

**CM Nos. 21849-CII-2018 in/and
CR No. 5242 of 2018**

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

**CM Nos. 21849-CII-2018 in/and
CR No. 5242 of 2018
Date of Decision: 19.11.2018**

Kanwarjyot Singh

.....Petitioner

Vs.

Satwinder Kaur and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. S.S. Chopra, Advocate,
for the applicant-respondents no. 1 to 3.

Mr. Namit Gautam, Advocate,
for the non-applicant/petitioner.

AMOL RATTAN SINGH, J. (ORAL)
CM No.21849-CII-2018

Though today the matter is listed only with regard to vacation of the stay ordered by this Court on 20.08.2018, (on further proceedings before the trial Court), vacation of the stay would actually involve consideration of the entire issue in the accompanying petition.

Consequently, upon the aforesaid observation of this Court, with the consent of learned counsel for the parties, the main petition itself is taken up on board today for arguments and final disposal.

CR No. 5242 of 2018

By this petition, the present petitioner challenges the order of the learned Civil Judge (Junior Division), Ludhiana, dated 23.07.2018, by which an application to reject the evidence/affidavit of the defendant (respondent no.1 herein, i.e. DW2), has been dismissed, with the defendants' application under

Order 18 Rule 3-A of the Code of Civil Procedure having been allowed, seeking permission to accept her testimony as DW2, it having been sworn after another witness, i.e. DW1 Mahesh Inder Singh Grewal, had already testified.

Thus, the provision, i.e. Order 18 Rule 3-A, is what is in issue in the present petition.

The said provision reads as follows:-

“[3-A. **Party to appear before other witnesses.**- Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.]”

Though learned counsel for the petitioner has very strenuously argued that what has been held by a co-ordinate Bench of this Court in **Jasvir Singh and another** vs. **Jaspal Singh** 2015 (3) RCR (Civil) 1024, is obviously mandatory and therefore permission to examine some other witness prior to the party who wishes to examine herself/himself, must be taken at the outset and not subsequently, in my opinion, what has been held by the Full Bench judgment of this Court in **The Amritsar Improvement Trust** vs. **Ishri Devi** 1979 PLR 354, to the effect that there is no inflexibility in Rule 3-A and permission can also be sought at a later stage, (though naturally not perfunctorily), with the trial Court to duly apply its mind, the ratio of the judgment of the co-ordinate Bench, with the judgment of the Full Bench not having been brought to its notice, has to be, with all due respect, held to be overruled by that of the Full Bench, specifically in the circumstances of this case, as would be seen.

This is especially so in the circumstances that the trial Court, vide the impugned order, has on merit also held that examination of the marginal witness to

the will, i.e. one Mahesh Inder Singh Grewal, was necessary prior to the examination of the party herself, i.e. respondent no. 1-defendant (Satwinder Kaur).

It would, however, be necessary to point to the judgment of the co-ordinate Bench, as has been relied upon by learned counsel for the petitioner, which holds as follows:-

“5. I will only take the filing of the proof affidavits of PW6 and PW7 as not regular without taking the permission of the court, but no prejudice can be said to have resulted. After all, cross-examination has not commenced. The counsel for the plaintiffs informs the court that PW6 is the plaintiff himself and PW7 speaks about the readiness and willing (sic) of the plaintiff to perform his part of the contract. Although under Order 18 Rule 3A of the Code requires the parties to be examined first before calling the witnesses, it is simply a practice that is not followed in many of the subordinate courts in Punjab and Haryana. The provision requiring the parties to be examined first was inserted by Act 104 of 1976 for a salutary purpose of bring the assertion of the respective parties first before other witnesses could be brought and to ensure that a party does not cover up every lacuna in evidence of what are brought through witnesses in cross examination. It is time that discipline at the trial and the statutory provision regarding Rule 3A of the Code is strictly followed. Even if prior permission is not taken before the commencement of trial, it shall be sought at least at the time before the party is examined. Even this is not being done in our courts. The parties assume that a witness can be examined in any order and the parties can also bring their own versions at any time they wish. Any breach of this rule will be viewed seriously and may result in eschewing the evidence of the parties, if no permission is taken under Order 18 Rule 3A of the Code to examine the party after examination of witnesses. I would issue this directive to apply in all future cases, so that it does not cause any serious dislocation and the parties and more particularly, the Bar which aids and advises

*the litigants is sensitive to the statutory provision under Order 18 Rule 3A of the Code and the consequences of not complying with the mandate. If, in future, any party does not offer his or her evidence first and brings third party witnesses first and later offers to tender evidence without taking prior permission, the opposite party may oppose such evidence before the party's evidence is tendered. The trial court shall not permit evidence to be given unless, it sets out reason in writing why such permission is being given. In **Gurmail Chand Vs. Ashok Verma** 2004 (3) RCR (Civil) 164, this court had held that if witnesses other than party was examined and party is examined later, no objection could be taken. In my respectful view, it will amount to putting the cart before the horse. Objections could be rightfully taken only when the party shows up to tender evidence and not when third party witness is given.”*

What has been held aforesaid is to be seen in the context of what was held by the Full Bench as follows:-

“11. The matter is capable of being viewed from another angle as well. Apart from the issue of the rule being mandatory or directory, it is clear that the command laid therein regarding the party appearing before his other witnesses has been itself provided with an exception where permission to do otherwise can be accorded by the Court for adequate reasons. When the provision itself provides both the mandate and an exception thereto, the one cannot be divested from the other. The significant thing to highlight here is that the true question at issue is not with regard to the ordinary rule that party shall appear before any witness on his behalf appears, but pertains to the stage at which such permission to appear at a later stage is to be secured. Whilst the ordinary rule with the exception thereto may normally be adhered to there appears to be nothing inflexible in rule 3-A with regard to the stage of securing the permission as such. I would, therefore, hold that such permission may also be sought at a later stage and if the court

finds merit in the same it would not be debarred from acceding to such a prayer. Equally it deserves to be recalled that the Legislature has itself prescribed a certain safeguard by laying down the requirement or the recording of reasons for doing so.

12. Before parting with this judgment, however a note of caution must be sounded. Holding that the aforesaid rule is directory and the permission may be granted at a later stage, is not to say that the mandate of the legislature in this context is to be easily disregarded or lightly deviated from. It is plain that as a normal rule the legislature requires the testimony of the party to be recorded first and the rationale there is not far to seek. Apparently in order to prevent an easy deviation from the rule, it has been laid down that the court shall record its reasons for doing so. It is to be hoped that the trial Courts in whom primarily the discretion has been vested, would keep both the letter and the spirit of the rule in mind before according permission thereunder in exceptional circumstances, and not whittle the same down by allowing too easy and indiscriminate deviation therefrom.”

(Emphasis applied by this Court)

Thus, it is seen that though in the first part of paragraph 5 of the judgment of the co-ordinate Bench of this Court in **Jasvir Singhs'** case (supra), it has been observed that the Court would have taken the filing of the proof affidavits of PWs 6 and 7 as not regular, without the permission of the Court having taken, with however, no prejudice having resulted because of the fact that cross-examination had not commenced, (which is also the same situation in the present case), subsequently of course a direction has been issued that in all future cases, permission to examine a witness other than a party to the case (by that party), shall be taken at least prior to the time that the parties examined. That, however, in my opinion, would not appear to be wholly in consonance with what has been held by the Full Bench, to the effect that “there appears to be nothing inflexible in rule 3-A

with regard to the stage of securing the permission as such. I would, therefore, hold that such permission may also be sought at a later stage and if the court finds merit in the same it would not be debarred from acceding to such a prayer. Equally it deserves to be recalled that the Legislature has itself prescribed a certain safeguard by laying down the requirement or the recording of reasons for doing so.”

(Emphasis applied by this Court)

It has also been pointed out that in paragraph 9 of the judgment of the Full Bench, it was held as follows:-

“No specific stage being prescribed or fixed by the statute for securing such permission, a party may perhaps as a matter of abundant caution apply at the stage of commencing his evidence and get the necessary permission and equally, if a sufficient ground is made out, he may secure the same at a later stage.”

However, learned counsel for the petitioner has submitted that in fact the application of respondent no. 1-defendant for examining herself subsequent to the other witness, came at a stage after the petitioner-plaintiff had already filed an application seeking rejection of her evidence, on the ground that Mahesh Inder Singh Grewals' examination-in-chief had already been conducted and therefore, his contention is that such application for examination of Satwinder Kaur subsequently was an afterthought.

Learned counsel for the respondents, on the other hand, submits that even if the application was admittedly submitted at the aforesaid stage, no prejudice was caused to the petitioner-plaintiff, inasmuch as, firstly, Mahesh Inder Singh Grewal was a marginal witness to the will relied by respondent no. 1-

defendant and though his cross-examination has been conducted, the cross-examination of Satwinder Kaur was still to be conducted.

Having considered the aforesaid, though counsel for the petitioner may be correct to the effect that with even the cross-examination of Mahesh Inder Singh Grewal having been conducted, the application filed by the respondents was at a very belated stage and that too only as a “knee-jerk reaction”, to the application filed by the petitioner-plaintiff, however, in my opinion, in view of what has already been observed in the first part of this judgment, the rejection of the application filed by the respondents and acceptance of that filed by the petitioner (to completely ignore the testimony of the respondent-defendant no.1), may result in a complete miscarriage of justice, in view of the fact that the trial Court has given reasons to the effect that Mahesh Inder Singh Grewal was in fact needed to be examined first, as a marginal witness to the will set up by respondent no. 1-defendant, that being the basis of the stand of the defendant.

Consequently, finding no merit in this petition, it is dismissed.

November 19, 2018
nitin/dinesh

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes
Yes