

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

C.R. No.3495 of 2017

Date of Decision:- 15.05.2017

Kuldeep Kaur

....Petitioner

VS.

Raj Kumar and others

....Respondents

CORAM:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Ashish Gupta, Advocate,
for the petitioner.

DAYA CHAUDHARY, J.

Petitioner-defendant-Kuldeep Kaur has filed the present revision petition under Article 227 of the Constitution of India for setting aside impugned order dated 12.12.2006 (Annexure P-1) passed by the Civil Judge (Sr. Division), Moga whereby the trial Court has treated the opportunity to cross-examine the plaintiff-respondent No.1 by petitioner-defendant No.5 as 'Nil' and also for setting aside impugned order dated 7.4.2017 (Annexure P-6) whereby application for setting aside the impugned order has been dismissed.

Briefly, the facts of the case, as made out in the present revision petition are that plaintiff-respondent No.1 filed a suit for possession by way of specific performance on the basis of agreement to sell dated 19.3.2012. After completion of pleadings, issues were framed in the suit and thereafter plaintiff tendered his affidavit in his evidence in chief on 19.9.2016 and

matter was deferred for cross-examination. Plaintiff was cross-examined by counsel for defendant Nos.1 to 4 but due to failure on the part of counsel for the petitioner, the cross-examination was treated as 'Nil' and matter was posted to 3.1.2017 for documentary evidence. Thereafter, an application was moved for recalling of impugned order dated 12.12.2016 which was also dismissed vide order dated 7.4.2017. Both these orders are subject-matter of challenge in the present revision petition.

Learned counsel for the petitioner submits that counsel for the petitioner was suffering from lung infection and he was advised bed rest from 9.12.2016 to 13.12.2016. Due to failure on the part of the counsel, the cross-examination on behalf of the petitioner was treated as nil. The application filed by the petitioner for recalling of order dated 12.12.2016 was also dismissed. Learned counsel submits that after 29.10.2016, the matter was adjourned to 12.12.2016 and cross-examination could not be conducted because counsel for the petitioner was unwell. It cannot be said that sufficient opportunities were granted. Moreover, the petitioner should not suffer because of inaction/default on the part of her counsel as the circumstances were beyond her control. At the end, learned counsel submits that one effective opportunity be granted to the petitioner to cross-examine plaintiff-respondent No.1, failing which, a great injustice would be caused to the petitioner.

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

Admittedly, plaintiff-respondent No.1 tendered his affidavit in

examination-in-chief on 19.9.2016 and his cross-examination was deferred to 29.10.2016 but he could not be cross-examined. Ultimately, case was deferred to 12.12.2016 for cross-examination. The plaintiff was cross-examined by the counsel for defendant Nos. 1 to 4/respondent No.2 to 5 but due to failure on the part of counsel for petitioner-defendant No.5, cross-examination could not be conducted and it was treated as 'Nil'. Thereafter, case was adjourned to 3.1.2017. The application for recalling of order dated 12.12.2016 and to allow the petitioner to conduct cross-examination has been dismissed on the ground that the petitioner availed sufficient opportunities to conclude the evidence but she failed to conclude.

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 plaintiff-respondnt No.1 was examined in chief and thereafter his cross-examination was deferred. The case was adjourned to 29.10.2016 but his cross-examination could not be conducted and it was further adjourned to 12.12.2016. On that day, counsel for defendants No. 1 to 4 cross-examined the plaintiff but counsel for petitioner-defendant No.5 was unwell and cross-examination on her behalf could not be conducted. The medical condition of the counsel was such that he was not in a position to be present in the Court and the application for grant of one opportunity to cross-examine the plaintiff was moved stating that the ailment of the counsel was beyond her control and absence of her counsel should not have been treated to be doubtful which was also dismissed.

From the sequence of events, it is clear that petitioner cannot be said to be at fault as her counsel failed to appear because of his ailment and the plaintiff could not be cross-examined. In such a situation, the petitioner cannot be legally permitted to suffer on account of negligence or inaction on the part of her counsel. The cross-examination of plaintiff is necessary/essential to decide the real controversy between the parties and is

also the legal requirement of fair trial. In case the adequate opportunities are not granted to the petitioner, then it will cause serious prejudice to the petitioner.

Accordingly, by considering the submissions made by learned counsel for the petitioner and also the nature of litigation as well as facts as mentioned above, the trial Court ought to have granted one effective opportunity to the petitioner to cross-examine as no prejudice is going to be caused to the other side and he can be compensated by way of money.

For the reasons recorded above, the present revision petition is allowed and impugned orders dated 12.12.2016 (Annexure P-1) and 7.4.2016 (Annexure P-6) are hereby set aside. The trial Court is directed to grant one more effective opportunity to the petitioner to cross-examine plaintiff subject to payment of costs amounting to ₹ 5000/-, to be paid by the petitioner to the party opposite. The trial Court would ensure the payment of costs personally to the party opposite. 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.

May 15, 2017
poonam

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes