration about the Will as forged. The burden of proving the genuineness of the alleged Will of the father cannot be placed on the defendant in view of the Specific Declaration sought by the plaintiff. The application for framing of an additional issue is, therefore, not tenable.

20. The issue No.3 is, therefore, correctly framed and the onus has been rightly placed on the plaintiff. The only correction sought by the plaintiff is that the word "alleged" be added before the word "Will", the genuineness of which has been challenged by her. The Issue No.3 is accordingly corrected as under:

*(iii) Whether the **alleged** Will dated 19.08.2012 executed in favour of defendant no. 1 by deceased father late Sh.Chaman Lal is void, illegal, fabricated and forged? OPP*

21. The application is partly allowed and the Issue No.3 is modified by adding the word "alleged" before the word "Will" and its execution. However, the prayer in regard to framing of additional issue is hereby dismissed.

22. Parties to continue with the recording of evidence before the learned Local Commissioner.

NEENA BANSAL KRISHNA, J

SEPTEMBER 1, 2022/va