

23.02.2022
Ct. 21
D/L 01

C.O. 428 of 2021
(Via Video Conference)

Mageba Bridge Products Pvt. Ltd.
-Vs-
M/S H.P. Trading Corporation & Ors.

Mr. S.P. Mukherjee,
Mr. Swarup Banerjee,
Mr. Manoj Kumar Tiwari,

... for the petitioner

Mr. KasiNath De,
Mr. Kaushik Chatterjee,
Mr. Suparno Ghosh,

....for the opposite parties

The present application is under Article 227 of the Constitution of India at the instance of the defendant/petitioner being aggrieved by the order permitting the plaintiff to cross-examine D.W. 2 TarakNathMitra, whom the defendant has called its witness only for the purpose of cross examination by the learned Civil Judge (Senior Division), 9th Court at Alipore in Money Suit No. 42 of 2011 on 21.01.2021.

The facts necessary for determination of the present revisional application in gist is that the plaintiff has filed Money Suit No. 381 of 2010 for recovery of Rs.13,91,138/- along with interest

thereon amounting to Rs. 3,24,274/- totaling Rs. 17, 15,412/- towards the price of the products supplied by the plaintiff company to the defendant company.

The defendant in their written statement has alleged that Tarak Nath Mitra, whom it has examined as D.W. 1 was a director of its company who was entrusted to look after and supervise all the account, finance and purchases of the defendant company including sanctioning of the bills of the suppliers with the authority to singly sign cheques on behalf of the defendant company.

It has also been alleged by the defendant that Tarak Nath Mitra in collusion and in conspiracy with certain suppliers was siphoning away the funds of the defendant company by making payment of fictitious and fabricated bills purportedly raised on the basis of fictitious and fabricated challan and such supplies showing purported delivery and purported materials without such materials being either ordered or being delivered to the defendant. Therefore, the defendant has set up a defence case that the bills on the basis of which plaintiffs have set their claim against the defendant is based on false and fictitious

bills prepared by the plaintiffs in collusion with said Tarak Nath Mitra.

It has come on record the learned Court below being satisfied with the prayer of the defendant has allowed the said Tarak Nath Mitra to be cross-examined as D.W. 2 only and by passing the impugned order the learned Court below has permitted the plaintiffs to cross examine the said Tarak Nath Mitra who has been called by the defendant as a witness for the purpose of cross-examination only.

Now being aggrieved by the impugned order the defendant/petitioner has preferred the present revisional application.

Therefore, the only issue which require determination in the present case is whether the plaintiff has right to cross examine the witness of the defendant who has been cross examined by the defendant?

It has been contended by the learned Advocate for the petitioner/defendant since Tarak Nath Mitra in collusion with the plaintiff has manufactured all those bills and vouchers on the basis of which plaintiff set its claim and as such the defendant has to call Tarak Nath Mitra as a

witness, not as a normal defence witness but for the purpose of confronting the said Tarak Nath Mitra with the documents, which the plaintiff has produced in support of its claim. Therefore, if Tarak Nath Mitra is permitted to cross examine by the plaintiff then the entire purpose of the cross examination of Tarak Nath Mitra would be futile. Learned Advocate in support of his such contention referred to *Sri Rabindra Kumar Dey vs. State of Orissa*, reported in (1976) 4 SCC 233 and *Vadiraj Naggapa Vernekar (D) Through Lrs. Vs. Sharad Chand Prabhakar Gogate*, reported in AIR 2009SC 1604.

On the other hand, learned Advocate for the opposite parties submits that there is no such law in the land which prevent a party to the suit to cross examine the witness of its adversaries. The plaintiffs have legal right to cross-examine DW1, though who has been cross examined by the defendant. He in support of his such submission referred to *Nirmal Kumar Saha & Anr. Vs. Dipankar Saha & Ors.* reported in, 2013 SCC Online Cal 15091 and *Bhajju Alias Karan Singh vs. State of Madhya Pradesh* reported in (2012) 4 SCC 327.

From the Xerox copy of documents that have been filed by the petitioner at the instance of this Court *prima facie* shows that cross examination of said Tarak Nath Mitra by defendant was started on 19th of January, 2018 and his cross examination by the defendant was concluded only on 14.02.2020. From the impugned order it is seen that plaintiff has filed a petition on 11.03.2020 seeking leave of the Court permitting them to cross examine the said Tarak Nath Mitra who has been cross examined by the defendant not as a normal witness but a witness to be examined under Section 154 of Indian Evidence Act and which was allowed by the learned Court below.

It is true in a criminal prosecution when witness does not support prosecution case or statement given by the witness under Section 161 of C.R.P.C. then the prosecution with the leave of Court can declare the witness as a hostile and thereafter cross examine the said hostile witness. That after cross examination by the prosecution the defence is given liberty to cross examine the hostile witnesses who has failed to support prosecution case rather support the defence case. There is no different rules for recording evidence in a

criminal proceeding and civil proceeding. It is true in the present case like in criminal prosecution there is no 161 statement of witness, but the defendants in its W.S. invariably has brought an allegation against said Tarak Nath Mitra alleging that he being one of the directors of the company used to look after and supervise all accounts, finance and purchase from the defendant's company including signing of the bills of the supplies with the authority to singly sign the cheque on behalf of the defendant. That Tarak Nath Mitra in collusion and conspiracy with suppliers was siphoning away the fund of the defendant company by making payment of fictitious and fabricated bills purportedly raised on the basis of fictitious and fabricated challans of such supplies showing purported delivery of purported materials without such materials being either order by or delivered to the defendants. Therefore on the basis of such allegation which has been brought against Tarak Nath Mitra in the W.S. the learned Court below has allowed the defendant to cross examine its own witness the said Tarak Nath Mitra but the defendant and the Court cannot deny the right of

the plaintiffs to cross examine the said Tarak Nath Mitra who may be a hostile witness.

The evidence of Tarak Nath Mitra shows that his cross examination by the defendant was concluded on 14.02.2020. Unfortunately, the learned Court below has failed to defer the evidence of DW 2 for cross examination by the plaintiffs and for which reason the plaintiffs have to come with a petition seeking permission to cross examine DW 2 and which the Court below either realizing the mistake committed by it for not deferring the evidence of DW 2 for cross examination by plaintiffs has allowed the plaintiffs application. It is the duty of the Court below to fix a date for cross examination of Tarak Nath Mitra by the plaintiff after cross examination from the side of the defendant was concluded on its own volition and there is no need for the plaintiff to file a separate application.

Defendant to produce D.W.2 Tarak Nath Mitra before the learned Court below for his cross examination by the plaintiff on the date fixed by the learned Court below. Defendant is given liberty to recall D.W. 2 if circumstances demand subject to discretion of the learned Court below.

Therefore, I do not find any illegality in the order impugned. Revisional application fails.

Accordingly, **C.O.428 of 2021 is dismissed.**
Connected applications, if any, are disposed of.

Interim order, if any, stands vacated.

There will be no order as to costs.

All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

Urgent Photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(**KesangDomaBhutia, J.**)