

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

Civil Revision no.8190 of 2016

Date of decision : 26.07.2018

Sunil Nagpal

... Petitioner

Versus

Indu

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Dinesh Arora, Advocate,
for the petitioner.

Mr. Ram Bilas Gupta, Advocate,
for the respondent.

AMOL RATTAN SINGH, J.

By this revision petition, the petitioner (defendant in the suit in question), challenges the order of the learned Civil Judge (Junior Division), Faridabad, dated 21.11.2016, by which his application seeking to lead additional evidence, has been dismissed, such application having been moved at a stage when his evidence had been closed and even rebuttal evidence of the plaintiff had been closed by him (plaintiff).

By his application, the defendant-counter-claimant wanted to examine himself, with his application (copy annexed with the petition) stating that “inadvertently and due to oversight” his affidavit had been “left to be tendered” and therefore he was not examined as a witness.

It was further stated that it was a bonafide error and due to some misconception, and that if the application was dismissed, it would prejudice his rights.

2. The application was opposed by the respondent-plaintiff on the ground that it was very obvious that the defendants' own affidavit, by way of

his examination-in-chief, not having been tendered, it was not due to any inadvertence but was intentional and deliberate and the application having been filed after a large number of opportunities were given to the applicant-defendant to lead his evidence, it could not be allowed.

3. The learned Civil Judge while dismissing the application found that the applicant-defendant (present petitioner) had closed his evidence on 07.10.2015, with the application for additional evidence filed on 28.09.2016, i.e. almost after one year, in fact, at a stage when the case was fixed for arguments.

Hence, as per that Court, with nine witnesses for the defendant having been examined, his own 'non-examination' could not be said to be due to any inadvertence and it was actually only to delay proceedings.

4. Further referring to Order 18 Rule 3-A of the CPC, that Court observed that where a party himself wishes to appear as a witness, he should appear before the other witnesses, and hence there was no reason to allow the application at the stage aforesaid.

Consequently, the application was dismissed, leading to the filing of the present revision petition.

5. Before this Court, Mr. Dinesh Arora, learned counsel for the petitioner, submitted that the suit of the respondent-plaintiff being one seeking permanent injunction against the petitioner-defendant, with a counter-claim filed thereto, the stand of the petitioner in his written statement to the plaintiff, was that there was no shop as shown in the site plan and he had also challenged the general power of attorney on the basis of which the sale deed was executed in favour of the plaintiff by her husband, who was the attorney of the original owner, Gurmukh Lal. He therefore submitted that dismissal of

the application has prejudiced the rights of the petitioner (defendant-counter-claimant) and as such, the order deserves to be set aside.

He further submitted that even the evidence of the plaintiff was closed after availing numerous opportunities on 07.05.2015, after which evidence of the petitioner-defendant started on 21.05.2015, with six witnesses produced on 31.07.2015 and evidence completed by 07.10.2015. He therefore submitted that no time was wasted by the petitioner and consequently, there was no intention to linger the case on.

6. As regards the observation made in the impugned order that it was not an inadvertent mistake, learned counsel submitted that looking at the fact that the entire evidence of the defendant was closed within slightly over four months (with the case naturally adjourned from time to time in between), it was very obvious that there was no intention to not examine himself but it was only upon realizing that his own affidavit had not been tendered, that he sought to lead additional evidence by examining himself.

Hence, learned counsel prayed that the impugned order be set aside.

7. In response, Mr. Ram Bilas Gupta, learned counsel appearing for the respondent reiterated what has already been noticed by the learned Civil Judge in the impugned order, further submitting that after the evidence of the plaintiff (respondent herein) was closed vide an order dated 07.05.2015, it was fixed for evidence on 21.05.2015 with no evidence led by the petitioner on that date, leading to it being adjourned to 16.07.2015, on which date again no evidence was recorded by the petitioner-defendant with the matter then adjourned to 31.07.2015, subject to payment of costs of Rs.200/-.

On that date two defence witnesses were examined and two

partially examined, with the matter further adjourned to 17.08.2015, on which date again, even the cost previously imposed had not been paid but two witnesses for the defendant were examined and the matter adjourned to 07.09.2015 with a last opportunity given for examining the remaining witnesses on 23.09.2015; but even on that date, the remaining defence witnesses were not examined though the cost imposed was paid.

Eventually, the matter was adjourned to 07.10.2015 for examination of the remaining witnesses subject to payment of costs of Rs.700/- and a last opportunity granted to examine the last defence witness on 21.10.2015, and for the plaintiff to avail the opportunity of rebuttal evidence, if he wished to.

Lastly, the matter was adjourned to 04.11.2015 for rebuttal evidence and arguments, with rebuttal evidence led on 20.09.2016, on which date it was closed and the case was fixed for arguments on 28.09.2016, with the application moved at that stage by the defendant-counter-claimant.

He therefore submitted that the petitioner did not deserve any leniency at all, as it has impossible to believe that he did not know that he had to examine himself through out the entire period as described hereinabove.

Mr. Gupta also relied upon a judgment of a co-ordinate Bench of this Court in **Saroj v. Charan Singh and others** 2017 (4) PLR 674 in support of his argument, wherein it was held that an application moved for additional evidence after even rebuttal evidence was over, would apparently be only to get the whole case reopened again.

Similarly, he relied upon a judgment of another co-ordinate Bench to the same effect, in **Sombir Singh and another v. Suresh Kumar Goel and another** 2018 (1) PLR 265.

8. Having considered the aforesaid arguments as also the impugned order, first of all, Order 18 Rule 3-A of the Code of Civil Procedure needs to be referred to, which reads as follows:-

“[3A. **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.]

9. Hence, it is obvious that where a party to the *lis* wishes to examine himself as a witness, he is required to do so at the outset, i.e. before any other witness that he wishes to examine, and thereafter he can only be permitted to appear as his own witness by permission of the Court.

After Rule 3-A was introduced in the statute by an amendment w.e.f. 01.02.1977, it was subject matter of consideration by a Full Bench of this Court in **The Amritsar Improvement Trust v. Ishri Devi** 1979 PLR 354, wherein their Lordships observed 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.”

(Emphasis applied by this Court)

Having observed so, it was then observed as follows:-

“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)

10. Thus, in a situation where a defendant/counter-claimant seeks to examine himself as his own witness, very obviously in the ordinary course he has to do so as his first witness, and only for specifically recorded reasons to the effect that it would be travesty of justice to not allow him to examine himself subsequently, that a Court would allow such subsequent examination of a party to the *lis*.

11. In my view, the learned Civil Judge has not erred in any manner

in dismissing the application in the circumstances already enumerated hereinfo, wherein even if one were to overlook the fact that the application for examining the petitioner himself came at a stage when he had examined all nine other witnesses that he wished to examine, the reasoning given in the application is not believable at all, that it was only an inadvertent mistake that he discovered later, that his own affidavit (by way of his examination-in-chief) was actually not on record.

If that were indeed the case, he would have, at worst, realised it when his own evidence was being closed on 07.10.2015 and not when enough opportunities had been granted thereafter for rebuttal evidence and arguments by the Civil Judge.

12. Though it would seem (in the absence of reasons given by either side for adjournments between 04.11.2015 to 20.09.2016), that the plaintiff-respondent took his own time to rebut evidence and to address arguments, yet that does not alter the fact that the defendants' own non-examination was not due to any inadvertence, but he being fully aware that he had not examined himself, filed the application at the absolute fag end of proceedings, with a view to prolong it.

13. It also needs to be noticed that at the time when notice of motion was issued in the present petition, this Court had noticed the argument of learned counsel for the petitioner to the effect that the Court (Civil Judge) should have exercised discretion in terms of Order 18 Rule 2 CPC, as per the amendment applicable to this Court and should not have adhered to strict compliance of Order 18 Rule 17, because the petitioner herein is not just a defendant but also a counter-claimant in the suit.

In this context, it is to be noticed that the amendment relied upon

by the petitioner, in Order 18 Rule 2 CPC, is the explanation added thereto, (as applicable to Madras (now Tamil Nadu), also adopted for Punjab & Haryana), which reads as follow:-

“Explanation.- Nothing in this rule shall affect the jurisdiction of the Court for reasons to be recorded in writing to direct any party to examine any witness at any stage.”

Having considered the above argument also, very obviously the explanation is virtually an extension/reiteration of the discretion conferred upon the Court as is expressed in Rule 3-A, the difference being that the latter applies only to a party to the *lis* as wishes to examine himself, whereas the aforesaid explanation to Rule 2 provides omnibus jurisdiction to the Court to examine any witness at any stage, for reasons to be recorded in writing.

Thus, the discretion eventually is to be exercised by the Court, naturally very judiciously, in the circumstances of each case; and in the context of the present case, I do not see how, when the application by the petitioner was filed in the circumstances given hereinabove, the discretion has been erroneously exercised by the learned Civil Judge.

14. Hence, I find no error in the reasoning given by the learned Civil Judge in the impugned order, for dismissing the application.

Consequently, this petition is dismissed.

(AMOL RATTAN SINGH)
JUDGE

July 26, 2018.

dinesh

Whether speaking / reasoned

Yes

Whether reportable

Yes