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

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Date of decision: 17.02.2017

+ CM(M) 187/2017 & CM APPL. Nos. 6208-6209/2017

BHAJINDER SINGH Petitioner

Through Mr.Kunal Kalra, Advocate

versus

HARDEV SINGH & ORS Respondents

Through Mr.Rajan Tyagi, Addl. Standing
Counsel with Mr.Mandeep Arora,
Advocate for R-2/ SDMC

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

CM APPL. No. 6208/2017(exemption)

Allowed subject to all just exceptions.

CM(M) No.187/2017 & CM APPL. No. 6209/2017(stay)

1. By the present petition filed under Article 227 of the Constitution of India, the petitioner seeks to impugn the order dated 06.06.2016 by which an application filed by the petitioner seeking permission to cross-examine DW-2 the witness of the South Delhi Municipal Corporation (*hereinafter referred to as the 'SDMC'*) was dismissed.
2. Respondent No.1 has filed the present suit for permanent and mandatory injunction to restrain defendant No.1/petitioner from encroaching upon Municipal Park, sewer of defendant No.2, MCD and MTNL Box by constructing a boundary wall around the same.

3. A perusal of the written statement of the SDMC would show that essentially the SDMC is supporting the case of the plaintiff/respondent No.1. The SDMC has confirmed that the petitioner has encroached the Municipal/Government open land by constructing boundary wall and pakka construction around the same etc. DW-2 Sh.G.P.Sharma, had also deposed on the same line.
4. The trial court by the impugned order dismissed the application of the petitioner seeking to cross-examine DW-2 Sh.G.P.Sharma noting that the petitioner has moved the present application after examination of DW-2 was completed and therefore, the application has no merit. It also noted that the matter is lingering on since 2012 for final argument and the reason has been unnecessary delaying tactics of the petitioner.
5. I have heard the learned counsel for the parties.
6. An advance copy of the petition has been sent to the respondents and their respective counsel. The learned counsel for respondent No.2/SDMC has appeared.
7. Sections 137 and 138 of the Indian Evidence Act, 1872 read as follows:

“137. Examination-in-chief.- The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.—The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.—The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

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.”

8. Hence, what these sections provide is that the cross-examination is to be done by an adverse party. In the present case, the adverse party is the petitioner as the SDMC is supporting the case of respondent No.1/plaintiff. The cross-examination by respondent No.1 of the witness of the SDMC would not have much relevance.

9. Reference may be had to the judgment of the Karnataka High Court in the case of *M/s Ennen Castings Private Limited (in liquidation), Rep.by Official Liquidator, Bangalore v. Sundaresh & Ors., AIR 2003 Kar 293*, where the court held as follows:

“10. Though there is no specific provision in the Indian Evidence Act providing for such an opportunity for a defendant-respondent to cross-examine a co-defendant/co-respondent, however, having regard to the object and scope of cross examination, it is settled law that when allegations are made against the party to the proceedings, before that evidence could be acted upon, that party should have an ample opportunity to cross-examine the person who had given the evidence against him. It is only after such an opportunity is given, and the witness is cross examined that evidence becomes admissible. In this regard it is useful to refer to passages in the law of evidence, by the learned authors on the subject.

Sarkar on Evidence, eighth edition p. 1141:

"No special provision is made in the Evidence Act for the cross-examination of the co-accused's or co-defendant's witnesses. But the procedure to be adopted may be regulated by the well-known rule that no evidence should be received against one who had no opportunity of testing it by cross-examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine witness called by one whose case was adverse to his, or who has given evidence against. If there is no clash of interest or if nothing has been said against the other party, there cannot be any right of cross-examination."

Principles and Digest of the Law of Evidence by M. Monir, third edition, p. 1114:

"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".

Phipson on Evidence, tenth edition, para. 1538:

"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."

10. The learned counsel for the petitioner has also pointed out that cross-examination of DW-2 was closed on 06.09.2012 and the petitioner has moved the present application seeking cross-examination of DW-2 on 04.10.2012. Hence, there is no real delay in approaching the trial court with a request to cross-examine DW-2 by the petitioner.

11. The learned counsel also submits that this court on 25.01.2017 in a petition being CM(M) No.741/2016 had requested the trial court to expeditiously dispose of the matter preferably within a period of nine months from that date. He submits that he will not delay the matter

whatsoever.

12. Keeping in mind the above position, and subject to payment of cost of Rs.5,000/-, the trial court may give one last opportunity to the petitioner to cross-examine DW-2 Sh.G.P.Sharma, a witness of the SDMC. Respondent No.2 to ensure the presence of DW-2 on the date so fixed by the trial court. The order of this court stipulating a period of nine months from the date of the said order dated 25.01.2017 as preferable period for disposal of the pending matter is modified as nine months from the date of this order. Neither of the parties shall take any adjournment in the matter, except in emergent circumstances.

13. With the above observation, the present petition and all the pending applications stand disposed of.

JAYANT NATH, J.

FEBRUARY 17, 2017/v