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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ADMIRALTY AND VICE ADMIRALTY JURISDICTION

**ADMILTRY SUIT NO.45 OF 2012
WITH
CHAMBER SUMMONS NO.23 OF 2015
IN
ADMILTRY SUIT NO.45 OF 2012**

ESSAR STEEL INDIA LTD. & ANR. ...Plaintiffs
vs
M.V.YURIY ARSHENEVSKIY ...Defendant

**WITH
ADMILTRY SUIT NO.47 OF 2012
WITH
CHAMBER SUMMONS NO.22 OF 2015
IN
ADMILTRY SUIT NO.47 OF 2012**

ESSAR POWER GUJARAT LTD. ...Plaintiff
vs
M.V.YURIY ARSHENEVSKIY ...Defendant

**WITH
ADMILTRY SUIT NO.50 OF 2012
WITH
CHAMBER SUMMONS NO.30 OF 2015
IN
ADMILTRY SUIT NO.50 OF 2012**

ESSAR OIL LTD. & ANR ...Plaintiffs
vs
M.V.YURIY ARSHENEVSKIY ...Defendant

.....
Mr. Rahul Narichania, Senior Counsel, a/w Mr. Shiv Iyer, Ms. Ramaiya
Dharmaraj, i/b. Bose & Mitra & Co., for the Plaintiffs.

Mr. Bimal Rajasekhar, for the Defendant.

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CORAM : S.C. GUPTE, J.

DATED : FEBRUARY 2, 2015

(ORAL ORDER) :

. These Chamber Summonses have been taken out in Admiralty Suits concerning maritime claims for loss or damage to cargo. The 1st Plaintiffs in these suits are cargo owners and consignees, who originally had a claim against the Defendant vessel. The 2nd Plaintiffs are insurers who have indemnified the 1st Plaintiffs. After payment under their respective insurance contracts, the 2nd Plaintiffs have been subrogated to the rights of the 1st Plaintiffs. As a result of this subrogation, the 2nd Plaintiff insurers are brought on record in the Admiralty Suits. The suits are now effectively contested by the 2nd Plaintiffs. The Chamber Summonses seek leave to allow the 2nd Plaintiffs to lead the evidence of the surveyor who investigated the loss or damage, which is the subject matter of the present suits, before either the 1st Plaintiffs or the 2nd Plaintiffs tender their own testimony.

2. The main controversy in the present suits concerns the factum as well as the reasons for the loss or damage to the cargo. The defence of the owners of the vessel is that the loss was caused due to a natural calamity for which the owners are not responsible. There was a surveyor appointed by the insurers in the present case, who has surveyed the purported loss or damage and made a report on the causes of such loss or damage.

3. In pursuance of directions passed by this Court, an affidavit of evidence of the surveyor was submitted by the Plaintiffs in lieu of examination-in-chief, which deals with the loss or damage to the cargo and the reasons for such loss or damage. In pursuance of the documents disclosed by the Plaintiffs and the examination-in-chief of the witness, this Court even proceeded to mark the documents of the Plaintiffs and direct the parties to have the cross-examination recorded before a Commissioner for recording of evidence. Just as the cross-examination of this witness was about to commence before the Commissioner,

the Plaintiffs, anticipating an objection as to the leading of evidence of the particular witness before the Plaintiffs themselves appear as witnesses, addressed a communication to the Defendant in that behalf. The Defendant refused to give up its objections on the basis of Order 18, Rule 3A of the Code of Civil Procedure, 1908 ("CPC"). This has prompted the Plaintiffs to take out the present Chamber Summonses for leave of this Court to permit the Plaintiffs to tender the present witness, the surveyor, before the Plaintiffs themselves appear as witnesses in the suit.

4 The Chamber Summonses are opposed by the Defendant. It is submitted by the Defendant that the purpose and scheme of Rule 3A of Order 18 of CPC will be defeated if the application is allowed. It is submitted that the application is not bona fide. It is submitted that the non-availability of the Plaintiff's own witness cannot be a ground for an application under Order 18 Rule 3A. It is also submitted that the illness of the second Plaintiff's witness is not supported by any particulars or evidence.

5 Order 18 Rule 3A of CPC provides that '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 reasons to be recorded, permits him to appear as his own witness at a later stage.' The object of Order 18 of CPC and particularly Rule 3A thereof was considered by this Court in the case of **Kumudini Damodar Magar Vs Bhushan Damodar Magar**¹. This Court noted that the object of Order 18 was to primarily regulate the proceedings in Court so that the parties may get sufficient opportunity to put up their cases and have the matter disposed of as expeditiously as possible. Rules in Order 18, accordingly, need to be construed and read in conjunction with each other so as not to defeat the object of this procedural law. At the same time, it must be noted that where the ends of justice so demand, any procedural law has to be construed liberally to advance the ends of justice rather than scuttle them. With these principles in mind, the Court construed the provisions of Rule 3A of Order 18 in the case of **Kumudini Magar** (supra) as follows:

1 2004 Vol. 106(3) Bom. L.R. 783

“14. With the above dissection of r.1. If one has to understand the legislative intent behind r. 3A of the said O.18, which was introduced by the Act 104 of 1976 into C.P.C., it is necessary to look into the recommendations of the Law Commission. In the 54th report with an intention to prevent the notorious practice indulged in by litigants in examining other witnesses first and later covering up the gaps by the examination of the parties themselves later, to substantiate their case, the Law Commission recommended introduction of r. 3-A in o.18 of the C.P.C. If that is the mischief sought to be remedied by the amended r.3-A of o.18 of the C.P.C., the order of the examination of such of the defendants who wish to examine themselves as witnesses in support of their defence cannot be left to the choice of the plaintiff. Rule 3-A of o.18 is directory in nature and the only mandatory provision it incorporates is to the extent of obtaining permission of the Court. The normal rule laid down is that the party wanting to examine himself should examine first before any witness is examined. This rule can be deviated only with the permission of the Court. Such permission of the Court, it is desirable, should be obtained before any witness is examined, but such is not the mandate. Such permission can be obtained even at the later stage.”

Even in a case decided by the Jammu & Kashmir High Court in **Romesh Kumar Vs Chanan Lal**², the Court noted that the provisions of Order 18 Rule 3A were directory in nature and not mandatory. To the same effect is the judgment of Orissa High Court in the case of **Maguni Dei Vs Gouranga Sahu and Ors**³. The Court in that case noted that the manner in which the provision was expressed in the statute indicated the anxiety of the Parliament to ensure that the Court should not shut out evidence of a party which is necessary for a just decision of the case. The Court noted that the paramount consideration of the judicial process being the doing of justice to the parties, a court can examine a party at a later stage if it considers the evidence essential despite some negligence on the part of a party.

6 On the other hand, learned Counsel for the Defendant relied on two judgments of Madras and Kerala High Courts. The Madras High Court in the

2 AIR 1991 J & K 4

3 AIR 1978 Ori 228

case of **Ayyasami Gounder Vs T.S.Palanisami Gaundal**⁴, held that the permission under Order 18 Rule 3A of CPC should be sought by a party, prior to the examination of other witnesses on his behalf. The Court noted that the object behind the introduction of Rule 3A of Order 18 of CPC was to put an end to the malpractices indulged in by the litigants in examining other witnesses first and later covering up of the gaps and loopholes in such evidence. The Court noted that the requirement that the party shall appear before any other witness on his behalf has been examined shows that in all cases, the party shall be examined first before the other witnesses and only in very exceptional cases, subject to the grant of permission by the Court, he may be permitted to appear as a witness at a later stage. The Kerala High Court in the case of **N.C.Kaladharan Vs Kamaleswaran**⁵, noted that though the discretion is certainly available with the Court to allow the request to postpone the evidence of the party only after his witnesses are examined, this was subject to the availability of sufficient reasons for doing so and which reasons have to be recorded. The Court noted that the permission cannot be granted for mere asking or as a matter of course and that the Court has to justify its action by giving sufficient reasons.

7 It is trite to say that any procedural provision ought to be construed liberally and with a view to advance the ends of justice. Bearing in mind the broad purpose behind the procedural requirements, as noted by our Court as also by the other Courts cited above, Rule 3A of Order 18 was meant to prevent a malpractice indulged in by the litigants earlier, in examining other witnesses first and then covering up the gaps by examination of the parties themselves later, with a view to substantiate their case. It was to get over this malpractice that the Law Commission introduced Rule 3A of Order 18 of CPC. Keeping this rationale of Rule 3A in view, let us examine the controversy in our case. In our case, though the Plaintiffs have to prove their entitlement to the cargo as well as subrogation by means of examination of their own personnel, what is central to the present suits is the factum as well as the reason for the loss or damage caused to the cargo and the responsibility of the owners towards such loss or

4 AIR 1990 Madras 237

5 AIR 2000 Kerala 354

damage. These matters are sought to be proved through the surveyor, who actually assessed the loss or damage and made a report thereon. The attempt of the Plaintiffs to lead the evidence of the Surveyor does not indicate any design on the part of the Plaintiffs to examine the surveyor first with a view to elicit the intent and course of cross-examination and then fill in the gaps through their own evidence. If at all, to achieve that end, the Plaintiffs would have examined the Plaintiffs' own witnesses first and then tendered the evidence of the Surveyor. The Plaintiffs' own evidence may properly pertain to the ownership of the 1st Plaintiffs of the cargo and the subrogation of the 2nd Plaintiffs, which has nothing to do with the controversy concerning the loss or damage to the cargo and the rights of the Plaintiffs to claim damages as a result. As is obvious, the evidence of P.W.1, namely, the Surveyor, before the Plaintiffs tender their own evidence, cannot possibly cause any prejudice to the Defendant. The evidence is already tendered along with the affidavit of documents and compilation. The documents have already been marked based on such evidence and the matter is sent to the commissioner for recording of evidence. In the premises, interests of justice, including the interest of both parties in an expeditious trial, would be better served if the witness tendered in evidence is cross-examined and his evidence is recorded first.

8 For the reasons stated above, the Plaintiffs are permitted to tender P.W.1 as their first witness and conclude his evidence first. Accordingly, the Chamber Summonses are made absolute in terms of prayer clause (a). There shall be no order as to costs. The time granted to the Commissioner originally for completing the recording of evidence and submitting his report has already expired. The time is extended, by consent of parties, up to 30 April 2015.

(S.C. GUPTE, J.)