

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMPMO No. 471 of 2023

Reserved on : 05.12.2025

Decided on: 29.12.2025

Sh. Gaurav Sharma and another ... Petitioners

Versus

M/s Durga and Sons ... Respondent

Coram

Hon’ble Mr. Justice Ajay Mohan Goel, Judge.

Whether approved for reporting?¹ Yes

For the petitioners : Mr. Ankush Dass Sood, Senior Advocate with M/s Yudhvair Singh Thakur and Rakesh Thakur, Advocates.

For the respondent : Mr. Vivek Thakur, Advocate.

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India, the petitioners/defendants have assailed order dated 09.06.2023, passed by the learned Trial Court, in terms whereof, an application filed under Order 18, Rule 3-A of the Code of Civil Procedure read with Section 151 thereof for the grant of permission to the plaintiff to appear as a witness has been allowed.

2. Case of the petitioners is that the respondent/plaintiff has filed a civil suit, which is pending adjudication before the learned Trial Court. In terms of the averments made in the petition,

¹ *Whether reporters of the local papers may be allowed to see the judgment?*

the suit was listed before the learned Court below for recording the evidence of the plaintiff on 25.02.2020, 11.03.2020, 04.09.2020, 28.04.2022, 25.05.2022, 15.06.2022, 19.07.2022, 19.09.2022 and 05.11.2022 but plaintiff did not appear to depose in the Court and after the recording of the statements of plaintiff's witnesses, he for first time entered the witness box for his examination on 22.12.2022. This was objected to by the petitioners/ defendants on the ground that the plaintiff should have taken leave of the Court at the first instance to be examined at a later stage. As a result of this objection, the plaintiff filed an application under Order 18, Rule 3-A of the Code of Civil Procedure which has been allowed by the learned Trial Court.

3. Learned Senior Counsel for the petitioners argued that the impugned order is *per se* perverse and not sustainable in the eyes of law. By placing reliance on the provisions of Order 18, Rule 3-A of the Code of Civil Procedure, learned Senior Counsel submitted that in terms of the statutory provisions where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined unless the Court for the reasons to be record permits him to appear his own witness at a later stage. Learned Senior Counsel submitted that this statutory

provision is mandatory and it has been so held by this Court in *Iqbal Singh vs. Kamal Dev and another*, CMPMO No. 176 of 2020, decided on 27.02.2020. Learned Senior Counsel accordingly submitted that in light of these facts, as the permission granted by the learned Trial Court was not sustainable in the eyes of law, the impugned order was liable to be set aside. Learned Senior Counsel submitted that as no permission was sought by the plaintiff from the Court that he should be allowed to be examined after recording of the statements of other witnesses, learned Trial Court could not have allowed the application filed by the plaintiff. Learned Senior Counsel further submitted that as the order passed by learned Trial Court was perverse on the face of it, the present petition deserves to be allowed.

4. On the other hand, learned Counsel for the respondent/ plaintiff submitted that there was no error in the impugned order. He argued that the suit was a summary suit instituted under Section 6 of the Specific Relief Act, seeking recovery of possession of the premises, wherein the plaintiff was a tenant. Learned Counsel submitted that the plaintiff had submitted a list of 9 witnesses, including himself as a party witness and on the first date of recording of the evidence, i.e. 15.01.2020, three witnesses were present and examined. Learned Counsel further submitted that on

the said date, Mrs. Aastha Sharma, wife of the petitioner, namely, Gaurav Sharma, appeared as a vice Counsel for Sh. Ajay Sharma, the Counsel for the defendants. Though, plaintiff was present to record his statement on said date, it was deferred on the request of Mrs. Aastha Sharma, Advocate. Learned Counsel further submitted that it was also a matter of record that as upto the date when the order under challenge was passed by the learned Trial Court, statement of five plaintiff witnesses stood recorded and out of these five witnesses, three witnesses were witnesses of record. Learned Counsel further submitted that statement of two witnesses of fact, i.e. one Ram Lal was recorded on 19.01.2022 and that of Ram Swaroop was recorded on 22.12.2022. He submitted that Ram Swaroop was examined after the respondent/plaintiff had made a formal request to enter the witness box on 22.12.2022. Learned Counsel also submitted that in the peculiar facts of the case, as the order was rightly passed by the learned Trial Court in the interest of justice, therefore, there is no infirmity therein. Learned Counsel also relied upon the judgment passed by Hon'ble Division Bench of this Court reported in 1981 ILR, H.P. in support of his contentions. Accordingly, he prayed that as there was no merit in the present petition, the same be dismissed.

5. I have heard learned Counsel for the parties and also gone through the averments made in the petition as well as documents appended therewith, including the impugned order.

6. A perusal of the record demonstrates that in the application filed under Order 18, Rule 3-A of the Code of Civil Procedure by the plaintiff before the learned Trial Court, it was mentioned that the plaintiff had filed the suit to recover the possession of the shop occupied by him as a tenant which suit was filed in the month of 2019. It was further mentioned in the application that the written statement was filed to the suit by the defendants on 14.11.2019, replication was filed on 10.12.2019 and Issues were framed on 20.12.2019. Plaintiff filed list of witnesses on 03.01.2020 and plaintiff Chain Singh was mentioned therein as witness No. 1. It was further mentioned therein that as the suit was to be tried in summary manner, the plaintiff did not prepare his statement in the shape of an affidavit as he had to state on oath directly before the Court. As per the plaintiff, he appeared in the Court on 15.01.2020 to record his statement on oath on the first date fixed for the evidence of the plaintiff. On the said date, the plaintiff and his other witnesses were present but Shri Ajay Sharma, learned Counsel for the defendants was not present and Ms. Aastha

Sharma, learned Counsel, who appeared for the defendants as vice Counsel, requested the Court that statements of official witnesses be recorded and the statements of plaintiff and other private witnesses be recorded on a later date as they were to be cross examined by Shri Ajay Sharma, Advocate. On her request, the plaintiff and other private witnesses were not examined and only three official witnesses of the plaintiff were examined and the case was adjourned for 25.02.2020. On 25.02.2020 also, plaintiff Chain was present and other private witness Ram Swaroop was also present. Statement of Ram Swaroop was recorded but on the request of learned Counsel for the defendants, his cross examination was deferred for 11.03.2020 and on that date, the witness present in the Court was not examined as certain record was not available. After that the case could not be taken up on account of Corona Virus and the matter was listed on 04.09.2020. The Counsel for the plaintiff appeared on 09.03.2021. Thereafter, the defendants could not be served by way of ordinary service and ultimately they were served for 28.04.2022 by way of affixation of summons on the house of the defendants. After three adjournments, the case was fixed for 19.09.2022, on which date, one PW Ram Lal was examined. The case was adjourned for 05.11.2022, on which date cross

examination of Shri Ram Swaroop was not done. The case was adjourned for 22.12.2022, on which date, Ram Swaroop was cross examined. Plaintiff Chain Singh appeared to record his statement but his examination was objected to and hence the application. It was further mentioned in the application that the non-examination of the plaintiff in the beginning was neither intentional nor deliberate but due to the reason mentioned in the application which were duly supported by the affidavit of Chain Singh.

7. Reply to this application was filed by the defendants, who denied the averments made in the application. Alongwith the reply, affidavit of Ms. Aastha Sharma, learned Counsel, was also appended, who stated on oath that on 15.01.2020, the matter was listed for the examination of the plaintiff's witnesses and only three official witnesses were present and examined accordingly but no other witness not the plaintiff was present. It was mentioned in the affidavit of Ms. Aastha Sharma that she had not made any request for deferring the examination of the plaintiff and other witnesses, as they were not present.

8. Thus, here is a case where the contention of the plaintiff before the learned Trial Court was that he was personally present on the first date, to have himself examined but his examination was

deferred on the request of the learned Counsel, who appeared for the defendants. This contention of the plaintiff has been denied by the learned Counsel, who appeared on behalf of the defendants, who incidentally happens to be the wife of defendant Gaurav Sharma.

9. *Zimni* orders which are appended with the petition demonstrate that on 15.01.2020, the following order was passed by the learned Trial Court:-

“Three P.Ws present and examined. Documents as per list filed. One P.W. is deferred as he has not brought the requisite record. Put up for remaining P.Ws on 25.02.2020.”

This *zimni* order thus demonstrates that Ms. Aastha Sharma, appeared as vice Counsel for the defendants.

10. In this backdrop, if one peruses the order passed by the learned Trial Court, the reasons which have been culled out therein for allowing the application reads as under:-

“7. Perusal of the case file suggests that the case was listed on 15.01.2020 for the first time for PWS and Ms. Astha Sharma, has tendered her appearance on behalf of defendants. The precise of the Court is as follows: "Three PWs present and examined. Documents as per list filed. One PW is deferred as he had not brought the requisite record. Put up for remaining PWs on 25.02.2020 and on 25.02.2020.

Witness Ram Swaroop was deferred. On the next date of hearing i.e. on 11.03.2020, the witnesses were again deferred for want of complete record. Therefore, it is clear that on 15.01.2020, one PW was deferred for want of record. It seems to be Ram Swaroop and after that on 25.02.2020(wrongly mentioned as 25.02.2019 on his statement placed on record) he was deferred on the request of Id. Counsel for defendants on the ground of being confronted his previous statement. Thereafter, this Court making efforts to get the record summoned, after which due to the grip of the COVID-19 pandemic, the matter got delay. After resumption of COVID-19 pandemic, service of defendant was secured and other PWs from PS. Kandaghat and Ram Swaroop was got examined. It was only on 05.11.2022 that the discussion regarding tendering of witnesses by plaintiff and his intention to do is seen Order 18 Rule 3-A of CPC states that:

A reading of Rule 3-A of Order 18 shows that it is in two parts, the first part of the rule creates a mandatory obligation on the litigant to examine himself as a witness before any other witness on his behalf is examined. If the rule were to end there, there would have been no scope perhaps to interpret the rule

except follow the letter of the rule. But the latter half of the rule provides power to the Court to permit deviation from the general principle enshrined in the first part and accord permission to the litigant for reasons to be recorded by the Court. As far as the second part is concerned, the rule is not very definite as to the point of time at which such permission can be accorded."

8. *Therefore, this rule has been inserted with an object the stopping the practice of litigants giving evidence at the end so as to fill up any blanks or lacuna in the evidence given by his witness which is to be strongly deprecated. However, this rule has to be construed and interpreted with great caution because insistence of examination of a party as a first witness is not an inviolable rule and the rule itself provides exception. The second part of this provision therefore, empowers the Court to permit the party to examine himself/herself at a later stage and there is no legal mandate to seek presumption at the threshold itself.*

9. *Perusal of the most crucial order dated 15.01.2020 denotes that it is true that Ms. Astha Sharma was present and she cross-examined three formal witnesses. It could be true that the presence of the plaintiff could not be recorded due to inadvertent mistake or oversight but it is seen that the*

defendants never agitated and objected the fact that they shall not examine any witness before the examination of plaintiff in the suit. It somehow goes to denotes that the respondents/defendants have waived of their right to do so. Moreover, the respondents shall have sufficient opportunity to cross-examine the plaintiff/applicant who shall be on over yet. It is worth mentioning that discretion granted to this Court under present in the Court and OWs are vet to be led. Pws also not completely the second part of Rule 3(Alaf Order 18 CPC is very crucial and shall be exercised to subserve the ends of justice. This is an apt case to do the same. Moreover, the prejudice caused to the applicant/plaintiff in denying him the right is much more than any prejudice caused to the respondents/defendants who have failed to pin point the same before the Court when weighed the scale of justice. There is thus, no quarrel with regard to the authority relied upon by the respondent/defendant titled Ikbal Singh Vs. Kamal Dev and another 2020 STPL 497 HP but the same is not applicable in the instant case. Reliance is placed on the Judgment of Brij S.C. Kothila Vs. Radha Krishan Kuthiala, 2015(3) Civil Court Cases 470(HP). Thus, the application is allowed and disposed of accordingly. After doing needful, be tagged with the main case file for record.”

11. Thus, what weighed with the learned Trial Court while allowing the application, permitting the examination of the plaintiff at a subsequent stage *inter alia* was that might be on 15.01.2020, the presence of the plaintiff was not recorded due to inadvertence or oversight and the defendants never agitated or objected to the fact that they shall not examine any witness before the examination of the plaintiff. Learned Court held that this denotes that the defendants had waived off their right to do so. Learned Court also held that otherwise also, the defendants shall get an opportunity to cross examine the plaintiff.

12. This Court is of the considered view that in the peculiar facts of the case, the order passed by the learned Trial Court calls for no interference. There is no dispute that in terms of the provisions of Order 18, Rule 3-A of the Code of Civil Procedure, if a party has to depose as a witness, then it has to depose at the first instance, except with the leave of the Court. However, record herein demonstrates that till the day when the impugned order was passed, statements of only two witnesses of fact were recorded and statement of one of them was recorded on the date when the plaintiff had sought permission to depose before the Court, which was objected to by the defendants. Because there is a serious dispute

between the parties as to whether the plaintiff indeed was present in the Court on 15.01.2020 or not and whereas the plaintiff is stating so on his own affidavit and the defendants are denying this fact on the anvil of the affidavit of the Counsel, who appeared in the Court on 15.01.2020, who is not the original counsel and who happens to be the wife of defendant Gaurav Sharma and thus, who can be said to be having a direct interest in the litigation, obviously, her affidavit has to be construed accordingly. This affidavit of the Counsel is not an affidavit filed by a Counsel engaged in routine by a party but herein the Lawyer happens to be the wife of defendant Gaurav Sharma and obviously, it can be construed that her affidavit shall be in favour of her husband only. Not only this, a perusal of the affidavit of the Counsel demonstrates that it has been conspicuously concealed therein that she indeed was the wife of defendant Gaurav Sharma. All these facts in the peculiar facts of the case lead this Court to the conclusion that learned Trial Court correctly granted opportunity to the plaintiff to be examined as its witness.

13. At this stage, this Court would like to refer to the judgment passed by Hon'ble Division Bench of this Court in **Smt. Uma Devi** v. **Smt. Rajkumari**, reported in Indian Law Reporter (Himachal Series) (1981) Vol. 10, page 17, in which, Hon'ble Division

Bench has *inter alia* held that no doubt the provisions of Order 18, Rule 3-A of the Code of Civil Procedure are mandatory, however, an exception has been made and the Court has been given discretion to allow a party to examine himself later on after examining one or more witnesses on his behalf. Hon'ble Division Bench also held that a party, who wishes to examine himself at a later stage, is not bound to ask for the permission of the Court before examining his first witness and that the party can ask for the permission at a later stage, however, the Trial Court should remember that it is the duty of the party to examine himself first, in case the party wishes to appear as his own witness and the discretion which has been given by way of the exception is not to be exercised lightly and it is enjoined upon the Courts to record reasons in writing while allowing a party to examine himself at a later stage.

14. Relevant paras of this judgment are quoted herein below for ready reference:-

"5. No doubt this rule is mandatory. It enjoins upon a party, who wishes to appear as a witness, to examine himself first before examining any other witness on his behalf. However, an exception has been made. The Court has been given the discretion to allow a party to examine himself later on after examining one or more witnesses on his behalf.

But we do not find anything in this rule which compels a party to ask for the requisite permission from the court before he examines his first witness. We cannot overlook the fact that the rule is a procedural one. It is meant to curb a particular evil for the enhancement of justice. It has to be interpreted in such a manner that while the evil is curbed, it does not lead to any injustice.

.....

8. *We, therefore, hold that a party who wishes to examine himself at a later stage is not bound to ask for the permission of the court before examining his first witness, and that the party can ask for the permission at a later stage. However, we must emphasise that the trial courts should remember that it is the duty of a party to examine himself first in case the party wishes to appear as his own witness. The discretion which has been given by the exception has not to be exercised lightly. It is for this reason that it is enjoined upon the courts to record their reasons in writing while allowing the party to examine himself at a later stage. It is neither possible nor desirable to lay down any hard and fast rules for the exercise of this discretion. The facts of each case are bound to vary. But the party must have some weighty reasons to convince the court for not examining himself first*

*before the court exercises its discretion in favour of the party.
It may be repeated that rule 3A has been framed to curb the
evil practice of a party examining himself last.”*

15. Accordingly, in light of above discussion as also in view of the judgment of the Hon'ble Division Bench of this Court supra, this petition is dismissed and the order passed by learned Trial Court under challenge dated 09.06.2023 (Annexure P-4), is upheld. Pending miscellaneous application(s), if any also stand disposed of accordingly.

(Ajay Mohan Goel)
Judge

December 29, 2025
(narender)