Before S. S. Sandhawalia, C.J. & S. P. Goyal, J.

JASWANT KAUR AND ANOTHER,—*Petitioners*

versus

DEVINDER SINGH AND OTHERS,—*Respondents*

Civil Revision No. 872 of 1982.

November 12, 1982.

Code of Civil Procedure (V of 1908)—Order 18, Rule 3—Option to reserve right of rebuttal to the evidence adduced by the other party—Such option—When to be exercised—Last stage therefor—Whether should be before the other party begins its evidence.

Held, that the real object of rule 3 of Order 18 of the Code of Civil Procedure, 1908 is to put the opposite party on its guard that the evidence it is going to lead would be challenged not only by the cross-examination of witnesses but also by positive evidence by way of rebuttal. It is in a way a notice to the opposite side of the reserved right to lead evidence again. In our jurisprudence, based as it is on the adversary system, the fair rule of the game is that the other party should be made well aware before it begins its evidence that it would be matched and opposed by evidence in rebuttal. Not exercising the option of reserving such a right upto penultimate stage would put the other side off its guard and it might well rest on its oars without anticipating any testimony by way of rebuttal. This is the prejudice which rule 3 seems intended to avoid and obviate. A close look at rule 3 would make it plain that its provisions do not in themselves prescribe inflexibly the precise time for exercising the option of reserving the right of rebuttal. This has to be consequently read into it by necessary implication so as to give it a meaning and not to cause prejudice to any one of the parties. Indeed, in a procedural provision, if the legislature does not expressly fix the stage the statute would obviously be construed with a certain modicum of flexibility. Considering rule 3 in the spirit of liberality it seems to follow that the stage for reserving the right to lead evidence in rebuttal should remain open upto the time beyond which it might tend to cause prejudice to the other party. Plainly enough this would be the point of time before the commencement of the evidence by the opposite side at which stage clear notice may be given that the same may be well met by rebuttal testimony. It is, therefore, held that the last stage for exercising the option to reserve the right of rebuttal can be before the other party begins its evidence.

(Paras 5, 6, 7 and 12)

Held, that an overly strict view is not to be taken in regard to the modalities of reserving the right of rebuttal. If it is possible to necessarily imply from the mode of reservation that the right of rebuttal has been retained then it should not be negatived merely on the ground that it has not been so done in express-terms. Cases where the party or its counsel makes the statement that he closes his evidence in the affirmative only, would inevitably imply that rebuttal evidence may well be led and consequently such right has been reserved.

(Para 13)

Motibhai Phabhubhai *v.* Umedchand Kasalchand, A.I.R. 1956 Saurashtra, 52.

Laxmi Narayan *v.* Banuram, A.I.R. 1977 M.P. 191.

DISSENTED FROM

Case referred by Hon'ble Mr. Justice S. P. Goyal,—vide *order dated 21st April,* 1982 *to a Division Bench for decision of an important question of law involved in the case. The Division Bench consisting of the Hon'ble the Chief Justice Mr. S. S. Sandhawalia and Hon'ble Mr. Justice S. P. Goyal after deciding the question referred to, again sent the case back to Single Judge for decision on merit. Hon'ble Mr. Justice G. C. Mital finally decided the case on 2nd May,* 1983.

Petition under Section 115 *CPC for revision of the Order of the Court of Shri N. D. Bhatara, P.C.S. Additional Senior Sub-Judge, Sangrur, dated 25th March,* 1982 *rejecting the petition.*

CIVIL MISC. No. 1286 *C-II-*1982.

Application under section 151 *CPC praying that pending the decision of the revision petition, further proceedings before the trial Court may kindly be stayed.*

J. R. Mittal, Advocate, *for the petitioner.*

Anand Sarup, Advocate, *for the respondents.*

JUDGMENT

S. S. Sandhawalia, C. J.

(1) What is the last stage for exercising the option to reserve the right of rebuttal to the evidence adduced by the other party under Order 18, Rule 3 is the core question in this set of five civil revisions which are before us on a reference.

(2) The facts relevant to the common question aforesaid may be briefly noticed from C. R. 872 of 1982—*Jaswant Kaur and others* v. *Devinder Singh and others.* The plaintiff-respondents had brought suit for permanent injunction restraining the defendant-petitioners from interfering in the agricultural land in their possession. On the pleadings of the parties a number of issues were framed and the burden of proof thereof was rested respectively on the plaintiffs or the defendants. The plaintiffs who apparently had the right to begin had not concluded their evidence both in the affirmative and in rebuttal when on the 19th of May, 1981, the plaintiffs' counsel made a statement that he was closing his case in affirmative only. At a later stage when the plaintiffs wished to lead evidence in rebuttal, an application was preferred on behalf of the defendants praying that the plaintiffs should be disallowed from doing so because the option to reserve the right of rebuttal had not been expressly exercised at the very outset. The trial court by a detailed order rejected the said application holding *inter alia* that the statement given by the plaintiffs' counsel that he was closing the evidence in the affirmative had implicit therein that the right of rebuttal stood reserved.

(3) This set of civil revisions first came up before my learned brother S. P. Goyal J. Before him reliance was sought to be placed on certain obserations in *National Fertilizers Ltd. Bhatinda* v. *Municipal Committee, Bhatinda and another* (1). Noticing the significance of the issue involved and expressing some doubt about the correctness of the view in *National Fertilizers' case* (supra) the matter was referred to a larger Bench.

(4) Inevitably the question herein would revolve around the specific language of Rule 3 of Order 18 which may be read for facility of reference:—

> "3. *Evidence where there are several issues*:—Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other

(1) CR 1406/81 decided on 26th February, 1982.

party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case."

Perhaps at the very threshold it must be borne in mind that it is essentially a procedural provision that we are called upon to construe. The oft repeated adage that the procedure is the hand-maid of justice and intended to advance its course and not to obstruct the same is a sound canon of construction for provisions of this nature. Therefore a somewhat liberal interpretation as against an overly strict one is inevitably called for.

(5) Again in giving a meaning to rule 3 the larger purpose thereof cannot be lost sight of, nor is it to be construed in isolation from the preceding rules 1 and 2. These provide for the right to begin in the order in which the parties are to state their case and produce evidence in support of the issues and the burden of proof whereof rests on them. When read along with these provisions it seems to be more than manifest that the real object of rule 3 is to put the opposite party on its guard that the evidence it is going to lead would be challenged not only by the cross-examination of witnesses but also by positive evidence by way of rebuttal. It is in a way a notice to the opposite side of the reserved right to lead evidence again. In our jurisprudence, based as it is on the adversary system, the fair rule of the game is that the other party should be made well aware before it begins its evidence that it would be matched and opposed by evidence in rebuttal. Not exercising the above option of reserving such a right up to penultimate stage would put the other side off its guard and it might well rest on its oars without anticipating any testimony by way of rebuttal. This is the prejudice which rule 3 seems intended to avoid and obviate.

(6) Now even the closest look at rule 3 would make it plain that its provisions do not in themselves prescribe inflexibly the precise time for exercising the option of reserving the right of rebuttal. This has to be consequently read into it by necessary implication so as to give it a meaning and not to cause prejudice to anyone of the parties. Indeed in a procedural provision, if the legislature does not expressly fix the stage the statute should obviously be construed with a certain modicum of flexibility. This would appear to be plain on principle and equally from binding precedent. Reference in this connection may be made to the

succeeding rule 3-A which was inserted in the Code by the 1976 Amending Act. This reads as under:—

> "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".

Even whilst construing this provision which is somewhat more specific the Division Bench in *M/s Kwality Restaurant* v. *Satinder Khanna* (2) held that the stage at which the requisite permission is to be sought is not so vital a matter which should debar the litigant later from seeking the permission or inexorably stifle his evidence if he once misses the opportunity of securing such permission at the very time when he is to commence leading his evidence. This view was later reiterated by the Full Bench in *The Amritsar Improvement Trust* v. *Ishri Devi*, (3) in the following terms:—

> "* * *. 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."

(7) Now considering rule 3 herein in the aforementioned spirit of liberality it seems to follow that the stage for reserving the right to lead evidence in rebuttal should remain open up to the time beyond which it might tend to cause prejudice to the other party. Plainly enough this would be the point of time before the commencement of the evidence by the opposite side at which stage clear notice may be given that the same may well be met by rebuttal testimony.

(8) It was contended before us that the precise time for exercising the option should be fixed immediately when the party

(2) AIR 1979 Pb. and Hary. 72.
(3) 1979 P.L.R. 354.

closes its own evidence. In actual practice it would ordinarily be so. However, I do not find this particular point of time as wholly sacrosanct. Reference in this connection is called to Order 16, Rule 1. This provides—

"1. *List of witnesses and summons to witnesses:*—

(1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.

(2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purposes for which the witness is proposed to be summoned.

(3) ** ** **

(4) ** ** **

1—A ** ** **"

From the aforesaid provisions, it follows that with reasonable diligence the parties can be fully aware of the list of witnesses which the other side proposes to call in support of its case. Equally, because of the provisions of sub-rule (2), the purpose for which the witness is proposed to be called, has to be indicated if the party wishes to secure his attendance by summons. Therefore, no serious prejudice arises even if the right is exercised at a stage later than the commencement of the evidence of the party who has the right to begin. In the larger perspective I would, therefore, opt for a somewhat liberal view to hold that this right may well be exercised at any time before the commencement of the evidence by the opposite side so as to put it on guard and avoid prejudice before it begins the examination of its own witnesses.

(9) Now apart from principle and the language of the statute, the weight of precedent also seems to be heavily tilted in favour of the view I am inclined to take. In *Illapu Nookalamma* v. *Illapu Simchachalam*, (4) on a close examination of the question it was

(4) AIR 1969 A. P. 82.

concluded as follows:—

> "— — —Hence, on a close and careful reading of the provisions of Order 18, Rule 3, Civil Procedure Code, the plaintiff must be held to be within her limits in filing the memo, after the close of her evidence and before the commencement of the defendant's evidence, exercising the option contemplated in Order 18, Rule 3, Civil Procedure Code."

Same view has been specifically expressed in *Inderjeet Singh* v. *Maharaj Raghunath Singh and others,* (5) and *S. Chandra Keerti* v. *Abdual Gaffar and others,* (6). A similar view has then been expressed by a learned Single Judge of Delhi High Court in *Kaviraj Ganpat Lal Sidhwani and others* v. *Om Parkash and another* (7)

(10) Though this reference appears to have been necessitated because of the somewhat elongated inferences from the observations of R. N. Mittal, J. in *National Fertilizers' case* (supra), on a closer perusal we find that the said judgment does not in any way lay down anything to the contrary and in fact is silent on the specific point before us. It is, therefore, wholly unnecessary to advert thereto in any detail.

(11) Undoubtedly, discordant notes have been struck in some of the other High Courts and a reference must first be made to the Division Bench judgment in *Motibhai Prabhubhai* v. *Umedchand Kasalchand,* (8). The concluding part therein lends support to the stand that the option is to be exercised at the time the party having the right to begin states its case and not later. However, what calls for pointed notice here is that the precise issue involved before the Bench was, whether the extreme and an overly strict view taken by Chief Justice Divatia in *Sanghavi Harjivandas* v. *Sanghavi Amratial Mavji,* (9) that the right of rebuttal has to be reserved before the date fixed for taking evidence was correct. The Division Bench held that such an extreme view was untenable and over-ruled the same whilst further opining that no formal application for doing

(5) AIR 1970 Raj. 278.
(6) AIR 1971 Mysore 17.
(7) 1975 P.L.R. (Delhi Sec.) 10.
(8) 1956 Saurusthra 52.
(9) 2 Saurahtra L. R. 156 (A).

so was necessary. It would appear that the attention of the Division Bench was primarily focused to the correctness of the earlier view and the issue as to what would be the last stage for exercising the option was not adequately canvassed. For the reasons already stated in the earlier part of the judgment and the weight of precedent to the contrary, I would respectfully record my dissent from *Motibhai Prabhubhai's* case (supra). Again, the learned Single Judge in *Laxmi Narayan* v. *Baburam*, (10) has opined that the option to reserve the right of rebuttal has to be made when the party begins his own evidence. What, however, pointedly calls for notice is that despite holding so, the Court did allow the plaintiff to lead evidence in rebuttal even though he had reserved the right long after beginning his evidence. For the reasons already recorded, with the greatest deference to the learned Single Judge, I would wish to dissent from what appears to me an overly strict construction of a procedural provision.

(12) To conclude, I would hold on the language of Order 18, Rule 3, Civil Procedure Code, on principle and on the weight of precedent, that the last stage for exercising the option to reserve the right of rebuttal can well be before the other party begins its evidence.

(13) Before parting with this judgment, the modalities of reserving the right of rebuttal also calls for some comment. It appears to me that herein also an overly strict view is not to be taken. If it is possible to necessarily imply from the mode of reservation that the right of rebuttal has been retained, then it should not be negatived, merely on the ground that it has not been so done in express terms. Cases where the party or its counsel makes the statement that he closes his evidence in the affirmative only, would inevitably imply that rebuttal evidence may well be led and consequently such right has been reserved.

(14) The common question of law having been settled as above, these Civil Revisions would now go back to the Single Judge for decision on merits, in accordance therewith.

S. P. Goyal, J.—I agree.

N. K. S.

(10) AIR 1977 M. P. 191.