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

% *Date of decision:* 22.09.2016

+ CM(M) 908/2016

ASHEESH VADERAA

..... Petitioner

Through

Mr.Sandeep Aggarwal & Mr.Ravikesh
Sinha, Advocates

Versus

STATE & ORS

.... Respondents

Through

Mr.Devvrat, Advocate

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. By the present petition the petitioner seeks to challenge the order dated 2.7.2016 by which an application under Section 114 CPC for recalling earlier order dated 14.5.2016 was dismissed. By the said order dated 14.5.2016 the trial court had rejected the request of the petitioner to cross-examine Objector Mr.Aswal Vaderaas on the ground that the petitioner has not filed any objections to the petition and, therefore, would not have a right to cross-examine objector No.1.

2. The disputes are regarding the Will of late Smt. Karuna Raj Vaderaas dated 5.2.2003. Respondent No.2 is stated to have been appointed Executor of the Will and has filed the present Probate Petition. Respondent No.3 the elder brother of the petitioner is the only objector of the Will. None of the other respondents or petitioners have filed objections.

3. Learned counsel appearing for the petitioner has vehemently argued that the petitioner could not have been denied the right to cross-examine the

witness of the Objector. He submits that even otherwise the said witness has in his evidence made allegations against the petitioner and petitioner would have a right to cross-examine the said witness. He relies upon judgment of this Court in the case of *Des Raj Chopra and Ors vs. Pooran Mal and Ors., AIR 1975 Delhi 109*; judgment of a Division Bench in the case of *Shahid Balwa vs. The Directorate of Enforcement, 2013 (201) DLT 211* and of Jammu and Kashmir High Court in *Dwarka Dass and others vs. State and others, 1979 Cr.L.J.550*.

4. Learned counsel for the petitioner further submits that the petitioner had been allowed to cross-examine PW-1 who was a witness produced by the petitioner before the trial court. Hence, it is urged that even on that occasion the petitioner was standing in the same capacity as he was when the impugned order was passed.

5. Learned counsel appearing for respondent No. 3 has opposed the present petition. He submits that the petitioner has not filed any objections on record. There is even no reply to the averments which according to the petitioner have been made against him by the witness of respondent No.3. In the absence of either a reply or objection he submits that there is no mechanism to control the cross-examination that the petitioner may indulge in. Hence, he submits that the petitioner has no right to cross-examine the said witness. He submits that in fact the petitioner never moved an application for cross-examination of the witnesses. They merely made an oral request which the trial court rightly refused.

6. Section 138 of the Indian Evidence Act reads as follows:-

“138. Order of examinations

Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross –examined, then (if the party calling him so desires) re-examined.

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 testified on his examination – in-Chief.

Direction of re-examination - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in-re-examination, the adverse party may further cross-examine upon that matter.”

7. Section 138 of the Evidence Act provides for cross-examination by an adverse party. The issue however is, can a defendant/respondent supporting the plaintiff/petitioner be allowed to cross-examine a witness of a co-defendant who is opposing the case of the plaintiff?

8. Reference may be had to the judgment of this court in the case of ***Des Raj Chaudhary and Puran Mal and Others*** (supra), wherein the court held as follows:-

“(13) In Phipson on Evidence (Eleventh Edition, page 647) it is stated that a defendant may cross examine a co-defendant or any other witness who has given evidence against him and reply on such evidence, though there is no issue joined between them.

(14) Any party is entitled to cross examine any other party who gives evidence, or his witnesses; and no evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross examination (See Halsbury's Laws of England, Third edition Vol. Xv para 809), (5).

(15) In the Court of appeal held that the evidence of one party cannot be received as evidence against another party in the same litigation unless the latter has had an opportunity of testing it by cross examination. Further on it was observed "If a defendant may cross examine co-defendant's witness, a fortiori, he may cross examine codefendant, if he gives evidence. If it is objected that there is no issue between a respondent and a co-respondent, the answer is that in most cases there is no issue between co-defendants but still the right to cross examine exists. In our judgment no evidence given by one party affecting another party in the same litigation can be made admissible against that other party, unless there is a right to cross examine and we are at a loss to see why there should be an deviation from that rule in the Divorce Court". It is, however, well settled that the evidence of one party cannot be received as evidence against another party unless the latter has had an opportunity of testing it by cross-examination."

9. Similarly, the Division Bench of Jammu and Kashmir High Court in ***Dwarka Dass and Others vs. State and Others*** (supra) held as follows:-

"5.The right to cross-examine could be exercised if the adverse party so desires, and similarly the right to re-examine arises if the calling party so desires subject to the limitations given in Section 138 of the Evidence Act. The examination of a witness therefore, will always include cross-examination unless the opposite party itself waives the right. The right of cross-examination is so fundamental and basic that we doubt whether the same could be taken away by a specific provision in that regard under an enactment. In special circumstances the court may have a discretion to allow or not to allow the cross-examination but the discretion has to be exercised judicially and in most cases than not it is exercised in favour of cross-examination. Even in circumstances referred to in Section 165, Evidence Act there is no absolute bar on cross-examination. It has been subjected to the permission of the court. The right to

cross-examine however is recognized subject to this limitation. The right of cross-examination not only is referable to Evidence Act itself but one of the principles of natural justice is that the evidence may not be read against a party if the same has not been subjected to cross-examination or at least an opportunity has not been given for cross-examination. The rule of law in England is also the same. In para 8 of the Halsbury's Laws of England, 3rd Edition Vol. 15 the following appears :

“No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.”

Section 138 of the Evidence Act impliedly lays down that the statement of a witness would be read as evidence against a party only if it was tested on the anvil of cross-examination or opportunity was afforded for the purpose. All witnesses are subject to cross-examination. The right of cross-examination could not be curtailed or circumscribed on one pretext or the other or in one way or the other, as shutting up of cross examination would necessarily result in injustice to the cause and to the party against whom the statement is intended to be used. It is the right of every litigant unless he gives up the same to be afforded on opportunity of cross-examining the witness whose testimony may be used against him at the trial. On the parity of reasoning therefore, a witness called by the court also is liable to be cross-examined by the parties to the proceedings, if they desire to do so.”

10. Hence, in my opinion, normally the defendant supporting the plaintiff would not be denied the opportunity to cross-examine a witness of the plaintiff or co-defendant unless special reasons are shown as to how prejudice is caused to a particular party. The sequence in which cross-examination would be done is important so as not to allow the supporting party to fill up the lacunae in the evidence of the plaintiff. In this context, reference may be had to the judgment of the Bombay High Court, Nagpur

Bench in the case of *Mandabai Ramkrishna Tumsare & Ors. v. Ramlal Hiranmanji Hiwarkar & Ors.*, 1986 MhLJ 643/(MANU/MH/0617/1985).

The court held as follows:

“10. In the circumstances of the present case, it is apparent that the plaintiff’s case is fully supported by defendants 6 to 8. They are therefore, not an adverse party to the plaintiff, but are proforma defendants through whom the plaintiff is claiming: right to the property. In a case like this, the evidence of the plaintiff having been recorded, it would be just and proper to ask the proforma defendants 6 to 8 to initially cross-examine the plaintiff and then direct the contesting defendants 1 to 5 to cross-examine the plaintiff. The reason is simple. For the administration of fair and just trial, it must be noted that the plaintiff’s evidence, if cross-examined by the adverse party may reveal certain lacunae which could be got corrected by the defendants supporting the plaintiff when they cross-examine the plaintiff subsequently inasmuch as they are interested in the claim of the plaintiff. By way of cross-examination, the supporting defendants can put leading questions and get the necessary answers. It is for this purpose, to meet the ends of justice, the trial Court should permit the contesting defendants to cross-examine the plaintiff last, particularly when the adverse party so desires. Thus if there are more than one defendant in a suit, the order of their cross-examination is a matter which rests on the discretion of the Judge. To put it in other words, cross-examination as defined in Section 137 of the Evidence Act is the examination of the witness by "adverse party" and the defendants who are supporting the plaintiff’s case are not an adverse party. Therefore, their formal cross-examination should be brought on record and it is then the "contesting defendants", which is the "real adverse party", should be directed to cross-examine the plaintiff.”

11. However, facts of the present case are a little different. Though the petitioner is supporting the case of respondent No.2/petitioner in the petition before the trial court, it is contended that certain allegations have been made

by the witness of respondent No.3 against the petitioner. The said allegations which are stated by the petitioner read as follows:-

“21. That my mother late Smt.Karuna Raj Vadera had civil and criminal litigations with her younger son Shri Asheesh Vadera.... The petitioner had filed his Vakalatnama on behalf of Shri Asheesh Vadera against the deceased Smt.Karuna Raj Vadera in the Hon’ble High Court of Delhi in OMP No.110/1987.”

“23. The petitioner’s father Shri Kanwal Narain, Advocate, was also appearing on behalf of Shri Asheesh Vadera against my mother deceased Smt.Karuna Raj Vadera...”

“25 That Shri Asheesh Vadera had filed police complaints against his mother the late Smt.Karuna Raj Vadera and the matter was dealt in OMP No.110/87.”

“26. That the matter about the complaints came up before the Hon’ble High Court in OMP No.110/87 (Ex.Ow1/27) and the Hon’ble Court was pleased to pass an order dated 29.07.1988.. The said order was sent to the SHO, Police Station, Defence Colony, New Delhi.”

“28. That late Smt.Karuna Raj Vadera had duly mentioned in the said Family Settlement that Shri Asheesh Vadera had taken his share from her property and his share of the HUF property.”

12. As there are allegations made against the petitioner, despite the petitioner supporting the case of respondent No.2/defendant in the trial court, it is in the interest of justice that the petitioner be allowed to cross-examine respondent No.3.

13. In view of the above, the present petition is allowed. Petitioner would have a right to cross-examine the said respondent No.3 with regard to the above allegations made.

JAYANT NATH, J

SEPTEMBER 22, 2016/n