

(1979) 03 BOM CK 0019

In the Bombay High Court

Case No : Civil Revision Application No. 585 of 1978 with C.R.A. No's. 490/78, 425/78 and 131/78

Nagorao Nilkanthrao Deshmukh and another

APPELLANT

Vs

Keshao Govind Patil

RESPONDENT

Date of Decision : 22-03-1979

Acts Referred:

Representation of the People Act, 1951 — Section 82

Citation : (1979) MhLj 809

Hon'ble Judges : A.A. Ginwala, J

Bench : Single Bench

Advocate : M.S. Deshpande in Civil Revn. appln. No. 585 of 1978, G.J. Ghate in Civil Revn. appln. No. 490 of 1978, G.J. Ghate in Civil Revn. appln. No. 425 of 1978 and G.G. Modak in Civil Revn. appln. No. 131 of 1978, for the Appellant; L. Mohta in Civil Revn. Appln. No. 585 of 1978, V.S. Sirpurkar and Mrs. K.V. Sirpurkar for non-applicants Nos. 2, 3 and 5 in Civil Revn. Appln. No. 490 of 1978, B.P. Jaiswal in Civil Revn. Appln. No. 425 of 1978 and M.G. Bhangde in Civil Revn. Appln. No. 131 of 1978, for the Respondent

Final Decision : Allowed

Judgement

A.A. Ginwala, J.—A common question of law regarding the interpretation of rule 3A of Order 18 of the CPC (hereinafter referred to as "the Code") is involved in all these four revision applications and hence they are being disposed of by this common judgment. The facts essential to understand the controversy between the parties, in so far as the present revision applications are concerned, need only be stated in respect of each petition.

2. In Revision Application No. 131 of 1978, the non-applicant plaintiff has filed a suit against the applicant defendants for recovering a certain sum. This suit was instituted on 2-7-1973 and the defendants filed their written statement on 20-3-1974. Issues were framed on 26-9-1974 and the case was posted for evidence for the first time on 20th December 1974. The plaintiff applied for adjournment on that day and thereafter the suit was posted for some other

purposes and it came for hearing again on 14-10-1977. However, it was not heard on that day and was adjourned To 21-11-1977""", when the witness on behalf of the plaintiff was examined. It is pertinent to note that before this witness was examined, the plaintiff did not move the Court for permission to appear as his own witness at a later stage of the suit. After some stages the case was again posted for hearing on 3-4-1978 when the plaintiff entered the witness box to examine himself as his own witness. At that stage the defendants made an application objecting to the plaintiff was prohibited from examining himself as his own witness as before examining the other witnesses he had not obtained permission from the Court as required by rule 3A of Order 18 of the Code. The defendants contended that this rule was mandatory and it was incumbent upon the plaintiff to have obtained permission prior to his examining the witness on his behalf. An objection was taken on behalf of the plaintiff to this application. It was said that the construction which was sought to be put by the defendants on this rule was absurd and that no objection had been taken by the defendants prior to that date. The trial Court by its order passed on that date allowed the plaintiff to examine himself and rejected the objection. The trial Court observed that no objection had been taken by the defendants at the time when the witness for the plaintiff was examined on 21-11-1977 and that in the interest of justice it was necessary to allow the plaintiff to examine himself. The trial Court also observed that under the circumstances of the case if the plaintiff is not allowed to examine himself, it would amount to debar a party from proving his case. It is against this order that the defendants have filed the present revision application.

3. In Revision Application No. 425 of 1973 the applicant-plaintiffs have instituted a suit against the non-applicant defendants for a declaration that they are owners of certain property. This suit was instituted on 6-9-1974. The defendants resisted the suit by their written statement filed on 3-12-1974 and claimed the suit property to be of their own. On 18-8-1977 the plaintiffs examined some witnesses on their behalf, but before their examination none of the plaintiffs entered the witness box. The suit there-after was adjourned to 17-3-1978 and on this date when the plaintiffs wanted plaintiff No. 1 to be examined as a witness on their behalf, an objection was taken on behalf of the defendants that the plaintiffs could not be allowed to examine him by virtue of the said rule. The defendants took this objection in writing and the plaintiffs filed their reply to it. It was contended by the plaintiffs that the case had reached the stage of evidence in 1975, i. e long before the said rule came into force and hence the plaintiffs decided to examine the witnesses first and then to examine themselves. It was further said that the witnesses who had been examined before hand were very old and were coming every time from distant villages and it was difficult and inconvenient to them to do so. It was further said that on 18-8-1977 the plaintiff had orally requested the Court to allow them to examine these witnesses before the evidence of the plaintiffs was recorded and no objection had been taken by the defendants to it. It was, therefore, submitted that oral permission was given by the Court and that is why the witnesses were examined prior to the

examination of the plaintiffs. Lastly it was said that plaintiff No. 1 could not be debarred from giving evidence as a witness and the Court should grant permission to him to do so. The trial Court by its order passed on 15th June, 1978, allowed the objection of the defendants and prevented plaintiff No. 1 from entering the witness-box. For arriving at this conclusion the trial Court relied on the decision of a learned single Judge of the Orissa High Court in Jagannath Nayak Vs. Laxminarayan Thakur and Others, , in which case it has been held that the said rule is mandatory and if a party wishes to examine himself at a latter stage of the suit after examining some witnesses on its behalf, it should obtain permission from the Court before such witnesses are examined. The trial Court was of the view that since no permission had been obtained by the plaintiffs before the other witnesses had been examined by them, plaintiff No. 1 could not be allowed to be examined at a later stage. On merits also the trial Court held that the fact that the witnesses were old, was no reason for not examining plaintiff No. 1 first as it was possible for him to examine himself on any date prior to this examination of the said witnesses. With regard to the contention of the plaintiffs that before examining their witnesses they had sought oral permission from the Court, the trial Court observed that this was not supported by the record and this was contradicted by defendant No. 1 in his affidavit. Then with regard to the contention of the plaintiffs that when they examined their witnesses, no objection was taken by the defendants, the trial Court observed that merely by acquiescence a party cannot get over the mandatory provisions of law. It was for these reasons that the trial Court did not allow plaintiff No. 1 to examine himself and it is against this order that the present revision application has been filed.

4. In revision application No. 490 of 1978 the suit has been filed by the applicant; plaintiff against the non-applicant defendants for partition of certain property, it appears that this suit was instituted in 1975 though the exact date is not available on record. It appears that when the suit came up for hearing on 22nd June 1977, the plaintiff examined one witness on her behalf without examining herself before that. This witness is said to be an old lady of 85 years of age. After her evidence was over, the suit was adjourned to 15-7-1977, on which date another witness on behalf of the plaintiff was examined. On this date also the plaintiff did not enter the witness box. The suit again came up for evidence on 20-6-1978 when the plaintiff wanted to examine herself. This was objected to by the defendants by a written application. It was said that the plaintiff could not examine herself at that stage because of the provisions contained in the said rule. The plaintiff herself made an application on the same day seeking permission under the said rule. In this application the plaintiff explained the circumstances in which it had become necessary for her to examine her witness earlier and reserve her evidence for a later stage. It was said that the said witness is a lady of advanced age and her evidence would not have been long and she was coming from a village at a distance of about 34 miles and was not inclined to come again. The evidence of the plaintiff would

have been lengthy and in these circumstances the evidence of that witness was recorded first. In these circumstances the plaintiff prayed for permission to examine herself as her own witness at this stage of the suit. The trial Court, relying on the said ruling of the Orissa High Court, held that the said rule is mandatory and the permission to appear as a witness after the evidence of the other witnesses should be obtained by a party before the commencement of the evidence of those witnesses. On merits the trial Court held that the plaintiff had ample opportunity to examine herself on earlier dates and it was not clear as to why she did not avail of it. It also observed that the plaintiff could have made an application for permission to examine herself at a later stage, before she put her witness in the box. Taking this view, the trial Court upheld the objection taken by the defendants and rejected the application of the plaintiff for permission. It is against this order that this revision application has been filed.

5. In revision application No. 585 of 1978 the non-applicant plaintiff has instituted the suit against the applicant defendants for specific performance of contract of sale. This suit appears to have been Filed in 1973. It appears that prior to 5-7-1978 the defendants examined three witnesses on their behalf without examining themselves first or without seeking any permission to do so at a later stage. On 5-7-1978 they applied for permission to allow the defendants to examine themselves at a later stage. This application was opposed on behalf of the plaintiff on the ground that Rule 3A order 18 of the Code was mandatory and hence the application could not be entertained at this stage. The trial Court, relying on the said ruling of the Orissa High Court, held that the said provision was mandatory and since permission had not been obtained by the defendants prior to examining their other witnesses, it could not be granted at that stage of the suit. Consequently the trial Court rejected this application and it is against this order that this revision application has been filed.

6. The questions, therefore, which falls for consideration in these revision applications (i) whether a party wishing to appear as his own witness after examining one or more of his witnesses must seek the permission as contemplated in rule 3A of order 18 of the Code, before examining such witnesses, and (ii) whether on his failure to do so he would be debarred from examining himself as his own witness at a later stage. As would appear from whatever has been slated above, in three of these revision applications the Courts below have taken the view that this provision is mandatory and a party who wishes to examine himself after examining some of his witnesses, has to seek permission of the Court in that respect before the said witnesses are examined. While interpreting the said rule, these Courts have relied on the decision of a learned Single Judge of the Orissa High Court in Jagannath v. Laxminarayan (cited supra) wherein it was held that the said rule was not only mandatory but the permission of the Court must be sought for at the time when the party is to commence leading its evidence and not thereafter. Now this decision of the learned Single Judge of that Court has been overruled by a Division Bench of that Court in Maguni Dei Vs. Gouranga Sahu and Others, . In

that case the Division Bench has held that the said rule is directory and that in proper cases the Court has power to examine a party at a later stage even though he has not obtained permission of the Court previously. The Division Bench laid down that the Court is not absolutely helpless in the matter, and if a party has acted in good faith and it is just and fair, permission should be granted to him to examine himself at a later stage. It would thus appear that the decision of the learned Single Judge of the Orissa High Court in Jogannath's case, on which reliance was placed by the Courts below, is no more in the field. At this stage I may mention that a Division Bench of the Punjab and Haryana High Court has taken a similar view as that of the Division Bench of the Orissa High Court. In *Kwality Restaurant, Amritsar Vs. Satinder Khanna*, that Court has held that the provisions contained in rule 3A of Order 18 of the Code is not inflexible and may be deviated from with the permission of the Court. It further held that no specific stage is prescribed or fixed by the statute for securing such permission though a party may as a matter of abundant caution apply at the stage of commencement of the evidence and get the necessary permission and if sufficient ground is made out he may secure this permission at a later stage. It appears that though the ruling in *Naguni Dei's* case had been handed prior to the decision of the Division Bench of the Punjab & Haryana High Court in *Kwality Restaurant's* case, the said ruling in *Maguni Dei's* case was not cited before the Division Bench of the Punjab & Haryana High Court and what was cited before it was the decision of the learned Single Judge in *Jagannath's* case. The Division Bench of the Punjab and Haryana High Court, however, dissented from the said ruling of the learned Single Judge of the Orissa High Court. It would thus appear that the Division Benches of the Orissa High Court and the Punjab & Haryana High Court have taken the view that the provision contained in rule 3A of Order 18 of the Code is not mandatory but only directory and that it is not absolutely necessary for a party who wishes to appear as his witness at a later stage after examining some of his witnesses to obtain permission to do so before the examination of such witness and the permission could be given by the Court even after some witnesses are examined by such party.

7. Mr. N. S. Deshpande, the Learned Counsel for the applicants in revision application No. 585 of 1978 and Mr. Ghate, Learned Counsel for the applicants in revision application Nos. 425 of 1978 and 490 of 1978, as also Mr. M. G. Bhangde, the Learned Counsel for the non-applicant in revision application No. 131 of 1978, submit that the said rule being a rule of procedure, cannot be construed as mandatory as it by itself or any other provision contained in the Code does not provide for the consequence of its non-compliance. They submit that the provisions governing procedure are for advancing administration of justice and not for hampering it. They contend that the rules of procedure are at best hand-maid of justice and not its mistress. Hence, according to them, the provisions contained in the said rule will have to be liberally construed and though the word "shall" has been used in the said rule, that by itself would not make it mandatory and the context of the provision and the purpose which is

sought to be achieved has to be looked into in order to arrive at a correct interpretation. They also submit that there is absolutely nothing in the language of the said rule to indicate that the permission has to be sought and granted before the party concerned examines any witness on his behalf. They submit that on the plain reading of this rule it is abundantly clear that permission could be obtained and granted at any stage of the suit and the only requirement of the rule is that in that case the Court has to be satisfied by cogent reasons, of the necessity of granting such permission, since the rule requires the Court to record its reasons for the same. They submit that the Legislature could never have intended to shut out any evidence merely because the party fails to obtain permission in the beginning.

8. On the other hand, Mr. G. G Modak, the Learned Counsel for the applicant in revision application No. 131 of 1978 and Mr. Sirpurkar, the Learned Counsel for non-applicant Nos. 2, 3 and 5 in revision application No. 490 of 1978 and Mr. B. P. Jaiswal, the Learned Counsel for the non-applicants in revision application No. 425 of 1978 contend that the said rule its very language is mandatory and if one has to look to the legislative history behind the rule, it would be clear that the Legislature wanted to be imperative as it wanted to put an end to the mischief which was prevalent before insertion of the rule by which a party would examine its witnesses first and come in the witness box thereafter in order to fill up any lacuna which may be left in the evidence of the witnesses. These counsel contend that if this was the purpose of enacting this provision, the very idea of granting permission at a later stage when the witnesses have already been examined would frustrate the very purpose of enacting this rule and will make it otiose. It was also contended that the rule has to be construed as a whole and as one composite provision rather than in two parts, as has been done by the Orissa High Court and Punjab and Haryana High Court. According to them, this rule cannot be read as if the first part of it lays down a general rule and the second part provides with only an exception. According to these counsel, the words following the word "unless", engraft a condition precedent on what is contained in the first part and a correct reading of the rule would be that if a party wishes to examine himself as a witness, he shall so appear before any other witness on his behalf has been examined, but if he does not want to do so, he must obtain permission of the Court before he examines any such witness, to appear as his own witness at a later stage.

9. The rule which falls for interpretation in these cases is to the following effect:

"3A. 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."

This rule has been inserted for the first time by the CPC (Amendment) Act, 1976 and has come into force with effect from 1st February 1977. It appears that in its Fourteenth Report the Law Commission of India considered the practice, which

was prevalent, of the plaintiff or defendant upon whom the burden of proving certain issues lies and who has to give evidence in support of his case, not being called as a witness before the evidence of the other witnesses is recorded, and is called after all his witnesses have been examined, the underlying purpose of this practice being to enable the plaintiff or defendant to fill in the gaps in the evidence given by the witnesses. The Law commission strenuously depreciated this practice and recommended that this should be stopped by making suitable amendment in rule 2 or rule 3 of Order 18 of the Code, so as to call upon the party concerned to make up its mind at the commencement of the proceeding as to whether it wishes to give evidence. (See para 71 at page 340 of the Fourteenth Report of the Law Commission of India). This report was made in 1958. It appears that no action was taken by the Government on this recommendation of the Law Commission at that time.

10. This question again came up for consideration before the Law Commission in 1964. At that time the Law Commission was of the view that it was unnecessary to make any statutory provision in this respect as had been recommended in its 14th Report. It said that the ordinary rule should be that the party who wishes to be examined as witness should offer himself first before the other witness are examined but a rigid provision on the subject did not seem to be desirable. (See page 170 of the Twenty-Seventh Report of the Law Commission of India). It would, therefore, appear that in view of this recommendation of the Law Commission no action was taken by the Government.

11. However, the matter came up again for consideration before the Law Commission in 1973. It observed that the Fourteenth Report had recommended that ordinarily a party who wishes to be examined as a witness should offer himself first before the other witnesses are examined and that the Commission had in a later report considered it unnecessary to make any such statutory provision. However, according to the Law Commission, the time had come to insert a statutory provision as recommended in the Fourteenth Report. It also gave a draft of the rule which is in the same terms as the present rule 3A. The Law Commission observed that hardship arising from special features of the case should not present problem since the proposed rule would be confined to ordinary cases and that having regard to the persistent mal-practice indulged into by litigants in this respect the time had come to insert a statutory provision. It appears that in pursuance of this recommendation of the Law Commission in its 54th Report the present rule 3A has been inserted in the Code by the abovesaid amending Act.

12. The question which really falls for consideration in these applications is whether the permission which is required under the said rule must as of necessity be obtained by the party concerned before it proceeds to examine any other witness on its behalf, or whether such permission could be sought or obtained after some of the witnesses had been examined. As already seen, it is strenuously urged on behalf of the non-applicants in some of these applications

that this rule is mandatory in nature and if that is so, the permission must be obtained by the party concerned before it proceeds to examine any of its witnesses. Much stress is laid on the word "shall" occurring in this rule and on the basis of this word it is urged that the rule can be construed to be mandatory only and not to be directory in nature. Now it is well settled that the question whether a particular provision is mandatory or directory would depend not solely on the use of the words "shall" or "may" in that provision. But, in order to arrive at a conclusion on this point, the Court will have to look to the context in which the provision has been enacted and the purpose behind it. Now obviously the present rule is a rule of procedure and in the *The State of Punjab and Another Vs. Shamlal Murari and Another*, , the Supreme Court while construing certain rule made by the Punjab and Haryana High Court with regard to the filing of Letters Patent Appeals has observed that the use of the word "shall" in a rule is not decisive and the context of the statute, the purpose of the prescription, the public injury in the event of neglect of the rule and the conspectus of circumstances bearing on the importance of the condition have all to be considered before condemning a violation a fatal. Again in the same case the Supreme Court has made the following observations with regard to the interpretation of procedural law:

""We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, the procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, Courts are to do justice, not to wreck this end product on technicalities."

13. Again in *Jagan Nath Vs. Jaswant Singh and Others*, , the Supreme Court, while construing section 82 of the Representation of the People Act, 1951, observed that a provision like the said section or the one contained in rule 1 of Order 24 of the Code cannot be construed to be mandatory unless noncompliance with it is made penal. Though in both these provisions the word "shall" has been used, the Supreme Court has construed them to be directory and not mandatory, because, no penal consequence had been provided for their non-compliance. It may be mentioned here that section 82 of the Representation of the People Act, 1951 provides that an election-petitioner shall join as respondents to his petition certain categories of persons. The word used in this section is "shall". Similarly, in rule I of Order 34 of the Code it is provided that subject to the provisions of the Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. In both these revisions, as would be seen, the Legislature has used the word "shall", but since no consequence for the noncompliance of the provision has been laid down in either of these

enactments, the Supreme Court held them to be directory and not mandatory on this sole ground only. This principle will have to be borne in mind while interpreting the rule 3A, which also is a rule of procedure and it is to be noted that the Legislature has not provided for any penal consequences for non-compliance of the rule. In other words, the Legislature has not laid down anywhere either in rule 3A or at any other place in the Code that a party which does not obtain permission of the Court before any of the its witnesses are examined would be debarred from examining itself as his own witness. In the absence of any provision to this effect it would not be improper or incorrect to hold, relying on the said ruling of the Supreme Court, that the said provision is not mandatory but merely a directory provision.

14. Apart from this, the language of the rule itself does not lay down specifically that the permission has to be obtained by the party concerned before it examines any of its witnesses. The words "unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage" are conspicuously silent as regard the stage at which the permission has to be obtained. It no where indicates that such a permission has to be taken at the very commencement of the evidence. Now, as has been already seen above, it has been contended that the rule has to be read as a whole and composite and cannot be split up into two parts, one laying down the general rule and the other an exception. It is urged that the word "unless" Occurring in this rule has to be construed as imposing a condition precedent on the general rule as embodied in the earlier part of the rule. Now the word "unless" only means "if not" or "except" and if this meaning is attributed to this word, the rule would read as, where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined except when the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage. Now reading this rule this way it cannot be said that the permission is a condition precedent for a party who wishes to examine himself after examining some of the witnesses. In my view, the words which follow the word "unless" lay down nothing but an exception on the general rule which is embodied in the opening part of the rule. In other words, if a party who wishes to examine himself after some of bis witnesses are examined, can apply for the permission and obtain it not necessarily at the stage when it commences his evidence, but even at a subsequent stage. It has to be remembered that the other construction which is sought to be put on this rule would deprive the Court of its power to allow a party to appear as a witness at any other stage of the suit. Certainly it cannot be said that by enacting this provision the Legislature wanted to take away this power of the Court.

15. It is urged that the provision has to be construed as mandatory because the Legislature wanted to put an end to a mal-practice or mischief which had been prevalent under which is a party would examine its witnesses first and then examine itself in order to fill in the lacuna in its evidence. Now assuming that this is the purpose, and it appears that this was the purpose, in enacting the

provision, it cannot be said that the Legislature wanted to be so rigid and inflexible as to deprive the Court of its jurisdiction to permit a party concerned to appear as his own witness at a later stage even though it had not obtained permission at the initial stage. It may be noted that no provision to his effect had ever appeared in the Code before the Amendment of 1976 and even if the Legislature wanted to put and the practice which was then prevalent, it would be sufficient to lay down a general rule in this respect and leave some discretion to the Court to allow such a party to appear as its witness though it had not obtained permission earlier, because that would be an abuse of the general rule, if any. It, therefore, does not appear that the Legislature ever intended to make the rule rigid, absolute or imperative, as has been contended by the other side in this case. The language of the rule does not support the interpretation which is sought to be put on it to the effect that it is imperative and mandatory, in *Santa Singh v. State of Punjab* A I R 1976 S C 2286, while construing the provision contained in section 235 of the Code of Criminal Procedure, 1974, the Supreme Court has observed that it is a well settled rule of interpretation, hallowed by time and sanctified by authority, that the meaning of an ordinary word is to be found not so much in a, strict etymological propriety of language nor even in popular use, as in the subject or occasion on which it is used and the object which is intended to be attained. Hence even if it is assumed that the said rule is in terms mandatory, the real intention of the Legislature would have to be gathered not only from the language in which the rule has been drafted but the object of the rule and the purpose for which it is enacted will have to be kept in view and mind while construing it. As already said above, the only object, which the Legislature appears to have in mind while enacting this rule is to put an end to the practice of a party examining itself after other witnesses are examined to fill up any gap and as I have said already, if this was the purpose and the object of the enactment, then certainly it could not be said that Legislature would go to the extent of the making it such a rigid rule as to prevent a party even in genuine and bona fide cases appearing as a witness at a later stage simply because it had failed to obtain permission from the Court before it examined any of the witnesses. In my view, therefore, looking at from any angle, it does not appear at all that this rule should be construed to mean that a party who wishes to appear as a witness after examining some of its witnesses, must obtain permission of the Court for doing so before examination of any such witnesses. In my opinion, it is open to the party concerned to apply for permission even after some of its witnesses are examined and it would be open to the Court in proper cases to give such permission, provided it is satisfied with the reasons which are advanced by such party. In this respect I respectfully agree with the rulings of the Division Benches of the Orissa High Court and the Punjab and Haryana High Court.

16. With this interpretation of the rule, therefore, one has to see if the orders which have been passed by the Courts in these four applications can be supported.

17. As already seen, in Revision Application No. 131 of 1978, the plaintiff himself did not apply for permission to examine himself as a witness after he had examined one witness on his behalf. The defendants objected to his being examined on the ground that he had not obtained permission as required under rule 3A. Now in spite of this objection the plaintiff did not apply for permission but only recorded his own objection to the objection taken by the defendants and he merely said that the defendants had not taken any objection when he examined his witness, besides saying that the construction of the rule as propounded by the defendants was absurd. It would, therefore, appear that the plaintiff not only has not applied for permission for examining himself as a witness, but has also not advanced any reasons as to why he did not examine himself before he examined the witness. It has to be noted that the said rule requires the Court to record reasons while granting permission and if that is so, it is incumbent upon the party who seeks the permission to make out good and satisfactory reasons which would Go home with the Court. Now if the party itself does not give any reasons, it is difficult to see how the Court could grant permission. It is true that in this case the Court has said that it would allow the plaintiff to examine himself as that is in the interest of justice and because the plaintiff has no other witness to be examined after his examination. Now to say that if a party is not allowed to examine itself it will amount to debarring it from proving its case is nothing but to beg the question. The rule provides that the party who wants to deviate from the general rule should obtain permission of the Court after assigning valid reason and if it does not do so, the necessary consequence would be that it would be debarred from examining itself. Now this omission by the party itself cannot be made a ground for permitting it to examine itself because in that case the rule will become otiose and ineffective. Therefore, in the circumstances obtaining in this revision application, the learned trial Judge ought not to have rejected the objection which had been raised by the defendants, and on the contrary, should have allowed the same. In the result, therefore, the Civil Revision Application No. 131 of 1978 is hereby allowed, the rule is made absolute and the order passed by the trial Court on 3-4-1978 on the application of the defendant at Ex. 81 is hereby set aside and the said application is allowed. Costs of this revision application shall be costs in the suit.

18. In Civil Revision Application No. 425 of 1978 no doubt an objection was taken by the defendants to the examination of plaintiff No. 1 as witness for the plaintiffs after some witnesses had been examined on their behalf and in reply to this objection the plaintiffs had given reasons as to why they could not examine plaintiff No. 1 before other witnesses and in addition sought permission of the Court to examine plaintiff No. 1 as their witness. Now apart from holding that the said rule is mandatory and the permission ought to have been obtained before the other witnesses of the plaintiffs had been examined, the learned trial Judge has also considered the merits of the reasons which had been advanced by the plaintiffs for permitting them to examine plaintiff No. 1 as witness at that stage of the suit. The learned trial Judge was not satisfied with the reasons and on that

count also he upheld the objection taken by the defendants and did not allow plaintiff No. 1 to appear as a witness. It would, therefore, appear that the learned trial Judge has applied his mind to the question as to whether permission should be given to the plaintiffs for examining plaintiff No. I as their witness and after proper application of the mind the learned trial Judge has chosen to reject the permission on this ground also, Mr. Ghate, the Learned Counsel for the applicants, submitted that the learned Judge had first held that the rule was mandatory and in order to support his conclusion on that count he had recorded the finding on merits rejecting the plea of the plaintiffs for permission. It is difficult to agree with this submission of Mr. Ghate, because it is always open to a Court to consider the alternate submissions if they are made before it. The question which had to be considered by the learned trial Judge in this case was as to whether the rule was mandatory and the alternate question was, if it was directory, whether permission should have been given or not and on the latter question also the learned trial Judge has held against the plaintiffs after assigning proper reasons. Since the learned trial Judge has exercised his discretion in a proper manner, I do not see any reason to interfere with the same. The result, therefore, is that revision application No. 425 of 1978 is hereby rejected and the rule is discharged. The costs of this revision application shall be costs in the suit.

19. The facts of Civil Revision Application No. 490 of 1978 are practically similar to the one in Civil Revision Application No. 425 of 1978. Here also, apart from holding that the rule is mandatory, the learned trial Judge has also considered the matter on merits and has deemed it fit not to allow the plaintiff to be examined at that stage of the suit. In my view, therefore, no interference is called for in this case also for the reasons which I have recorded while rejecting revision application No. 425 of 1978. Hence, Civil Revision Application No. 490 of 1978 is hereby rejected and the rule is discharged. Costs of this revision application shall be costs in the suit.

20. In so far as Civil Revision Application No. 585 of 1978 is concerned, it would appear that the learned trial Judge has rejected the application made by the present applicants for permission to examine themselves at that stage of the suit simply because in its view rule 3A of Order 18 of the Code was mandatory. It has not gone into the merits or demerits of the reasons which had been given by the defendants for not examining themselves before they examined some of their witnesses. Since I have held that it is open to a party to apply for such permission even after some of its witnesses are examined, it is necessary to allow this revision application and remand the case to the trial Court for passing proper order on the application made by the applicant-defendants in the light of the interpretation of this rule which has been stated above. In the result, therefore, revision application No. 585 of 1978 is hereby allowed and the rule is made absolute. The order passed by the trial Court on 14th September 1978 on the application of the defendants at Ex. 40 is hereby set aside and the trial Court is directed to pass appropriate order on this application in the light of the

observations made above. The costs of this application shall be costs in the suit.