

(1980) 08 MP CK 0010

In the Madhya Pradesh High Court

Case No : Civil Revision No. 439 of 1977

Girraj Trading Co. Gwalior

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 21-08-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 3A

Citation : (1982) JLJ 303 : (1982) MPLJ 211

Hon'ble Judges : H.G. Mishra, J

Bench : Single Bench

Advocate : N.K. Jain, for the Appellant; H.D. Gupta, for the Respondent

Final Decision : Allowed

Judgement

H.G. Mishra, J.

This is plaintiff's revision against Order dated the 17th August, 1977, whereby application submitted by the plaintiff under Order 18, Rule 3-A CPC for permission to examine Maganlal, partner of the plaintiff's firm, after examination of their Munim Hariom Prakash, was rejected.

No exhaustive statement of facts is necessary for decision of this revision. Suffice it to state that on 1.7-8-1977, which was date fixed for evidence of the parties, the plaintiff-applicant submitted an application wherein it was stated that Maganlal as well as his Munim (Hariom Prakash) are present in the Court, since the Munim will produce and prove "Bahikhata" of the plaintiff's firm, therefore, it will be proper if the statement of Munim be recorded prior to that of Maganlal. Accordingly it was prayed that the plaintiff may be permitted to examine Maganlal after the Munim.

It appears that the trial Court proceeded with examination of Hariom Prakash Munim of the plaintiff without any objection on behalf of the defendant. However, after completion of the statement of Hariom Prakash, the Court has by impugned order rejected, inter alia, the aforesaid application and has precluded the plaintiff

from examining Maganlal in support of the case. Aggrieved by this part of the order the present revision has been filed on behalf of the plaintiff.

In this revision, Shri N. K. Jain learned counsel for the plaintiff-applicant contended that Order 18, Rule 3-A CPC empowers the Court to give the permission sought for; and that rejection of the prayer for the purpose is wholly arbitrary and illegal. Shri B. D. Gupta learned counsel for the non-applicants defendants argued in support of the impugned order.

Having heard the learned counsel for the parties I have come to the conclusion that the revision deserves to be allowed.

Rule 3-A has been inserted in Order 18 of the CPC 1908 by section 69(ii) of the CPC (Amendment) Act, 1.976 (104 of 1976). It reads as under : -

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.

The object and reasons for insertion of the aforesaid rule as stated in S. O. R. are as under;-

New rule 3-A is being inserted to provide that a party who wishes to be examined as a witness should first offer himself for examination before other witnesses are examined." 7. Before insertion of rule 3-A by Amendment Act No. 104 of 1976, the usual practice was that party should go into witness-box first to depose in support of his case and was to be followed by his other witnesses. The principle underlying this practice appears to be that the contrary practice of enabling a party to come in the last and to fill up the lacuna in the corroborative evidence, was not considered to be conclusive to the better administration of justice. The Rajasthan High Court adopted the aforesaid practice by adding a new sub-rule 4 to Order 18, Rule 2, Civil Procedure Code. The sub-rule 4 so inserted by the Rajasthan High Court runs as under: -

(4) Where a party himself wishes to appear as a witness he shall so appear before any other witness on his behalf has been examined, provided that the Court may on an application made in this behalf and for reasons to be recorded permit him to appear as his own witness at a later stage (25-7-1957).

This sub-rule is, in substance, similar to rule 3-A inserted in Order 18 by the Amendment Act No. 104 of 1976. A problem, somewhat akin to that which has been posed by this revision, posed itself before Rajasthan High Court in Lajjaram Vs. Khubiram, where in C. M. Lodha, J. (as he then was) construed nature of the sub-rule (4) of rule 2 of Order 18, as under: -

A bare perusal of sub-rule (4) would show that under certain circumstances a party may appear in his evidence after another witness on his behalf has been examined. All that is required is that there should be an application to seek such a permission and the Court may grant permission.

I do not see any reason to construe rule 3-A of Order 18 in a different manner. The intention of the Parliament underlying Rule 3-A appears to be to incorporate the practice which was usually followed in the matter prior to its insertion in Code of Civil Procedure. No doubt, the rule so inserted enjoins upon a party to first offer himself for examination before his other witnesses; but, it also empowers the Court to permit a departure from the generality of the rule by allowing the party to appear as his own witness at a later stage. Of course, the Court has to record reasons for permitting such a course to be adopted. In view of the language employed in the rule, it cannot be said that the intention of the Parliament was to make the rule so rigid as not to permit even a reasonable change in the order of examination of witness. The rule so inserted is after all a rule of procedure. In *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, , the purpose of procedural laws is stated to be as under:-

A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties: not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

In the light of the aforesaid principles, rule 3-A of Order 18 has to be construed in a manner which may advance the cause of justice and should not be construed in a manner to frustrate it. In the instant case, what the plaintiff wanted was only to examine their partner Maganlal the same day after examination of their Munim Hariom Prakash. This departure appears to have been sought on a reasonable ground viz. that Hariom Prakash being Munim of the plaintiff's firm will first produce and prove any relevant entries in the accounts books. From the tenor of the application, it appears to have been moved before commencement of evidence in the case. Moreover, it appears that the defendant did not object to examination of Hariom Prakash as the first witness in the case. The obvious intention of the defendant appears to be to let the plaintiff fall into the trap spread by Rule 3-A. However, in the facts and circumstances stated above, it will be deemed that the Court had impliedly granted the requisite permission.

In order to resist the aforesaid conclusion, Shri Gupta placing reliance on *Jagannath Nayak Vs. Laxminarayan Thakur and Others*, , contended that Order 18, Rule 3-A is mandatory. I am afraid reliance on the ratio of *Jagannath's* case (supra) is not available to the defendant in the facts and circumstances of the present case. Firstly, towards the end of Para 4 *Jagannath's* case (supra) it has been stated that:-

However this opinion of mine is not final and would not fetter the appellate Court in coming to its own independent conclusion in the matter, if he is called upon to decide the matter.

Accordingly, the opinion expressed in the case of Jagannath (supra) is not a concluded opinion, on the point in controversy. Secondly with due deference to S. K. Ray, J. who decided Jagannath's case (supra), the view expressed by Lodha, J. (as he then was) in Lajjaram's case (supra) commends to me more as it is in consonance with the principles enunciated by the Supreme Court in Sangaram Singh's case (supra). After all, too rigid a construction has to be avoided.

In view of the aforesaid discussion, the revision succeeds and is, hereby allowed. The impugned part of the order which concerns with the rejection of permission to the plaintiff to examine himself as a witness in the case after Hariom Prakash, is set aside, and the trial Court is directed to examine Maganlal partner of the plaintiff-firm now in support of his case. No order as to costs.