

(2000) 01 BOM CK 0012

In the Bombay High Court

Case No : Civil Rev. Application No. 1182 of 1999

Sanjay Narayanrao Barde and another

APPELLANT

Vs

Vimal Kesharao Bairam and others

RESPONDENT

Date of Decision : 21-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 2000 Bom 384

Hon'ble Judges : S. K. Shah, J

Bench : Single Bench

Advocate : B. P. Dharmadhikari, for the Appellant; Sudhir Moharir, for the Respondent

Final Decision : Dismissed

Judgement

S. K. Shah, J.—it. Heard finally by consent of parties.

2. This revision by the original defendants is directed against the order passed by the Civil Judge, Senior Division, Chandrapur on 29-10-1999 on exhibit 82 allowing the respondents/plaintiffs to lead evidence of one of the plaintiffs No. 3 even after they had examined the other witnesses.

3. Brief facts are that the respondents/plaintiffs had filed suit for specific performance of contract against the appellants/defendants. At the trial, plaintiffs had examined witness Keshav who was the holder of power of attorney for the respondents. Thereafter the respondents wanted to examine one surveyor as their witness. Before the witness surveyor could be examined, the applicants had filed pursis (exhibit 64) stating therein that the plaintiffs had given list of witnesses and shown the plaintiffs as their witnesses and thus, mentioned that no other witness could be examined prior to the examination of plaintiff without leave of the Court. On that pursis, the learned Trial Judge passed order, "Permission granted to examine plaintiffs witnesses as the power of attorney for plaintiffs is already examined. The question of examination of plaintiff evidence

shall be decided at proper stage". Thereafter the evidence of surveyor came to be recorded. It is thereafter that the respondents filed application (exhibit 82) seeking permission of the Court to allow the plaintiffs to examine plaintiff No. 3. It is this application which came to be allowed by the learned Trial Court under Order 18, Rule 3-A of the Code of Civil Procedure. It is against this order that this revision is filed u/s 115 of the Code.

4. The contention raised on behalf of the applicants is that in view of the provisions of Order 18, Rule 3-A, Civil Procedure Code, the plaintiffs should have first obtained the permission from the Court to examine witnesses before the plaintiffs could be examined. It was further contended that since the plaintiffs did not make such application and obtain permission from the Court and proceeded to examine the witnesses, now it was not open for the plaintiff No. 3 to examine himself as the party and the order passed by the learned Trial Court was in contravention of the provisions of Rule 3-A of Order 18, Civil Procedure Code. It was also contended on behalf of the applicants that the provisions of Order 18, Rule 3-A, CPC were mandatory in nature and the respondents could not ask for the permission by making an application (exhibit 82) subsequent to the examination of the witnesses and the Court has no power to grant such an application without getting prior permission.

5. Thus, the questions that arise for consideration are -

- (i) Whether the provisions of Rule 3-A of Order 18, CPC are wholly mandatory?
- (ii) Whether application made subsequent to the examination of witnesses could be made by the party for its own examination? and
- (iii) Whether the Court had power to grant such an application?

6. In support of the aforesaid contention, learned counsel appearing for the applicants has relied on a ruling of the Madras High Court in the case of Ayyasami Gounder and others Vs. T.S. Palanisami Gounder, . In the aforesaid citation, the learned Single Judge of the Madras High Court held :-

"The resort to Order XVIII, Rule 3-A of the Code, after other witnesses are examined on behalf of a party thereafter, would defeat the very purpose of the rule that the party should be examined first as a witness and the other witnesses later. The requirement that the party shall appear before any other witness on his behalf has been examined, shows that in all cases, the party should be examined first before the other witnesses and only in very exceptional cases, subject to the grant of permission by court, he could be permitted to appear as a witness at a later stage. The provision, enabling the party to appear as a witness at a later stage, subject to orders of Court, and the requirement that he shall appear before any other witness on his behalf has been examined, show that the proper time at which the permission for examining a party as a witness later, should be applied for is when the party himself should appear as a witness and that according to the rule, should be before other witnesses are examined."

Thus, the learned Single Judge of the Madras High Court has taken a view that the rule is that the party should first examine itself before any other witness is examined and if the party desires to deviate from this rule, the permission of the Court should be sought before any witness is examined so that the party could examine itself later. In effect, the learned Single Judge of the Madras High Court in the aforesaid ruling has held that the provisions of Rule 3-A of Order 18 of the Code are mandatory in nature. This judgment was cited before the Trial Court and the Trial Court read it to the advantage of the plaintiffs while granting application (exhibit 82).

7. Therefore, it would be necessary to read the provisions of Rule 3-A of Order 18, Civil Procedure Code, which reads as under:-

"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."

8. A careful reading of this provision would indicate that a party wishing to examine itself should appear first as a witness before any other witness on his behalf is examined, unless the Court for reasons to be recorded, permits him to appear as his own witness at a later stage. These provisions, therefore, clearly lay down the normal rule that the party if wants to examine as witness should examine himself first and then the witnesses should follow. In case, the party wishes to deviate from this normal rule and wishes to examine witness first and himself later, then the permission of the Court should be obtained. A careful reading of this provision would indicate that there is no mention as to the stage at which permission of the Court to examine party himself at a later stage should be obtained. Therefore, the provisions of Order 18, Rule 3-A of the Code merely appear to be directory and what is mandatory is the previous permission of the Court to deviate from the general order of examination of the witnesses. This provision was incorporated with a view to obviate the general practice that the party was examining itself after the witnesses were examined with advantage to the party for filling up the lacuna left in the evidence of the witnesses. The provisions do not lay down the consequences of not following the rule. Therefore, the rule cannot be read as of mandatory nature.

9. This view has been subscribed by number of rulings not only of this Court, but also by other High Courts. In the case of Kwality Restaurant, Amritsar Vs. Satinder Khanna, , the Division Bench of the said High Court held that the intention of the Legislature was that the normal rule was that a party desiring to examine as witness should do so before anyone of his witnesses. However, the rule is not inflexible and may be deviated from with the permission of the Court. It was further observed that no specific stage is prescribed or fixed by the Statute for securing such permission and that a party may perhaps as a matter of abundant caution apply at the stage of commencing his evidence and get the necessary permission and if sufficient, ground is made out, he may secure such

permission at a later stage. Similar view has been taken by the Allahabad High Court in the case of Mohd Aqil vs. Alimulla, 1978 All.L.J. 547 as also in the case of Romesh Kumar Vs. Chanan Lal, . Moreover, even the Division Bench of the Orissa High Court in the case of Maguni Dei Vs. Gouranga Sahu and Others, took a view that the provisions of Rule 3-A of Order 18, CPC were directory in nature and that in proper cases, the Court has got power to allow the party to be examined at later stage even though the party had not obtained Court's previous permission, as provided in the rule.

10. The learned Single Judge of this Court in the case of Hari Shrawan Sutar vs. Ramdas Tukaram Patil, reported in 1985 Mh.L.J. 197 also took the view that the provisions of Order 18, Rule 3-A of the CPC lay down the normal rule that the party as a witness must offer himself as a witness before any other witness is examined. This salutary rule can be departed by leave of the Court for which reasons are required to be recorded. Once such reasoned order is made, the examination of such a party at a later stage would be quite regular and in keeping with the rule. It follows from this that but for such leave the party will not be free to examine itself as a witness at a later stage. To this extent the rule has to be treated as mandatory. That means, mandatory nature was only with regard to the leave of the Court.

11. The subject was extensively discussed by the learned Single Judge of this Court in the case of Nagorao Nilkanthrao Deshmukh & anr vs. Keshao Govind Patil, 1979 Mh.L.J. 809. After having taken into consideration the various reports of the Law Commission on the aspect and thus, considering the intention of the Legislature in enacting the provisions of Rule 3-A of Order 18, Civil Procedure Code, it observed thus -

"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 should not be said that legislature would go to the extent of making it such 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".

12. Thus, having gone through all these rulings, the following position emerges :-

That, Rule 3-A of Order 18 of the Code is directory in nature and that the only mandatory provision it incorporates is to the extent of obtaining permission of the Court. The normal rule laid down is that the party wanting to examine himself should examine first before any witness is examined. This rule can be deviated only with the permission of the Court. Such permission of the Court, it is desirable, should be obtained before any witness is examined, but such is not the mandate. Such permission can be obtained even at a later stage. In addition to the aforesaid observations made by the learned Judges of different High Courts it can be deduced that by enacting the provision of Rule 3-A, the Legislature had struck the balance between the right of the party to lead evidence as it wants and the misuse of that right in filling up the lacuna occurring in the evidence already recorded. This balance has been achieved by making it mandatory for the party wanting to deviate from the general rule to obtain permission of the Court which would ensure that the party is not misusing the right and would not use that right for filling up the lacuna.

13. Further point that arises for consideration is, whether it is open for the party to make an application seeking permission of the Court to examine himself at a later stage at its sweet will and also on the flimsy ground. The provisions of Rule 3-A of Order 18, CPC require that the Court can accord permission for deviating from the general rule that party should examine himself first and then the witnesses only for the reasons to be recorded. Considering the mandatory nature of this requirement, it is necessary to ensure that the party is not misusing the liberty. To achieve that objective, the reasons on the basis of which permission can be granted, have to be cogent and strong enough.

14. This being the legal position, we would examine facts of this case and will see as to whether the learned Trial Court was justified in granting permission. In this respect the learned counsel representing the respondents submitted that on defendants' pursis (exhibit 64), the plaintiffs were permitted to examine the witnesses first. However, what is to be noted is that it is for the plaintiffs to make an application seeking permission to examine himself at a later stage and examine witness before hand. Such application was not made by the plaintiffs. By pursis at exhibit 64, it was the defendant who brought to the notice of the Court as also the respondents/plaintiffs that they have given the list of witnesses at exhibit 57 and shown the plaintiffs as their witnesses, thus pointing out that no other witness can be examined prior to the plaintiff, without the leave of the Court. It is on this pursis that the learned Trial Judge passed the order permitting the plaintiffs to examine witness and leaving the matter of question of examination of plaintiff to be decided at a proper stage, which stage obviously was subsequent one. What is required under Rule 3-A of Order 18 is the positive act of the plaintiffs to seek permission to deviate from the rule to examine party first and then the witnesses. Such thing was not done. The order of the Trial Court though indicates that the Court permitted the plaintiffs' witness to be examined, whether permission to examine plaintiff should be accorded, was left to be decided at a subsequent stage. Therefore, I do not find any substance in

the submission made on behalf of the respondents that the Court had already accorded permission to the plaintiffs to examine plaintiff No. 3 later on.

14A. As regards the application at exhibit 82, it is pointed out on behalf of the applicants that in fact, no reasons were assigned why evidence of the plaintiff was kept back and why the evidence of plaintiff was sought to be led at a later stage. As against this, it is contended on behalf of the respondents that the plaintiffs evidence was to be led on the point of readiness and willingness to perform his part of the contract and other minor points. It was also contended on behalf of the respondents that earlier it was felt that it was not necessary to examine plaintiff in view of examination of P.W. 1 Keshao, the Power of Attorney Holder for plaintiffs. However, it was contended, on verification of the legal position, it was felt necessary to examine plaintiff No. 3 for the purpose of proving the signature on the agreement the performance of which was sought in the suit.

15. It is contended on behalf of the applicants that the perusal of application at exhibit 82 and the contents thereof would show that what was mentioned in the application was not the reason why the plaintiff No. 3 was not examined earlier to the examination of witnesses and why the plaintiff No. 3 was to be examined at a later stage. What is mentioned in the application is only the purpose. In this regard it is also pointed out that the agreement the execution of which is sought in the suit, has already been exhibited.

16. Therefore, what appears from the application at exhibit 82 is the reason for which the evidence of plaintiff No. 3 is to be led is for the purpose of proving the signature on the document in order to complete legal requirement. Although it was vehemently submitted on behalf of the applicants/ defendants that examination of plaintiff No. 3 at a later stage was with a view to fill up the lacuna, nothing material was pointed out on this aspect. It is true that the permission to deviate from the rule has to be granted on cogent reasons and to my mind, the aforesaid reason assigned by the plaintiff is quite cogent. The intention was not to leave any legal lacuna. Therefore, I do not find any substance in this submission-.

17. It was further submitted on behalf of the respondents that the scope of revisional powers u/s 115 of the CPC was very limited and it was pointed out that no irreparable loss would be caused to the defendants if the plaintiffs are allowed to examine plaintiff No. 3 as a witness. On this aspect also, no irreparable injury or failure of justice is pointed out which would be caused to the applicants. In my view, the reason of examining the plaintiff No. 3 now at a later stage, is quite just and proper and, therefore, I do not find any ground for interference in the order of the learned Trial Judge passed on exhibit 82. Under the circumstances, I do not find any substance in the revision and the same deserves to be rejected.

18. In the result, the present civil revision application fails and is dismissed accordingly. No order as to costs.