

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

% **Date of decision: 21st September, 2017.**

+ **CM(M) 1018/2017 & CM No.33838/2017 (for stay)**

SUBISHI IMPEX PVT LTD

..... Petitioner

Through: Mr. L.K. Singh, Mr. Raj Kumar and
Ms. Saira Parveen, Advs.

Versus

OSRAM INDIA PVT LTD

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 227 of the Constitution of India impugns the orders dated 25th August, 2017 and 8th September, 2017 in CS No.57814/2016 filed by the respondent/plaintiff and in the counter-claim filed therein by the petitioner/defendant in the Court of Additional District Judge (ADJ)-02 (North), Rohini Courts, Delhi.

2. The respondent/plaintiff has instituted the suit, from which this petition arises, for recovery of Rs.71,29,720/- and the petitioner/defendant has filed a counter-claim therein for recovery of Rs.24,80,000/-. The following issues have been framed in the suit and the counter-claim:

“1. Whether the plaintiff is entitled to recover an amount of Rupees seventy one lacs twenty nine thousand and seventy two only along with interest at the rate of eighteen per cent per annum? OPP

2. Whether this Court does not have territorial jurisdiction to entertain this suit? OPD

3. *Whether defendant is entitled to counter claim of Rupees twenty four lacs eighty thousand only along with pendentelite and future interest at the rate of twelve per cent? OPD*
4. *Relief.”*

3. The respondent/plaintiff produced PW-1 Sushil Kumar Ratan whose affidavit by way of examination-in-chief was filed and who was also partly cross-examined by the petitioner/defendant.

4. On 25th August, 2017, the counsel for the respondent/plaintiff stated before the Suit Court that PW-1 Sushil Kumar Ratan had left the service of the respondent/plaintiff and will not be produced for further cross-examination. Vide impugned order dated 25th August, 2017, the name of PW-1 Sushil Kumar Ratan was dropped from the list of witnesses and it was further observed that his part examination recorded in the Court shall not be read in evidence as the witness had not completed the test of cross-examination; affidavit by way of examination-in-chief of another witness, namely Arvind Waswani, of the respondent/plaintiff was taken on record.

5. The petitioner/defendant applied for review of the aforesaid order contending that once cross-examination of PW-1 Sushil Kumar Ratan had commenced, the respondent/plaintiff has no prerogative to drop the said witness and the said witness would remain bound to appear till his cross-examination was completed by the Court and he was discharged by the Court. It was further contended that the respondent/plaintiff could not be allowed to bring other witness to depose the same fact which has been deposed by PW-1 Sushil Kumar Ratan in his examination-in-chief and whose cross-examination was incomplete.

6. The learned ADJ, vide impugned order dated 8th September, 2017, dismissed the application for review reasoning (i) that the petitioner/defendant on 25th August, 2017 had not raised any such objection; (ii) that in civil cases, it is the duty of the parties to produce their witness for examination as well as cross-examination and in case any witness fails to complete the test of cross-examination, his testimony is not to be read in evidence and if any witness is not brought by the party calling such witness, then an adverse inference can also be drawn against such party depending upon the facts and circumstances of the case; (iii) that Section 138 of the Evidence Act, 1872, on which reliance was placed, did not provide that a party cannot drop the witness. It was however observed that necessary implications for not producing the witness for cross-examination shall follow in due course of trial.

7. This petition came up first before this Court on 15th September, 2017, when the counsel for the petitioner/defendant sought time to search case law.

8. The counsel for the petitioner/defendant has today referred to:

(A) ***Lalitha Vs. Sarangadharan Hari*** MANU/KE/0417/1988 where a Single Judge of the Kerala High Court held in the context of a complaint in a warrant case initiated by the Police that the practice of giving up witnesses after the commencement of chief examination is contrary to Section 138 of the Evidence Act supra and that once a witness is examined-in-chief, the adverse party has a right of cross-examination and the party who called the witness cannot give up the witness so as to deprive the opposite party of the right of cross-examination;

(B) ***Tinku Ram Vs. State*** MANU/DE/3698/2011, where a Division Bench of this Court, in an appeal against conviction for offence punishable under Section 302/324 of India Penal Code, 1860, (i) quoted with approval the passage from page 2170 of “Sarkar on Evidence” to the effect that deposition of a witness whose cross-examination became impossible can be treated as evidence and the Court should carefully see whether there are indications that by a complete cross-examination the testimony was likely to be seriously shaken or his good faith to be successfully impeached; and, (ii) referred to ***R Vs. S, A*** 1984 (NOC) 145 All, to the effect that in a divorce case, where the cross-examination of a witness, of the wife, who was the uncle of the husband, was interrupted to enable the witness to effect a compromise and which witness did not turn up thereafter and to compel whose appearance for cross-examination the husband did not take steps, the reading of evidence of that witness could not be objected on the ground that the cross-examination was not completed;

(C) ***In re: Quartz Hill & Company*** Vol. XXI Chancery Division 642 laying down that every rule of procedure ought to be framed with a view to it being such that if it be properly acted upon, the course of justice will be kept pure and undefiled; and,

(D) ***Ahmad Ali Vs. Joti Prasad*** AIR 1944 All 188 where a Single Judge of the Allahabad High Court held that there is no provision in the Evidence Act that the evidence of a witness who has been

examined in open Court upon oath shall be excluded because it has not been possible for the other party to cross-examine him.

9. I have enquired from the counsel for the petitioner/defendant as to what is the prejudice which is suffered by the petitioner/defendant by the respondent/plaintiff so substituting PW-1 Sushil Kumar Ratan with another witness namely Arvind Waswani.

10. The counsel for the petitioner/defendant states that PW-1 Sushil Kumar Ratan in the substantial cross-examination already done has made admissions in favour of the petitioner/defendant.

11. I have next enquired from the counsel for the petitioner/defendant, whether not the petitioner/defendant can so cross-examine the substituted witness as well.

12. The counsel for the petitioner/defendant states that the respondent/plaintiff and its substituted witness would now be alerted and are unlikely to make the said admissions.

13. I have considered the controversy.

14. Section 138 of the Evidence Act, on which reliance is placed, is as under:

“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.”

15. I am unable to read therein any rule prohibiting a party from dropping a witness, even if his examination-in-chief has been recorded and he has been partly cross-examined.

16. I am further of the view that there is an inherent difference between a prosecution for an offence and a civil suit. While in a prosecution, the State as prosecutor is required to place before the Court all the materials collected by it in investigation i.e. not only the material which is in favour of the prosecution but also the material which is in favour of the accused or the charged person, there is no such requirement in a civil dispute. Thus, the judgments supra relating to prosecutions, in my view, would have no applicability to a civil suit.

17. I am even otherwise unable to fathom the grievance of the petitioner/defendant. What the counsel for the petitioner/defendant has argued today on the basis of the judgments aforesaid is what has been held in the impugned order. All that the said judgments hold and state is, that the evidence of a witness whose cross-examination has not been completed can be read in certain situations.

18. My research on the subject reveals:

(A) A Division Bench of the High Court of Madras in ***Maharaja of Kolhapur Vs. S. Sundaram Ayyar*** AIR 1925 Mad 497 to have, relying

on earlier precedents and on Taylor on Evidence, held that there is nothing in the Evidence Act which renders as inadmissible the evidence untested by cross-examination; such evidence is admissible but the weight to be attached to such evidence should depend upon the circumstances of each case; in some cases, if there is other evidence on record, its probative value may be very small and may even be disregarded;

(B) The High Court of Patna in *Mt. Horil Kuer Vs. Rajab Ali* AIR 1936 Pat 34 to have held that the fact that a witness has not been cross-examined is no bar to the acceptance of his deposition in evidence and that the weight to be attached to the said evidence depends upon the circumstances of each case; the Court should look at the evidence carefully, to see whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached;

(C) This Court in *Krishan Dayal Vs. Chandu Ram* ILR 1969 Delhi 1090 (in an appeal from a suit for accounts) to have held that a statement of a witness in examination-in-chief, which was admissible at the time it was recorded, cannot become inadmissible by reason of subsequent death of the witness before cross-examination; the absence of cross-examination would undoubtedly affect the value and weight to be attached to the statement of the witness, but it would not render the statement inadmissible or result in its effacement; so far as the question is concerned as to what weight should be attached to the said evidence, the Court has to keep in view the facts and circumstances of

each individual case; some of the factors which may be borne in mind are the nature of the testimony, its probative value, the status of the witness, his relationship or connection with the parties to the case, a likely animus which may colour his statement and any other factor touching the credibility of the witness which may emerge on the record; the Court should see whether there are indications on the record that as a result of cross-examination his testimony was likely to be seriously shaken or his good faith or credibility to be successfully impeached; the Court may also adopt a rule not to act upon such testimony unless it is materially corroborated or is supported by the surrounding circumstances;

(D) The High Court of Calcutta in ***Dever Park Builders Pvt. Ltd. Vs. Madhuri Jalan*** AIR 2002 Cal 281 to have held on a reading of Section 138 of the Evidence Act that cross-examination is not a must nor as a matter of course and without the same the evidence given in examination-in-chief cannot be rejected or expunged; however if the adverse party opts for, certainly cross-examination is a must; there is no provision under law that if the witness is not cross-examined either in full or part, his evidence would be absolutely rendered inadmissible;

(E) A Division Bench of the High Court of Calcutta in ***Ashis Sen Vs. Arun Kumar Bose*** 2006 SCC OnLine Cal 131 to have held that the principle of requiring a testing of testimonial statements by cross-examination requires not necessarily an actual cross-examination but merely an opportunity to exercise the right to cross-examine, if desired; wherever the opponent declined to avail himself of the offered

opportunity, it must be supposed to have been because he believed that the testimony could not or need not be disputed at all or be shaken by cross-examination;

(F) The High Court of Calcutta to have again, fairly recently in *Srikumar Mukherjee Vs. Avijit Mukherjee* 2015 SCC OnLine Cal 6445, to have held that the evidence of witness who becomes unavailable for cross-examination either because of death or otherwise, shall remain on record but the Courts shall consider its probative or evidentiary value or relevance along with other evidence so available.

19. I may notice that most of the aforesaid judgments are in the facts of the witness becoming unavailable for cross-examination by reason of death. The present case is essentially different in this respect. Here, PW-1 has not become unavailable for any such reason but owing to the respondent/plaintiff having chosen to give him up. Another difference in the present case is that here it is the petitioner/defendant who wants to rely on the uncompleted cross-examination of PW-1. However, in my view, the principle would remain the same. The only additional factor which the Suit Court, while determining the probative value of the evidence of PW-1 will have to consider is, whether any adverse inference is to be drawn against the respondent/plaintiff for having so given up PW-1. While doing so, the possibility of PW-1, in his further cross-examination by the counsel for the petitioner/defendant, clarifying the part of the cross-examination which the petitioner/defendant wants to rely upon, and of the respondent/plaintiff re-examining PW-1 will also have to be considered.

20. Once that is the position in law, the question of a party to the *lis* being compelled to produce a witness whom that party has decided to give up in the midst of recording of his evidence, would not arise.

21. Though the learned ADJ in the order dated 25th August, 2017 observed that the partly recorded evidence of PW-1 Sushil Kumar Ratan shall not be read in evidence but on review sought by the petitioner/defendant, the learned ADJ in the order dated 8th September, 2017 has clearly reviewed that part of the order and held that necessary implications for not producing the witness for cross-examination shall follow in due course of trial. Similarly, it has been held that if any witness is not brought by the party calling such witness, then an adverse inference can also be drawn against such party depending upon the facts and circumstances of the case.

22. Thus, what has been observed in the judgments cited by the counsel for the petitioner/defendant has already been held in the impugned order also and in my view the said stage will arise only when final arguments are addressed in the suit and the counter-claim and no finding in that respect can be given at this stage

23. When what has been propagated has already been granted, the petition has to necessarily fail.

24. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 21, 2017

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(corrected & released on 20th October, 2017)