

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

CR No. 5053 of 2017 (O&M)

Date of decision: 12.09.2017

HANS RAJ TUTEJA & ANR

...Petitioners

Vs.

OM PARKASH (SINCE DECEASED) THRU LRS & ORS.

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Nitin Jain, Advocate for the petitioners.
Mr. Cvinod S. Bhardwaj, Advocate for respondent No.4.

RAJIV NARAIN RAINA, J. (ORAL)

Respondent No.2 was ex-parte before the trial Court and is, therefore, proceeded against ex-parte in the present petition.

This petition arises out of an interlocutory order passed by the Civil Judge, Junior Division, Bhiwani on 17.07.2017, directing the learned counsel for the plaintiff, the present petitioner, to furnish an advance list of questions to be asked from the witness in deferred cross-examination so that the time of the Court could be saved. The matter was posted to 04.08.2017 for further cross-examination of the defence witness in attendance.

The trial Court judge has opinionionated, observing that the learned counsel for the plaintiff while in cross-examination was asking many irrelevant questions. If that was so, then which question was irrelevant should have been considered and its irrelevancy should have been briefly recorded in writing before permitting the party to put the next question and so on and so forth. Learned trial Judge should remember that cross-examination is an art best left in the hands of the counsel since the range of questions to be asked can never be anticipated and much would depend on

the skill brought to bear to elicit the truth by even asking leading questions and the nature of the case, the dispute between the parties and the materials on record, documentary and oral, recorded prior to the appearance in the witness box by DW-4 with the testimony of other witnesses recorded.

During cross-examination, there is always an element of surprise which is permissible under the Indian Evidence Act, 1872, and that is what is all what cross examination is all about to sweep the witness of his feet for counsel to ask inconvenient questions which are relevant and sometimes seemingly irrelevant for the moment for the presiding Judge to understand, who I believe has not read the case properly, but which may add up to something which the Court is clueless and shunts out by a knee jerk reaction during cross-examination. In any case, the stage of consideration of what is relevant or irrelevant has not been reached and the innocent trial Judge should not have turned away the counsel by deferring the cross-examination in *terrorem* by directing him unlawfully to furnish the list of questions beforehand to be asked from the witness. The path of cross-examination adopted by the counsel is special to him and his case of which he is the master of facts and the object of the entire exercise is to reach the point of truth on each of the disputed facts-in-issue.

Moreover, the Court is not to don the role of a cross-examiner, it is a silent admitter of testimony while being recorded and to object to a wayward question when it borders on the absurd. At the stage of recording of the depositions of witnesses, the Court only writes the evidence and permits it to be taken on record without forming any final opinion on the weightage to be attached to the testimony to be tested on the pleadings and

proof of facts which would entitle party to a decree. The evidentiary value of the testimony is yet to be decided at the final hearing of the *lis* with the entire case before the Court and therefore, I have no hesitation in setting aside the order which if allowed to stand can result in manifest injustice and expose the opposite party beforehand to the questions to be asked and come prepared. This would defeat the purpose of cross-examination and deflect the course of justice. The element of surprise will be wholly lost and result in a mechanical recording of oral evidence in case the course is adopted and upheld by this Court.

Accordingly, it is ordered that DW4 is to be recalled for further cross-examination in the light of this order and the learned counsel for the plaintiff is permitted to ask questions without furnishing list of questions in advance to the Court. Any list given in advance would cause grave prejudice to the cross-examiner as a studied answer would come on record beforehand and remove the element of surprise. If this procedure is allowed as per the impugned order, it would amount to rewriting the law of recording of oral evidence in cross-examination of a witness produced by the contesting side. In case, an irrelevant and stupid question is asked by the learned counsel, then the Court can always record a note giving briefly the reason why it is not relevant to the case and is not made part of the record.

Assuming the case of the defendant appearing as his own witness to contest the suit set up against him, to repel the effect that he claims right under subsequent agreement to sell, then the plaintiff can always ask him searing questions including as to whether he knew of the existence of the previous agreement of sale. If this course is followed, an

answer would come by direct question or by suggestion put to the witness and help the Court in its final decision to resolve the dispute.

Any questions cornering disputant's witness during cross-examination cannot be considered irrelevant unless reason for rejection is assigned. It may be noticed that by an interim order dated 01.08.2017, the trial Court was directed to adjourn the case beyond the date fixed by this Court and accordingly the trial Court in view of this order would now fix a date for appearance of DW-4 for the authority below to resume further cross-examination of the witness standing in the box and record his testimony.

Cross-examination is not a matter of procedure but it is a matter of substance. Learned trial Court would do well in reading the judgment of the Supreme Court in Muddasani Venkata Narsaiah (D) Th. Lrs Vs. Muddasani Sarojana, 2016 (3) RCR (Civil) 236 to understand the scope of cross-examination. This would go a long way to help the learned trial Judge to deal with such a situation in the future.

With these observations and directions, the instant petition is allowed, the impugned order is set aside and the remaining cross-examination will be recorded as above. No expression of opinion on the merits of the dispute is made in this order, confined as it is to examine the correctness of the impugned interlocutory order as a 'case decided'.

[RAJIV NARAIN RAINA]
JUDGE

12.09.2017

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Whether speaking/reasoned: Yes

Whether Reportable: No

