

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 16th September, 2010
% *Judgment Delivered on: 22nd September, 2010*

+ **RSA No.57/2002, CM No.170/2002 & Cr.M.A.No.13263/2008**

BALDEV KRISHAN KALRA (DECD.)

THROUGH L.Rs.

.....Appellant

Through: Mr.Dinesh Kumar with Mr. Vikas
Mishra, Advocates.

Versus

MANGAL SAIN KALRA

.....Respondent

Through: Mr.Nalin Jain & Mr.Amit Sherawat,
Advocates.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

RSA No.57/2002 & CM No.170/2002 (u/O 41 R 5 r/w S.151 CPC)

1. This is an unfortunate dispute between two brothers. The plaintiff is Sh. Mangal Sain Kalra, the elder brother of the defendant, Sh. Baldev Krishan Kalra. The plaintiff filed a suit for possession. It was alleged that the plaintiff is the sole owner of the shop bearing no. 57 situated at Khurshid Market, Sadar Bazar, Delhi-6. He had purchased it vide registered sale deed dated 31.05.1980 for a sum of Rs. 27,000/-.

2. The plaintiff had permitted the defendant to occupy a portion of this shop as a licensee. This was in lieu of the fact that the defendant after having migrated from Jammu had four minor children; the defendant was extremely hard up; the parents of the parties were worried and at the request of their parents, the

plaintiff had agreed to this arrangement in order that the defendant could settle in life. Defendant however started competing with the plaintiff; plaintiff requested the defendant to vacate the suit property but to no avail. Notice dated 06.9.1982 was served upon the defendant. Another notice dated 01.9.1983 was served upon him to which reply dated 09.9.1983 had been given by the defendant. Intention of the defendant had become mala fide; in this reply, he claimed ownership of the suit property. For identification purposes, the portion in occupation of the defendant was given number as 57-A while the portion in possession of the plaintiff was shown as shop bearing no.57; defendant now claimed ownership over property no.57-A. Defendant being a licensee only is liable to be evicted from the suit property.

3. Defendant had contested the suit. It was stated that he is the owner of the suit property. In Para 6 of his written statement, it was stated that a document dated 27.9.1971 had got signed by the defendant in the presence of the plaintiff; it was a sham and frivolous document; the actual fact being that the defendant was the owner of the portion in his occupancy i.e. shop no. 57-A over which the plaintiff had no interest or right.

4. On 23.5.1985 the trial judge had framed six issues which inter alia read as follows:

- "1. Whether the suit is not properly valued for the purpose of court fees and jurisdiction?
2. Whether the suit is not maintainable?
3. Whether the suit is barred by time?
4. Whether the plaintiffs are owner of the suit premises?
5. Whether the plaintiffs are entitled for possession?

6. Relief.”

Thereafter, an additional issue was framed on 28.08.1991 which reads as follows:

1. “Whether Late Shri. Baldev Krishan Kalra had become owner of the suit property by possessory title? If so its effect?” OPD.

5. Trial judge vide its judgment and decree dated 14.10.1997 dismissed the suit of the plaintiff. The defendant was given a protective cover of the family settlement Ex. DW1/1 dated 27.9.1971; it was held that this family arrangement between the two brothers had given a legal right to the defendant in the suit property; plaintiff was not entitled to possession of the suit property.

6. In appeal, the first appellate court while judgment and decree dated 5/03/2002 reversed the findings of the trial judge. The suit of the plaintiff was decreed. Ex.DW 1/1 was held to be a license executed between the parties wherein the plaintiff had given permissive user to the defendant to occupy the property at his will; it did not vest any right or title in the defendant.

7. On 25.03.2010, the appeal was admitted and the following substantial question of law was formulated:

“Whether the first Appellate Court correctly interpreted the document Ex. DW 1/1 while decreeing the suit for possession in favour of the plaintiff/respondent?”

8. On behalf of the appellant, arguments had been addressed at length. It is submitted that the testimony of the PW1 i.e. the statement of the plaintiff, Sh.Mangal Sain, cannot be read in evidence as he has been examined-in-chief on 11.7.1989 on which date his cross- examination had been deferred; on 07.4.1993, the evidence of the plaintiff stood closed. It is pointed out that PW-1 had not been cross-examined and in the absence of which his

evidence is no evidence in the eye of law. It has however not been disputed that PW-1 had been recalled for his rebuttal evidence on 11.4.1994; on that date, his testimony was confined only to the evidence in rebuttal and the cross-examination effected of PW 1 on 16.11.1994 was also a cross-examination in terms of the rebuttal evidence adduced by PW 1 in his chief. It is submitted that the evidence of PW1 recorded on 11.7.1989 on which no cross-examination has been effected has to be ignored. For this proposition, reliance has been placed upon AIR 9 SC 1141 Gopal Saran Vs. Satyanarayan as also another judgment of this court reported in 2001 Cri. L. J. 1288 Sh. Ripen Kumar Vs. Department of Customs. It is pointed out that evidence as defined in Section 3 of the Evidence Act means "the examination-in-chief and cross-examination; where witness has not been cross-examined, his statement cannot be termed as an evidence and cannot be read in evidence."

9. It is submitted that the sale deed dated 31.5.1980 Ex.PW 1/B relied upon by the plaintiff was tendered by PW 1 only in his rebuttal evidence; it was incumbent upon the plaintiff to have adduced this document in his examination-in-chief as a specific issue i.e. issue no. 4 had been framed by the trial court as to whether the plaintiff is the owner of the suit property or not; PW 1, however, chose to produce this document only in his rebuttal evidence. It has to be ignored under Order 18 Rule 3 of the Code of Civil Procedure. Attention has been drawn to this document which has been executed between Sh.Vijay Kumar Kalra, special attorney of Smt. Shanti Devi in favour of the plaintiff. The column of the vendor has been signed by the stenographer of the Court of

Sh.M.K. Chawla, the then Additional District Judge; the consideration mentioned in the document is Rs. 27,000/-; it is dated 31.5.1980. It is submitted that this sale deed clearly recites that on 07.10.1966, Smt.Shanti Devi, had agreed to sell this property to the vendee for Rs. 27,000/-; this document prepared in 1980, had valued this property for the same amount; the market value has been ignored. The sale deed, even otherwise, is a sham document as the property was a lease hold property and without having been converted into free hold, the same could not have been sold. It was incumbent upon the parties to have disclosed the true market value; this document has to be ignored; it cannot be read in evidence.

10. Counsel for the appellant has placed reliance upon a judgment of the Supreme Court reported in (2010) 4 SCC 350 State of Haryana and Others Vs. Manoj Kumar to substantiate this submission that where a sale deed had been executed pursuant to a decree on a suit for specific performance and no objection had been raised on the under valuation of the sale deed, the Supreme Court had held that the High Court had erred is not interfering with this question of the under valuation; this was held to be a reason why the Government was losing out on revenue; guidelines had been laid down by the Apex Court in this regard. It is submitted that in the instant case as well it was only after a suit for specific performance had been filed by the plaintiff that this sale deed dated 31.5.1980 had been executed in his favour; on the analogy and ratio of the judgment cited supra, this sale deed which was grossly undervalued cannot be read in evidence; further the sale deed merely having been given an exhibit mark i.e.Ex.PW 1/A

is no proof of the document. Attention has been drawn to the plaint. Para 6 refers to the consideration of Rs.27,000/-. Para 18 has described the value of suit property for the purposes of court fee and jurisdiction at Rs.13,500/-; there is not a whisper of the market value in this entire plaint. Attention has also been drawn to the version of the DW 2, Sh. Arvind Kalra, wherein he has deposed that the value of the shop would be between Rs.1,00,000.- to Rs.1,50,000/- . It is submitted that this version of DW-2 is not rebutted and nor challenged in cross-examination. The suit property having been under-valued, the court below had erred in concluding that such a suit was maintainable.

11. Even otherwise, this sale deed was contrary to the family settlement Ex. DW 1/1 executed between the two brothers i.e. the plaintiff and the defendant which was much prior in time i.e. on 27.9.1971. Attention has been drawn to the family settlement Ex. DW 1/1 dated 27.9.1971. It is stated that the suit filed on 11.5.1984 on a family settlement which was entered into between the parties more than 13 years ago is otherwise time-barred. This document further shows that it was not a license; at best it was a pre-emptive right given to the plaintiff that in case the property is likely to be sold, plaintiff will have the first right to purchase it and defendant will pay him a sum of Rs.25,000/-; thereafter both the parties will be given equal sharing in the upgradation of the value of the property.

12. A suit for possession was not maintainable; for a declaration of his status; it was incumbent upon the plaintiff to have filed a suit under Section 34 of the Specific Relief Act. For this proposition, reliance has been placed upon AIR 2008 SC 2033 Anathula

Sudhakar Vs. P. Buchi Reddy, where it had been held that where complicated questions of title are involved, the same can be examined only in a title suit for declaration and consequential relief.

Ex.DW 1/1 had created an irrevocable license in his favour. Reliance has been placed upon Section 60(a) of the Indian Easement Act, 1882; it is submitted that this license had been coupled with a transfer of property in favour of the defendant. For this proposition, reliance has been placed upon a judgment of the Supreme Court reported in AIR 1927 Bombay 240 Janardan Mahadeo Bhase and Ors Vs. Ramchandra Mahadeo Bhase and Ors as also a judgment of the Bench of Nagpur, High Court reported in AIR (38) 1851 Nagpur, Rahimbax Vs. Samsu and Ors. It is submitted that in the instant case as well the license granted to the defendant had created an interest in the property; it was irrevocable.

13. Learned counsel for the appellant has placed reliance upon several judgments of the Apex Court reported in AIR 2000 SC 426 Ishwar Dass Jain Vs. Sohan Lal, (2001) 5 SCC 46 Surendra Kumar Vs. Nathulal and Anr. and (2000) 3 SCC 668 Rohini Prasad and Ors Vs. Kasturchand and Anr. to substantiate his submissions that the arguments now advanced before this court are all matters which call for an interference by the second appellate court; this power is granted to this court under Section 100 of the Code of Civil Procedure. The Supreme Court has reiterated time and again that misreading of the evidence by the first appellate court will lead to a miscarriage of justice; if findings are based on no evidence they are perverse for which interference is called for by the second

appellate court. Attention has been drawn by the learned counsel for the appellant to the impugned judgment wherein it has been recorded that the learned trial court did not give any separate evidence on the additional issue framed by it; it is submitted that this is a clear perversity. For this proposition reliance has been placed upon a judgment reported in (2006) 5 SCC 545 Hero Vinoth (Monor) Vs. Seshammal . It is stated that under Order 41 Rule 23 and Rule 23 A of Code of Civil Procedure, this Court has ample power to remand the case back to the trial court which has committed the perversity; fresh findings of facts are required to be recorded in the instant case.

14. Arguments have been countered by the learned counsel for the respondent. It is submitted that this is a court sitting in second appeal. It is only substantial questions of law which are required to be answered by the court and which had already been formulated. The submission of learned counsel for the appellant that the additional issue framed on 28.8.1991 had not been decided by the trial court for which the matter is to be remanded back to the trial judge is a submission without any force. It is pointed out that this is not a substantial question of law which has to be answered by this court; further this was never raised before the first appellate court; no cross appeal had also been preferred by the appellant to challenge the findings of the trial court. Even otherwise, the first appellate court has in elaborate detail given its findings on the additional issue. The submission that the sale deed was inadequately stamped is also an argument without any merit. Attention has been drawn to para 6 of the sale deed which states that it is exempt from stamp duty. It is pointed out that the suit

has been properly valued for the purposes of court fee and jurisdiction and this has to be gathered from the averments which are made in the plaint. The defendant is himself confused about his stand; the initial written statement had stated that the so-called family arrangement dated 27.9.1971 is a sham document; in the amended written statement the plea of ownership had been set up by the defendant pursuant to which the additional issue on the possessory title of the defendant had been framed. It is submitted that this document Ex.DW-1/1 dated 27.9.1971 was only a license which had been granted by the plaintiff in favour of the defendant which is not an inheritable right. For this proposition reliance has been placed upon AIR 2002 SC 2051 The Corporation of Calicut vs. K.Sreenivasan. Provisions of Section 60 (a) of the Indian Easement Act are inapplicable. Appellant has failed to show their applicability; there was no transfer of property by the plaintiff in favour of the defendant in terms of Ex.DW-1/1. Findings in the judgment of first appellate court call for no interference. It is pointed out that the appellant before this court had deliberately concealed the fact that after the initial discharge of PW-1 he had been recalled for his examination on 15.7.1994 and thereafter he had been cross-examined in detail on 16.11.1994. The appeal is liable to be dismissed for concealment of material facts. For this proposition reliance has been placed upon AIR 1994 SC 853 S.P.Chengalvaraya Naidu (dead) by L.Rs. vs. Jagannath (dead) by L.Rs. & Ors. Findings in the impugned judgment call for no interference.

15. This court is sitting in second appeal. The substantial question of law had been formulated by it on 25.3.2010 which has

been aforenoted. This substantial question of law which has to be answered by this court relates to the interpretation of Ex.DW-1/1; contention of the respondent is that this is a license whereas the contention of the appellant is not clear to this court even at this stage. In fact, no arguments (as aforenoted) have been submitted by the appellant on the interpretation of this document. The other extraneous arguments which the appellant has urged even though not framed as substantial questions but which do not touch upon the fact findings given by the two courts below shall be answered by this court. The second appellate court is empowered to deal with all such questions which raise a substantial question of law; its powers are not transgressed and limited only to that question of law which has been formulated by it. This power is expansive.

16. This court shall first answer the question of law as formulated by it on 25.3.2010. As aforenoted no argument had been addressed by the learned counsel for the appellant on the interpretation of this document. In the first written statement the defence of the defendant was that the document dated 27.9.1971 (Ex.DW-1/1) is a sham and frivolous document which had been got signed from him in the presence of the plaintiff. Thereafter with the permission of the court the written statement was amended. Additional para 6-A was added. In this para the defence of the defendant was that "vide the document dated 27.9.1971 the defendant Sh.Baldev Krishan Kalra was irremovable from the premises and he had legal possession and possessory title to the same". On the basis of the same document the defendant now claimed ownership of this shop; his possessory title having matured

into an ownership; further defence being that the document is not a license.

17. Pursuant to this amended written statement an additional issue was framed on 28.8.1991 relating to “the ownership of the defendant by way of possessory title”. It is apparent from a reading of the amended written statement that the stand of the defendant is not clear. In one breath he has condemned the document dated 27.9.1971; in the very next breath he seeks shelter under the said document claiming possessory title and ownership emanating therefrom.

18. Initially six issues had been framed; thereafter the additional issue had been framed. While disposing of Issue no.5 the court had considered the document Ex.DW-1/1 dated 27.9.1971; its contents had been carefully scrutinized as is evident from the decision of the trial judge on this issue. After a detailed discussion on the various clauses of the said document the trial judge held as follows:

“.....On the basis of above discussion, I am of the considered opinion that the deceased defendant Sh.B.K.Kalra was not a licensee of the plaintiff in the year 1971, when the document Ex.DW1/1 was entered into between the plaintiff and the other family members including the deceased defendant. Rather, it appears to be a sort of family settlement between the parties and until and unless the plaintiff proves to the satisfaction of this court that the Late Sh.B.K.Kalra (and after his death his LRs) made breach of any of the terms of Ex.DW-1/1, the plaintiff is not entitled to take back the possession of the portion which was earlier in the occupation of Late Sh.B.K.Kalra and after his death it is in the occupation of his LRs. To my opinion, the plaintiff has failed to prove on record that either the late Sh B.K.Kalra or his LRs have violated any of the terms and conditions of the document Ex.DW-1/1 and hence, the plaintiff does not seem to be entitled for possession of disputed portion from the defendants. As discussed above, neither defendant Late Sh.B.K. Kalra nor his LRs after his death seem to be the licensee in the disputed property and hence, their does not arise any question of alleged licence being

terminated by the plaintiff vide notice dated 1.9.83 as alleged by the plaintiff. In view of the above discussion, I am of the considered opinion, that the plaintiff is not entitled for possession of the portion in occupation of the LRs of Late defendant Sh.B.K.Kalra. Hence, issue no.5 is decided against the plaintiff and in favour of the defendants.

19. Suit of the plaintiff was dismissed. Admittedly, no separate finding was given on the additional issue but the perusal of the judgment shows that the additional issue had been taken care of while deciding Issue no.5.

20. This was a grievance and a ground of appeal before the first appellate court. The first appellate court vide its judgment and decree had set aside the findings of the trial judge. The relevant extract of which reads as under:

“7.The document is not a contract although it is signed by the two brothers Mangal Sain Kalra and Baldev Krishan Kalra. The document describes its as a “solemn declaration a pledge and confirmation”. The document records that Baldev Krishan suffered losses in his business in Jammu and that in order to provide Baldev Krishan another chance in making a fortune his parents sold their house at Jammu and provided capital for his new business. The document acknowledges that Mangal Sain is in possession of shop no.57. The document also acknowledges that Mangal Sain plaintiff allowed Baldev Krishan defendant a space in shop no.57 on the bidding of their mother Kartar Devi and their father Gian Chand Kalra. The document further acknowledge that Baldev Krishan will not be liable to pay any charges but he will not be permitted to transfer possession to anyone except Mangal Sain who continued to be the rightful owner of the shop. The document further acknowledge that if Baldev Krishan abandons his trade and restores possession to Mangal Sain, Mangal Sain would give a sum of Rs.25000/- to Baldev Krishan. Baldev Krishan takes a pledge that he will improve his business and his earnings and would not cause any further worries to the family.

8. It is clear that the document does not create any right of tenancy in the shop. Baldev Krishan enters the property on account mere grace of Mangal Sain. The document further shows that Baldev Krishan did not enter into any adverse possession. Baldev Krishan did not acquire any right in shop no.57 which was akin to ownership. The right of Baldev Krishan created by the document is nothing but a privilege of a licensee.

9. Since the possession of Baldev Krishan and that of his legal heirs was never adverse to the interest of the real owner the possession can never mature into any kind of title whatever may be the length of such possession be. The additional issue framed therefore gets answered accordingly.”

21. Ex.DW-1/1 had been delved into in an in-depth detail by the first appellate court. The trial court had also scrutinized this document while disposing of Issue no.5 on the basis of which it had arrived at a finding that this was a family arrangement. This fact finding calls for no interference especially in view of the contrary stand which has been taken by the defendant right from the inception of the trial up to today. His defence is not clear to this court even as on date. Earlier the defendant had discarded this document in toto describing it as sham and frivolous. In the amended written statement he had taken shelter under this document; he had described it as a sort of family arrangement giving him possessory title which possessory title had matured into ownership. Before this court a third contrary plea had been set up that Ex.DW-1/1 has created an irrevocable license in his favour for which reliance has been placed upon the provisions of Section 60 (a) of the Indian Easement Act.

Section 60 (a) of the Indian Easement Act reads as follows:

“60. License when revocable—A license may be revoked by the grantor, unless—
(a) it is coupled with a transfer of property and such transfer is in force;
(b)”

To attract this statutory provision in favour of the appellant the license must be coupled with a transfer of property. No such evidence is forthcoming from a perusal of Ex.DW-1/1. In fact, Ex.DW-1/1 has categorically recited that the defendant Bal Krishan Kalra is not permitted or allowed to transfer the possession of this property to anybody except to its original owner namely Mangal Sain Kalra. The question of transfer of property in favour of the defendant does not arise. Section 60 (a) of the Indian Easement

Act has no application; so also the judgments of Janardan Mahadeo Bhase (supra) and Rahimbax (supra).

22. The plaintiff has claimed title to the suit property on the basis of the sale deed Ex.PW-1/B dated 31.5.1980. This had been specifically averred by him in para 1 of the plaint. In his examination in chief dated 11.7.1989 PW-1 had deposed that he is the owner of the suit property by virtue of a duly registered sale deed. Thereafter in his rebuttal evidence on the additional issue recorded on 15.7.1994 he had proved this sale deed as Ex.PW-1/B.

23. In AIR 2001 SC 2532 State of Haryana Vs. Ram Singh, it has been held that a registered agreement to sell is a public document under Section 74(2) read with Section 77 of the Indian Evidence Act; no formal proof of the said document is required. There is even otherwise no dispute to this document. It was an admitted document. There is no denial of the same in the corresponding para of the written statement. There is also no bar under any provision of law which states that a document initially not produced cannot be proved at the time when the witness has been recalled; such a document being a public document is also admissible without formal proof. As such this objection of learned counsel for the appellant that Ex.PW-1/B which had not been proved in the initial version of PW-1 and had been proved only at the time of his rebuttal evidence i.e. on 15.7.1994 is an argument which is neither here nor there. It takes him nowhere.

24. This sale deed Ex.PW-1/B was executed on 31.5.1980. It clarifies that this sale deed was exempt from stamp duty; stamp duty was not required to be paid. This submission of the learned counsel for the appellant also falls flat.

25. The present suit was a suit for possession. The valuation of the suit property has been detailed in para 8. It had been valued at Rs.13,500/- i.e. for the portion in possession of the defendant on which the requisite court fee had been paid. Issue no.1 had been specifically framed on this count. The burden of proving this issue was upon the defendant. Trial judge had noted that no evidence had been produced by the defendant to establish this submission. Issue had been decided in favour of the plaintiff. Before the first appellate court this argument was not agitated and neither does it find mention in the grounds of appeal filed before the first appellate court. Be that as it may, this question has to be answered by necessarily looking at the averments made in the plaint which clearly state that the portion in possession of the plaintiff is valued at Rs.13,500/-. This was in terms of the sale figure mentioned of the property i.e. a sum of Rs.27000/- which had been paid by the vendee to the vendor; half portion of this property was with the plaintiff on which the requisite fee had been paid. The submission of the learned counsel for the appellant that this sale figure had been arrived at in the year 1966 and the sale deed having been executed on 31.5.1980 i.e. after a span of 14 years should have been taken into account the inflated market value is clearly a misconceived and erroneous argument; the sale deed has categorically recited that the vendor had agreed to sell the property for the sum of Rs.27000/-; it was for this reason that this figure found mention in Ex.PW-1/B. The actual transaction entered into between the same parties cannot be challenged by presuming an inflated value. This argument also is noted only to be rejected. Judgment of State of Haryana (supra) has no application.

26. The oral and documentary evidence on record had established the title of the plaintiff in the suit property by virtue of Ex.PW-1/B. He was the owner of the suit property i.e. Shop No.57. The additional contention raised by the learned counsel for the appellant (at this stage) that there is confusion in the shop numbers and the defendant is occupying Shop No.57-A which is distinct and different from the suit property which is Shop No.57 is again a last ditch effort to confuse the court. In para 1 of the plaint the plaintiff has categorically stated that he is the absolute owner of Shop No.57. In para 15 it has been averred that the portion in possession of the defendant in terms of a permissive license granted by the plaintiff to the defendant is Shop No.57-A; this portion which is in possession of the defendant for the purposes of identification has been given No.57-A. In the corresponding para of the written statement this position has not been denied; it has been admitted that for the purposes of identification the portion in possession of the defendant has been marked as 57-A. It is not as if this is a municipal number which has been given by any statutory body. The No.57-A had only been accorded by the plaintiff to distinguish the area of the shop which was in possession of the defendant.

27. In the grounds of appeal before this court it has been averred that PW-1 had not appeared for his cross-examination and as such his evidence is not legally admissible under Section 137 of the Indian Evidence Act. It has correctly been pointed out by learned counsel for the respondent that the appellant has concealed from this court that PW-1 had in fact been recalled for his examination

on 16.11.1994 and had been cross-examined in detail by the learned counsel for the respondent.

28. Section 137 of the Indian Evidence Act describes an examination-in-chief, cross examination and re-examination; these are the three stages of the examination of a witness. Section 138 states that the examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness has testified in his examination-in-chief.

29. Perusal of the record shows that the evidence of the plaintiff was closed on 7.4.1993 and evidence of the defendant was closed on 11.4.1994; on the same date the matter had been fixed for rebuttal evidence of the plaintiff on the additional issue. On this additional issue the examination-in-chief of PW-1 was recorded on 15.7.1994. He had been cross-examined on 16.11.1994. This was not a re-examination of the witness but an examination afresh of PW-1 on the additional issue. It is relevant to point out that the additional issue had been framed as way back as on 28.8.1991 at which time the evidence of both the parties was in progress. Thereafter, after the closure of the evidence of both the parties i.e. of the plaintiff and the defendant, the matter was again listed for rebuttal evidence of the plaintiff. This rebuttal evidence was on the additional issue which had been framed. Order 18 Rule 3 of the Code of Civil Procedure provides that in cases where onus of some of the issues is on the party which is to open the case while that of certain other issues on the other party, it is open to the party which is to open its case to give its entire evidence or to give evidence only in respect of issues of which onus was on him while

reserving his right to produce evidence on issue of which ones was on the other side. That is the evidence which is commonly described as evidence in rebuttal. As already noted the cross-examination of a witness under the statutory provision of Section 138 of the Evidence Act is not confined only to the facts to which the witness has testified in his examination-in-chief; it is much wider. Nothing prevented the defendant counsel to cross-examine PW-1 on other scores apart from what he had stated in his examination-in-chief. In fact, cross examination effected of PW-1 by the defence counsel on 16.11.1994 shows that it was a two page lengthy cross-examination. Order 18 Rule 3 of the Code is not attracted.

30. In (1999) 8 SCC 649 Rammi alias Rameshwar vs. State of M.P. on the aspect of a re-examination the Supreme Court held as follows:

“There is an erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation.”

31. In AIR 1964 Supreme Court 1563 D.C Thakkar Vs. State of Gujarat, the Supreme Court on the interpretation of the provisions of Section 137 read with Section 154 of the Indian Evidence Act had held that a party calling a witness can be put questions in the nature of cross examination even at the stage of re-examination.

32. This is on the aspect of a re-examination which is much narrower than an examination of witness who has been recalled in rebuttal evidence to testify on an additional issue as was so in the

instant case. Nothing prevented the defendant from eliciting answers to queries which he had in mind. He had in fact done so as is evident from the cross-examination of PW-1 dated 16.11.1994. These facts had been concealed by the learned counsel for the appellant and have been highlighted only by the learned counsel for the respondent. In the grounds of appeal the impression given was that PW-1 was not recalled for his cross-examination. In the judgment of S.P.Chengalvaraya Naidu (supra) it has been reiterated that the litigant must come to court with clean hands and in a case of falsehood the litigant can summarily be thrown out at any stage of the litigation. As such this submission raised by the learned counsel for the appellant is also without any force.

33. The substantial question of law as formulated on 25.3.2010 has been answered. The other arguments addressed before this court by learned counsel for the appellant have also been answered. There is no fault in the findings of the impugned judgment. There is no merit in the appeal. Appeal as also the pending application is dismissed.

Cr. M.A.No.13263/2008 (u/S. 340 Cr.P.C.)

34. By this application, the respondent/plaintiff Mangal Sain Kalra had sought an enquiry against the appellant/defendant under Section 340 of the Code of Criminal Procedure (Cr.P.C). It has been averred that false statements have been made by the appellant; the averments have been mentioned in para 3 of the application. It is pointed out that the appellant before this Court has in his body of appeal stated that PW-1 had not appeared for cross-examination; he had proved documents in his rebuttal evidence which were beyond the scope of a rebuttal evidence; trial

court record shows that the appellant/defendant was willfully making false allegation to gain an advantage in his favour. Purposely for this reason, cross-examination of PW-1 has also not been filed along with the present appeal; he is liable to be prosecuted under Section 193 of the Indian Penal Code (IPC). Reply has opposed the application. It is pointed out that no willful false statement has been made by the non-applicant neither was he trying to mislead the Court; no offence has been made out. Rejoinder has also been perused.

35. Section 340 of the Cr.P.C refers to the procedure to be followed for cases mentioned in Section 195 i.e. for the prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence. This is contained in Section 195 of the Cr.P.C. The contention of the learned counsel for the applicant is that the non-applicant has committed an offence under Section 191/193 of the Indian Penal Code (IPC). Section 193 of the IPC speaks of punishment for false evidence. The intention to give false evidence is the prima ingredient of the offence; in the absence of which, the offence is not made out. This intention/mens rea is clearly missing in this case. The appellant himself has detailed the various dates on which the applicant had averred that PW-1 had appeared for his examination-in-chief, his cross-examination and rebuttal evidence. The intent to give false evidence is absent; the application not happily worded but the necessary mens rea being absent; no offence is made out under Section 193 of the IPC. Application is without any merit. It is dismissed.

INDERMEET KAUR, J.

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