

CR No.1374 of 2017(O&M)

Gurpreet Kaur
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high court

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

CR No.1374 of 2017(O&M)

Date of Decision: 06.04.2017

Kiran Bala

....Petitioner

Versus

Surinder Sharma and another

....Respondents

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Tarun Dhingra, Advocate
for the petitioner.

DAYA CHAUDHARY, J.

CM No.7355-CII of 2017

This application has been moved for placing on record the certified copies of *zimni* orders dated 03.12.2016 to 11.01.2017 as Annexure P-5 (Colly) and also for exemption from filing certified copies of the same.

CM is allowed as prayed for.

C.R. No.1374 of 2017

The present revision petition has been filed under Article 227 of the Constitution of India for setting aside the impugned order dated 18.01.2017 (Annexure P-1) passed by the Civil Judge (Senior Division), Karnal, whereby, the application for adjournment of the case filed by the petitioner has been dismissed and opportunity for cross-examination of PW Krishan Kumar and Surender Kumar was treated as NIL. A further prayer has also been made for granting one effective opportunity to cross-examine said two witnesses.

Briefly, the facts of the case are that respondent No.1 filed a suit for possession by way of specific performance of contract of sale deed dated 20.08.2016 pertaining to the suit property and also for declaration declaring the alleged agreement to sell dated 17.01.2011 as well as General Power of Attorney dated 17.01.2011 executed by defendant No.1/petitioner in favour of defendant No.2/respondent No.2. After issuing notice in the suit, the written statement was filed by defendant No.1/petitioner. Thereafter, the case was fixed for plaintiff evidence and plaintiff/respondent No.1 examined PW Surender Kumar and tendered examination-in-chief on 21.11.2016 but his cross examination was deferred. On 03.12.2016, another PW Krishan Kumar was examined, who also tendered his examination-in-chief and thereafter, the cross-examination of said witness was also deferred. Petitioner-defendant No.1 partly cross-examined PW Krishan Kumar and the remaining cross-examination of the witness was deferred. Thereafter, counsel for defendant No.1/petitioner moved an application for adjournment of the case but the same was dismissed vide order dated 18.01.2017 and opportunity for cross-examining the said witnesses was treated as NIL. Said order dated 18.01.2017 is under challenge in the present revision petition.

Learned counsel for the petitioner submits that the counsel for the petitioner was not feeling well as he was suffering from respiratory problems and was unable to attend the Court. Even medical record was annexed with the application but the same was not taken into consideration. Learned counsel also submits that proper opportunities have not been granted to the petitioner to cross-examine the plaintiff witnesses, whereas, the same is necessary for just decision of the case. At the end, learned

counsel submits that no prejudice is going to be caused to the other party, in case, one more effective opportunity to cross-examine the plaintiff witnesses is granted.

Heard the arguments of learned counsel for the petitioner and have also perused the impugned order as well as other *zimni* orders, which have been placed on record.

Facts relating to filing of suit; filing of written statement and thereafter examination of two plaintiff witnesses are not disputed. The case was pending for cross-examination of two witnesses i.e PW-Krishan Kumar and Surender Kumar. Part cross-examination of PW-5 Krishan Kumar was recorded and remaining cross-examination of said witness was deferred but on the next date also, he could not be cross-examined and cost was imposed. Both the witnesses were present but counsel for defendant No.1/petitioner could not come present as he was suffering from some ailment and an application was also moved, which was dismissed and opportunity to cross-examine the said witnesses was treated as NIL and the evidence of plaintiff respondent No.1 was closed.

No doubt, opportunities were granted to petitioner-defendant No.1 even after imposition of the cost. Both PWs were present and they were examined. Cross-examination of PW-5 Krishan Kumar was deferred. On the next date of hearing i.e 15.12.2016, PW Brahmjeet Kaushal, SBOP Nilokheri was present but he could not be examined as he made a statement that in the summons, record was mentioned from the year 2014, whereas, the Court had summoned record from 2011. The date was sought for producing summoned record and the case was adjourned to 19.12.2016. On 19.12.2016, cross-examination of PW2 was completed and one another PW

was also recorded as PW6. Part cross-examination of PW5 Krishan Kumar was also recorded and the case was adjourned to 11.01.2017 for remaining cross-examination of PW5 and for cross examination of PW1. On the next date of hearing i.e 11.01.2017, both PWs Krishan Kumar and Surender Sharma were present but they were not examined. Request made by the petitioner was allowed subject to payment of cost of ₹ 800/- and the case was adjourned to 18.01.2017. On that date, counsel for the petitioner could not come present as he was suffering from respiratory problems. Written request was moved by him but the same was not accepted. The opportunity for cross-examination was afforded to proxy counsel for defendant No.1/petitioner but it was treated as NIL. It cannot be said that opportunities were not given and the request on all dates was made by counsel for the petitioner. Moreover, the petitioner cannot be penalized because of inaction on the part of her counsel as he could not cross-examine the plaintiff witnesses. The reason given in the impugned order is that many opportunities were given and even the cost was imposed.

Rule 1 Order 17 of Civil Procedure Code is relevant for deciding the controversy in the present case, which deals with grant of time and adjournments. The said provision is reproduced as under :-

“1. Court may grant time and adjourn hearing. -

(1) The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing :

Provided that no such adjournment shall be granted more than three times to a party during hearing of the suits.

(2) *Costs of adjournment.* - In every such case the Court shall fix a day for the further hearing of the

suit, and shall make such orders as to costs occasioned by the adjournment of such higher costs as the Court deems fit:

Provided that, -

(a) when the hearing of the suit has commenced, it shall be continued from day to-day until all the witnesses in attendance have been examined, unless the Court finds that, for the exceptional reasons to be recorded by it, the adjournment of the hearing beyond the following day is necessary,

(b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party,

(c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment,

(d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for a adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time,

(e) where a witness is present in Court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid.” (emphasis supplied)”

It is clear from Rule 2 proviso (e) of Order 17 that where a

witness is present in court but the other side is not ready to cross-examine the witness, the court can dispense with his cross-examination but in case, a genuine and *bona fide* request is made for adjournment, instead of resorting to forfeiture of the right to cross-examine, the court may grant time by imposing costs. Said provisions clearly show that under the scheme of Civil Procedure Code, a suit cannot be dismissed for non-payment of costs as it results in forfeiture of the right to further prosecute the suit or defence as the case may be. Award of costs, is an alternative available to the court, instead of dispensing with the cross-examination and closing the evidence of the witness. If the costs imposed for seeking an adjournment to cross-examine a witness are not paid, the appropriate course is to close the cross-examination of the witness and prohibit the further prosecution of the suit or the defence, as the case may be by the defaulting party.

On perusal of *zimni* orders, it is apparent that the counsel for the petitioner was absent and the request was made by proxy counsel. Even on the date when the impugned order was passed, an application was moved by the proxy counsel. Said application was dismissed and the impugned order was passed. A specific request was made by moving an application by annexing the medical record. Since, the counsel for the petitioner could not appear and the impugned order was passed. From the sequence of events as mentioned above, it is clear that petitioner/defendant No.1 cannot be held at fault as her counsel failed to appear because of his ailment and the plaintiff witness could not be cross-examined. In such a situation, the petitioner cannot legally be permitted to suffer on account of negligence or inaction on the part of counsel. The cross-examination of prosecution witnesses is essential to decide the real controversy between the parties as the same is

the legal requirement of fair trial. In case, the adequate opportunities are not granted to the petitioner-defendant No.1 then it will cause serious injustice

Accordingly, by considering the nature of litigation and the facts as mentioned above, the trial Court ought to have granted one opportunity to defendant No.1/petitioner to cross-examine PWs Krishan Kumar and Surender Sharma. Moreover, no prejudice is going to be caused to the plaintiff, particularly when, he can be compensated with adequate costs in this connection.

In view of the reasons as mentioned above, the present revision petition is allowed and the impugned order dated 18.01.2017 (Annexure P-1) passed by Civil Judge (Senior Division), Karnal is hereby set aside. The trial Court is directed to provide one more effective opportunity to petitioner/defendant No.1 to cross-examine prosecution witnesses, namely, Krishan Kumar and Surender Sharma subject to the payment of compensatory costs of ₹ 10,000/-, to be paid by defendant No.1/petitioner to plaintiff/respondent No.1. The trial Court would ensure the payment of costs personally to the plaintiff. Above all, the payment of costs would be a condition precedent for defence of the case further.

Needless to mention here that the present order has been passed only by considering the peculiar facts and circumstances of the case and it would not be a condition precedent in any other case.

(DAYA CHAUDHARY)
JUDGE

06.04.2017
gurpreet

Whether speaking/reasoned

Yes

Whether Reportable

Yes