

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision:13.5.2016

1. CR No.7852 of 2015(O&M)

Kuldeep Kumar **....Petitioner**

VERSUS

Kanwar Pal Singh and others **.....Respondents**

2. CR No.384 of 2016(O&M)

Kuldeep Kumar **....Petitioner**

VERSUS

Kanwar Pal Singh and others **.....Respondents**

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

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

Present: Mr. Sandeep Arora, Advocate for the petitioner.

Mr. Satyaveer Singh, Advocate for respondent No.1.

REKHA MITTAL, J.

This order shall dispose of CR Nos.7852 of 2015 and 384 of 2016 as common questions of law and fact are involved for adjudication. For brevity, the facts are taken from CR No.7852 of 2015.

Counsel for the petitioner has contended that Kanwarpal Singh-respondent No.1 has filed a suit for possession by way of specific performance of the agreement to sell dated 27.02.2009 in

respect of both No.331, Rehri Market now known as Krishna Market, Sector 41-D, Chandigarh and in the alternative for recovery of Rs.25,00,000/- along with interest towards damages on the plea that the aforesaid agreement was executed by Sh. Mulkh Raj (since deceased) predecessor-in-interest of the defendants including the petitioner. The petitioner (defendant No.1) with Nagal Mal and Gulshan Kumar (defendants no.2 and 3), his brothers, filed a joint written statement controverting claim of the respondent/plaintiff; execution of agreement to sell by their father with the plea that the agreement is a forged and fabricated document as it was never executed by father of the defendants. Various allegations have been raised by way of preliminary submissions as well as reply on merits.

Nagal Mal and Gulshan Kumar (defendants No.2 and 3), appeared in the witness box and by way of their examination in chief, they reiterated their stand raised in the written statement. During the course of cross examination by counsel for the respondent/plaintiff, they have taken a complete somersault and admitted the agreement to sell dated 27.02.2009 and the same having been signed and thumb-marked by their father. It is argued with vehemence that keeping in view conduct and the facts elicited during cross examination of Nagal Mal and Gulshan Kumar, they are to be termed as adversary having clash of interest with the petitioner and thus, the petitioner is entitled to cross examine Nagal Mal and Gulshan Kumar. In support of his contention, he has relied upon judgment of this Court Ajaib Singh Vs.

Surinder Singh and others, CR No.3684 of 2011, decided on 06.08.2012.

Counsel for the contesting respondent/plaintiff, on the contrary, has urged that as Nagal Mal and Gulshan Kumar contested suit of the respondent/plaintiff by way of written statement and reiterated their stand taken in the written statement by way of examination in chief, the mere fact that during their cross examination, counsel for the respondent/plaintiff has been able to extract truth from their mouth, the same is not sufficient to call them adversary to the petitioner to entitle him to cross examine them. It is further argued that even if a co-defendant has an interest adverse to the other defendant, the other defendant can, at best, be entitled to cross examine a co-defendant only before he is cross examined by the plaintiff. It is further argued that as Nagal Mal and Gulshan Kumar have already been cross examined by the respondent/plaintiff, the petitioner has rightly been denied the right to cross examine them, by the trial Court. In support of his contention, he has referred to another judgment of this Court Mohinder Singh Gill Vs. Jagdeep Singh and others, 2013(1) R.C.R.(Civil) 569. Further reliance has been placed upon judgment of the High Court of Karnataka at Dharwad Circuit Bench, Sri Ramacandra and another Vs. Sri. Vithal and others, 2009 (9) KarLJ 110 and judgment of the Madras High Court Vijaya Vs. Saraswathi and others, 2009(5) R.C.R. (Civil) 65.

I have heard counsel for the parties, perused the paper-book and the judgments cited at bar with able assistance rendered by counsel for the parties.

The rival contentions made by counsel for the parties make it evident that the petitioner along with Nagal Mal and Gulshan Kumar (defendants No.2 and 3) seriously contested claim of the respondent No.1/plaintiff; denied execution of agreement to sell dated 27.02.2009 by their father Sh. Mulkh Raj with the plea that agreement is the result of fraud and forgery and further denied their liability to deliver possession of the property in question by way of specific performance of the agreement or pay damages to the tune of Rs.25,00,000/-. It is also an admitted position of the case that when Nagal Mal and Gulshan Kumar appeared in the witness box, in their examination in chief they reiterated their stand as taken up in the written statement. That being so, before their cross examination by the respondent/plaintiff, the petitioner possibly could not know as to what would be their stand during the course of cross examination, in order to say that the petitioner could only seek their cross examination, if any, prior to cross examination by the respondent/plaintiff, as has been held in Mohinder Singh Gill's case (supra). The occasion for the petitioner to ask for cross examination of Nagal Mal and Gulshan Kumar arose when during cross examination, they resiled from their version and completely sided with the respondent/plaintiff virtually admitting his claim in regard to the agreement to sell having been executed by their father.

This Court in Ajaib Singh's case (supra) dealt with a similar situation and has observed that in the instant case also, it is apparent from the testimony of defendant No.3 that he has made the statement against defendant no.4 while making admission qua the power of attorney and agreement of sale which he along with defendants No.1 and 2 had denied in the written statement. In this situation, since the interest of defendant No.3 is clashing with defendant No.4, therefore, permission was bound to be given to defendant No.4 to cross examine defendant No.3 to the extent of clash of interest. Further the Court laid down certain guidelines to be followed by the Subordinate Courts and a relevant extract therefrom reads as follows:-

“From the law discussed above, the following guidelines are needed to be imparted to the subordinate courts to face the aforesaid situation.

1. Section 138 of the Act imparts the right of cross examination to the adverse party. However, it is up to the adverse party that he may cross examine or not.
2. The party defendant who has no clash of interest with the other defendant has no right of cross examination.
3. The element of one being adverse party could be determined either from the pleadings of the parties or from the evidence so led or being led.
4. The court could declare defendant (s) as adverse party when defendant(s) supporting the case of the other defendant(s) at the time of pleadings, but changes his stand during cross examination.
5. In the absence of any conflict of interest of evidence which may not effect the interest of other defendant(s) then the question of granting the opportunity to cross examine the co-defendant does not arise.

6. The court has been given power to term the co-defendant as adversary for extending permission to cross examine the defendant is to avoid collusion or fraud on the part of one defendant against the other.
7. If a co-defendant during the examination in chief or cross-examination demolishes the case of the other defendant, then it would amount to a case for clash of interest, empowering the court to cross examine the other defendant (having similar interest) to the extent of clash of interest.”

The present case is squarely covered by guidelines No.4, 6 and 7, therefore, I find merit in contention of the petitioner that he is entitled to cross examine NagaL Mal and Gulshan Kumar but to the extent of clash of interest.

To be fair to the respondent, counsel has made a submission that the very purpose of cross examination would be frustrated in case plea of the petitioner to cross examine his co-defendant is allowed. There cannot be any dispute about the settled position in law that the purpose of cross examination is to test veracity and credibility of a witness and to extract as to where lies the truth. The position would have been different if counsel for the respondent/plaintiff would have been able to extract something favourable to the respondent/plaintiff during the course of cross examination by using skills of an astute lawyer. In the case at hand, in the opening lines of cross examination, Nagal Mal admitted everything in favour of the respondent/plaintiff sufficient to hold that he, for the reasons best known, sided with the respondent/plaintiff and for that reason taken a complete somersault and resiled from his earlier version raised in the written statement as well as by way of

examination in chief. In this scenario, contention raised by counsel for the respondent cannot detain this Court to disallow an opportunity to the petitioner to cross examine Nagal Mal and Gulshan Kumar to the extent of clash of interest.

In view of what has been discussed hereinabove, both the petitions are allowed. The impugned order(s) is set aside and the petitioner is permitted to cross examine Nagal Mal and Gulshan Kumar (defendants No.2 and 3) to the extent of clash of interest.

Nothing stated in this order shall be construed as an expression of opinion on merits of the controversy.

May 13, 2015

D. Gulati'

(REKHA MITTAL)

JUDGE