Before Sudip Ahluwalia, J.

VIJAY GANAPATI—*Petitioner*

versus

STATE OF HARYANA AND ANOTHER—*Respondents*

CR No.5694 of 2016

November 28, 2019

A. ***Code of Civil Procedure, 1908—O.18 R.3-A—Evidence of other witnesses before evidence of the party can be permitted only after Court records reasons.***

Held that, there can be no dispute on the legal position that if evidence of witnesses other than the party to the proceedings is permitted, the Court is required to record its reasons for according such permission.

(Para 8)

B. ***Eschewing of statements of other witnesses—Not permissible if no objection raised.***

Held that, to sum up therefore, this Court is of the opinion that at this stage, it is not a fit case to have the evidence of PWs 4 & 5 to be got expunged simply because the Ld. Trial Court did not record any reasons for permitting their evidence before completion of PW1's cross-examination, when undoubtedly, no serious objection, at least in writing, was raised before the Court and cross-examination of those witnesses was completed on behalf of Petitioner without insisting on recording any objection that the prescribed procedure was not being followed. Besides, a litigant cannot be permitted to approbate and reprobate at the same time by first actually and actively participating in the evidence by cross-examining the witnesses, and then to seek expunction of the same evidence merely on the ground that no reasons for accepting their evidence at that stage were recorded.

(Para 10)

Gagandeep S.Sirphikhi, Advocate
for the Petitioner.

Pawan Kumar Jhanda, Asst. A.G., Haryana
for Respondent No.1-State.

Amit Jain, Advocate
for Respondent No.2.

SUDIP AHLUWALIA, J.

(1) This Revision has been preferred against the Order dated 10thAugust, 2016 passed by the Ld. Additional District Judge, Gurgaon in case i.e. Petition No.10/3-5-12/22-4/16, vide which Application of the Petitioner, who happens to be Respondent No.2 in the said Probate Petition filed under Section 151 read with Order 18 Rule 3-A of the Civil Procedure Code (for short, 'the CPC'), was dismissed.

(2) Background of the matter can be understood by referring to the orders passed by the Ld. Court below before the date of the impugned order, i.e. 30th January, 2016 and 20th February, 2016. The two orders are set out as below :-

> "PW1 is present and her cross-examination has been recorded partly. Cross-examination of PW1 has been deferred as other witnesses are not present in the Court today and the learned counsel for respondent no.2 wants to cross-examine her with other witnesses. Now to come up on 20.2.2016 for further cross-examination of PW1 as well as for remaining evidence of petitioners.
>
> ADJ/Gurgaon.30.1.2016"

> "Cross-examination of PW4 and PW5 concluded. PW1 is present and her cross-examination has been recorded partly. Cross-examination of PW1 has been deferred as court time is over. Now to come up on 25.3.2016 for further cross-examination of PW1 as well as for remaining evidence of petitioners.
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> ADJ/Gurgaon.20.2.2016"

(3) After passing of the Order dated 20th February, 2016, the Petitioner filed his aforesaid Application (Annexure P-8) on 24th March, 2016, which was the date fixed by the Ld. Court below for cross-examination of the original PW-1. The said Application was supported by an Affidavit of Petitioner- Sh. Vijay Ganpati and also by a separate Affidavit sworn by Sh. K. Surender, Advocate, which two Affidavits both dated 24th March, 2016, are part of the Application (Annexure P-8).

(4) The Ld. Trial Court however, found no merit in the Petitioner's Application and dismissed the same after recording the following reasons –

"4. In reply to the application, it is urged that the applicant has been continuously delaying the proceedings of the petition. The conduct of the applicant has been noted by the court time and again.

The petitioner was in fact examined at the first instance and tendered her affidavit on 29.9.2015,whereupon the applicant/respondent took an adjournment for her cross examination.The case was then adjourned for 17.10.2015. On 17.10.2015 remaining witnesses were examined, however, the applicant chose not to appear and was proceeded against exparte. The case was adjourned to 26.10.2015 for arguments. On 26.10.2015, the applicant filed an application for setting aside exparte proceedings, which was subsequently allowed. However, considering the conduct of the applicant, heavy cost of Rs.10,000/- was imposed upon him. Thereafter, on 30.01.2016, the petitioner was cross -examined, but further cross-examination was deferred and the case was adjourned to 20.2.2016. On 20.2.2016, the petitioner was further cross-examined, however, it was again deferred as the court time was over. But, the applicant without any objection examined the other witnesses i.e. PW1 and PW5. Since these two witnesses were advocates, therefore, it was deemed proper that they be cross-examined and freed in time. The applicant never raised any objection regarding cross-examination of the petitioner prior to cross-examination of PW4 and PW5. The application is nothing, but a delaying tactic on the part of the applicant. It is denied that penalty of eschewing applies squarely to the petitioner and has, thus, prayed for dismissal of the application.

5. Perusal of the file reveals that petitioner Raman Sharda had filed a petition under Section 276 & 278 of the Indian Succession Act, 1925, for grant of probate, on 3.5.2012. After presence of the respondents, they left no stone unturned in delaying the matter by moving one application after the other. The issues were finally framed by the Court on 18.5.2015 and the case was posted for evidence of the petitioners for the first time for 4.7.2015. The petitioner submitted her affidavit on 29.9.2015 and on the request of applicant Vijay Ganpati, the matter was posted for

17.10.2015 for cross-examination of the said witness, but on 17.10.2015 the applicant was proceeded against exparte and the matter was adjourned to 26.10.2015 for arguments. Thereafter, an application for setting aside exparte proceedings was moved, which was allowed with heavy cost of Rs. 10,000/- and the case was fixed for 20.2.2016 for cross-examination of PW1. On 20.2.2016 cross-examination of PW4 and PW5 was concluded, however, cross-examination of PW1 was again deferred as the court time was over. PW4 Krishan Kumar is a practicing advocate in Supreme Court of India. Similarly, PW5 Sarat Chandra Nanda is also practicing advocate in Supreme Court of India. So, the contention of learned counsel for respondents that both merit. Order dated 20.2.2016 clearly reveals that no such objection was taken at that time by the applicant, who went ahead to complete the cross-examination of PW4 and PW5 and the matter was adjourned to 25.3.2016, but on 25.3.2016 instead of cross-examining the petitioner, the instant application was moved.

6.Thus, the plea of the applicant that the cross-examination of PW4 and PW5 before cross-examination of petitioner is violative of the order of the Hon'ble High Court and statutory provisions of Order 18 Rule 3-A CPC, is without any merit because the discretion is available with the court and in the instant case, the petitioner was very much present and affidavit was filed on the very first date fixed for evidence of the petitioners, but cross-examination was deferred on the request of the applicant himself. So, he cannot be allowed to take benefit of a situation created by none other than him. Hence, the law relied upon by the applicant is not applicable to the facts of the case in hand.

7. The court finds no merit in the application which is rather an abuse of process aimed at delaying an already very old petition. The application is, thus, sans merit and is dismissed with special cost of Rs.5000/-. The payment of cost in the District Legal Services Authority, shall be condition precedent before further prosecution of the matter."

(5) In challenging the aforesaid decision, the Petitioner has firstly drawn attention of this Court to the bare perusal of Order 18 Rule 3-A CPC, which provides –

> "**3-A. 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."

(6) Ld. counsel for Petitioner has further relied on the observations of a Bench of this Court *in* ***Jasvir Singh and another*** versus ***Jaspal Singh***[1] which were extensively reproduced in his Application dated 24.3.2016 (Annexure P-8) and the crucial extracts from it are set out below –

> "The parties assume that a witness can be examined in any order and the parties can also bring their own versions at any time they wish. Any breach of this rule will be viewed seriously and may result in eschewing the evidence of the parties, if no permission is taken under Order 18 Rule 3A of the Code to examine the party after examination of witnesses. I would issue this directive to apply in all future cases, so that it does not Order 18 Rule 3A of the Code and the consequences of not complying with the mandate. If, in future, any party does not offer his or her evidence first and brings third party witnesses first and later offers to tender evidence without taking prior permission, the opposite party may oppose such evidence before the party's evidence is tendered. The trial court shall not permit evidence to be given unless, it sets out reason in writing why such permission is being given. In **Gurmail Chand** versus **Ashok Verma** 2004 (3) RCR (Civil) 164this court had held that if witnesses other than party was examined and party is examined later, no objection could be taken. In my respectful view, it will amount to putting the cart before the horse. Objections could be rightfully taken only when the party shows up to tender evidence and not when third party witness is given."

(7) Thereafter a Full Bench decision of this Court in ***The Amritsar Improvement Trust*** versus ***Ishri Devi***[2] has also been relied upon by the Petitioner, in which it was observed inter-alia –

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[1] 2015(3) R.C.R. (Civil) 1024

[2] 1979 PLR 354

"9. Keeping the aforesaid canon of construction with regard to procedural laws in mind we may now go back to the language of Rule 3-A. A bare reference thereto would make it manifest that the Legislature has undoubtedly laid down the rule that a party appearing as his own witness on his behalf has been examined. However, in equally express terms one exception to the said rule has also been provided by the Legislature itself. This is that with the permission of the court a party for sufficient cause may be allowed to appear even at a stage subsequent to the examination of one or all of his witnesses. It, therefore, deserves highlighting that the rule requiring a party to step into the witness-box first is not an inflexible one and can be relaxed with the permission of the court. What however is significant to note herein is that the language of the statute does not in any way prescribe the precise time at which the permission to appear later is to be secured. It does not say that this must necessarily be in the very first instance before any witness has been examined on his behalf. One may, therefore, say that the statute is silent as to the stage at which the permission is to be secured. Nor can it be said that by necessary intendment the legislature has laid down that the said permission must be sought at the very inception of the evidence and not later. Indeed, when broadly construed, the intention of the Legislature appears to be that the normal and the ordinary rule prescribed now is that party appearing as his own witness should do so before any one of his witness. However, the rule is not an inflexible or a sacrosanct one and may be expressly deviated from with the permission of the court based on adequate reasons. No specific stage being prescribed or fixed by the statute for securing such permission, a party may perhaps as a matter of abundant caution apply at the stage of commencing his evidence and get the necessary permission and equally, if a sufficient ground is made out, he may secure the same at a later stage.

10.Coming now to precedents, in view of the fact that Jagannath Nayak's case (supra) has itself been overruled by a Division Bench of its own court, it would obviously be wasteful to examine or refute its rationale. It suffices to mention that some reliance was placed on the legislative

history of the provision and in particular the report of the Law Commission for taking that view, which was considered and repelled in M/s Kwality Restaurant, Amritsar's case (supra) to which a detailed reference can be made on this specific point. Again it would be wasteful to tread the same ground over again and agreeing with the reasoning of the Division Bench in Maquni Devi's case (supra) and the Allahabad view in Mohd. Aqil's case (supra), I would hold that the provisions of rule 3-A are directory in nature and the court is not denuded of jurisdiction to grant permission when an application therefor is made for good reasons

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."

(8) There can be no dispute on the legal position that if evidence of witnesses other than the party to the proceedings is permitted, the Court is required to record its reasons for according such permission. Indeed, this is the Statutory requirement of Order 18 Rule 3-A of the CPC already reproduced above. The observations of this Court in '***Jasvir Singh***'*s* case (Supra) are only a reiteration of the Statutory

mandate. It is also correct that the order in question passed on 20.2.2016 does not record any reason as to why examination of PWs 4 and 5 was done before completion of the cross-examination of PW1 i.e. the original Applicant in the Probate Proceedings. The contention of Petitioner in this regard is that such evidence of PWs 4 & 5 was taken by the Trial Court in spite of oral objection raised from his side by his counsel Sh. K. Surender whose own affidavit is annexed to the Application filed on the subsequent date, which was fixed for resuming cross-examination of PW1.

(9) But it is to be noted that the order dated 20.2.2016 does not indicate anywhere that any such objection was raised. Be that as it may, the fact remains that not only PWs 4 & 5 were examined on the relevant date, but their cross-examination was also conducted on behalf of Petitioner. If there was any serious objection against such examination before completion of cross-examination of PW1, it was always open for the Petitioner's counsel to decline to cross-examine the witnesses and insist that he would first complete the cross-examination of PW1. But clearly, no such objection was got recorded. It was also open to the Petitioner's side to immediately place on record an application to the effect that they would insist on completion of cross-examination of PW1 before taking up the evidence of PWs 4 & 5 in Court, but even this option was not exercised. Rather cross-examination of PWs 4 and 5 was actually completed and thereafter that of PW1 was resumed and also done to a certain extent till the Court time was over. Undoubtedly, the relevant order dated 20.2.2016 suffers from a procedural infirmity to the extent that reasons for permitting before completion of cross-examination of PWs 4 and 5 have not been recorded, but at the same time, sight can also not be lost of the fact that their cross-examination was also done by the Petitioner's side when it could very well be declined with an insistence to record the reasons why the same was being permitted. Even after the order on 20.2.2016 was passed, the Petitioner's side filed the Application for eschewing the evidence of PWs 4 and 5 more than a month later before the Trial Court itself instead of challenging the order under which their evidence was recorded, and that also in a situation when it had actively cooperated in the proceedings by having already conducted the cross-examination of those witnesses. Such approach of Petitioner's side certainly fits into the pattern of its previous conduct of causing long delays during the proceedings earlier, the details of which have already been noted by the Ld. Trial Court in the impugned order, and which has been reproduced in Para 4 above.

(10) To sum up therefore, this Court is of the opinion that at this stage, it is not a fit case to have the evidence of PWs 4 & 5 to be got expunged simply because the Ld. Trial Court did not record any reasons for permitting their evidence before completion of PW1's cross-examination, when undoubtedly, no serious objection, at least in writing, was raised before the Court and cross-examination of those witnesses was completed on behalf of Petitioner without insisting on recording any objection that the prescribed procedure was not being followed. Besides, a litigant cannot be permitted to approbate and reprobate at the same time by first actually and actively participating in the evidence by cross-examining the witnesses, and then to seek expunction of the same evidence merely on the ground that no reasons for accepting their evidence at that stage were recorded.

(11) If anything, in the present case, it is the Petitioner who would appear to be acting in a manner similar to laying the cart before the horse, which expression ironically finds mention in the observations of this Court *in* ***Jasvir Singh's*** case (supra) while referring to the decision in ***Gurmail Chand's*** case (supra) as reproduced earlier. It is to be noted that at an earlier stage in the Suit, partial cross-examination of PW-1 had been actually conducted on behalf of Petitioner, who thereafter had himself sought its deferment on 30.01.2016 as he wanted her to be cross-examined 'with her other witnesses'. Now if the provisions of Order 18 Rule 3-A CPC were to be followed strictly as insisted by the Petitioner, it was also incumbent upon him to ensure that cross-examination of PW1 (applicant) from his side was itself completed before evidence of her remaining witnesses was taken. But the Petitioner himself got such cross-examination adjourned through his counsel, who thereafter got the evidence in cross-examination of her other witnesses to be completed on the next date followed by a resumption of her cross-examination without taking any steps to ensure that his objection to recording of evidence of the other witnesses could be verified at a later stage if necessary. In the given facts and circumstances, he certainly does not appear entitled to seek expunction of such evidence of witnesses whose cross-examination has been voluntarily done from his side after cross-examination of applicant (PW1) was initially got deferred on his own request. This conduct coupled with his previous record of having caused long delays in the proceedings at the earlier stages would certainly not entitle him to seek any indulgence from this Court.

(12) No merits. Dismissed.

(13) The Ld. Trial Court is now directed to endeavour to complete the pending proceedings before it as expeditiously as possible preferably on a day to day basis, and without granting any unnecessary adjournments to either side. It would be appreciated if proceedings are completed preferably within four months from the date of communication of this order.

Tejinderbir Singh