Before S. S. Sandhawalia, C. J. and S. S. Dewan, J.

KWALITY RESTAURANT,—*Petitioner-Defendant.*

versus

SATINDER KHANNA,—*Respondent-Plaintiff.*

Civil Revision No. 358 of 1978

July 26, 1978.

Code of Civil Procedure (V of 1908)—*Order* 18 *Rule* 3-*A*—*Party seeking permission to appear as his own witness after the examination of his other witnesses*—*Such permission*—*Whether must be taken at the commencement of that party's evidence.*

Held, that from a reading of rule 3-A of Order 18 of the Code of Civil Procedure, 1908, it is manifest that the normal rule prescribed by the Legislature is that a party appearing as his own witness should do so before any one of his own witnesses. However, the rule is not inflexible and it may be deviated from with the permission of the court and the party may, for sufficient cause, be allowed to appear even at a stage subsequent to the examination of one or all of his witnesses. The language of the statute does not prescribe the precise time at which such permission is to be secured and it does not say that this must necessarily be in the very first instance before any witness has been examined on behalf of the party. Moreover, the rule aforesaid is one of procedure and such a rule is to be liberally construed and care must be taken that so strict an interpretation be not placed thereon whereby technicality may tend to triumph over justice. (Paras 4 to 7).

Jagannath Nayak v. *Laxminarayan Thakur and others*, A.I.R. 1978 Orissa 1. (DISSENTED FROM).

Petition under Section 115 *C.P.C. for revision of the order of the Court of S. Dalip Singh, Sub-Judge, Amritsar, dated the* 23*rd January,* 1978, *overruling the objection of the learned counsel for the defendant in regard to the statement of the plaintiff.*

M. K. Mahajan, Advocate, *for the Petitioner.*

Bhagirath Dass, Advocate, with S. K. Heeraji, Advocate, *for the Respondent.*

S. S. Sandhawalia, C.J.

1. Whether rule 3A of order 18 of the Civil Procedure Code envisages that permission of the Court for a party to appear as his

own witness subsequent to his other witnesses must necessarily be obtained at the very commencement of the evidence and not later is rather significant question which falls for determination in this civil revision admitted to a hearing by the Division Bench?

2. It is unnecessary to advert to the facts in any great detail. It suffices to mention that the trial Court for adequate reasons accorded permission (despite objection raised on behalf of the defendant) to the plaintiff for appearing as his own witness on an application made by him apparently after he had already examined evidence in support of his case. This order is sought to be challenged primarily on the basis of the judgement reported as *Jagannath Nayak* v. *Laxminarayan Thakur and others* (1) which undoubtedly supports the case of the petitioner.

3. As the controversy must necessarily revolve around the provisions of the statute, it is reproduced for facility of reference—

> "R. 3A. *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."

4. Now a bare reference to the language of the aforesaid provision would make it manifest that the legislature has laid down the rule that a party appearing as his own witness must so appear before any other witness on his behalf has been examined. This rule is couched in terms mandatory. However, in equally express terms one exception to the said rule has also been provided by the legislature. This is that with the permission of the Court such 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. What is significant to note herein is that the language of the statute does not prescribe the precise time at which such permission 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 behalf of the party. One may say that the statute is, therefore, silent as to the stage at which this permission is to be secured. Nor can it be said that by necessary intendment the said permission must be sought at the very inception of the evidence and not later.

(1) A.I.R. 1978 Orissa 1.

5. In construing a provision of the aforesaid nature it must necessarily be kept in the forefront that in essence it lays down a rule of procedure. As has been oft repeated, procedure is ultimately the handmaid of justice meant to advance its cause and not to obstruct the same. A procedural rule, therefore, has to be liberally construed and care must be taken that so strict an interpretation be not placed thereon whereby technicality may tend to triumph over justice. It has to be kept in mind that an overly strict construction may result in the stifling of material evidence if for one reason or another the party concerned fails to secure the permission at the very first instance. That cannot easily be ascribed to be the intent of the legislature in a matter essentially procedural.

6. With the aforesaid canon of construction in the background one may proceed to examine the argument raised on behalf of the respondent. Relying particularly on the last lines of the rule, i.e. "for reasons to be recorded, permits him to appear as his own witness at a later stage", it was contended by Mr. Bhagirath Dass that the words "at a later stage" may go well with the permission to be obtained as also with the sequence of the stage of the appearance of the party. It was in fact contended that the language of the statute if at all is plainly open to the construction that both the permission and the stage of appearance by the party may be later to the examination of some or all of his evidence. Without more it may be observed that this argument is again not devoid of plausibility. It may well be imagined that a plaintiff or a defendant at the very earliest stage may not even think it necessary to step into the witness-box in support of his case. However, the trend of evidence either his own or that of the opposite party may necessitate his own examination or he may feel compelled to do so even at a later stage. But denying him that right merely on the ground that he did not at the very first instance anticipate such necessity and thus secure the permission of the Court before examining any one of his witnesses would perhaps be too harsh a construction to place on the rule in the absence of any express or implied intendment to that effect.

7. Broadly construed, therefore, the intention of the legislature appears to be that the normal rule prescribed by the legislature now is that a party appearing as his own witness should do so before any one of his own witnesses. However, the rule is not inflexible and may be deviated from with the permission of the

Court. No specific stage is prescribed or fixed by the statute for securing its 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 sufficient ground is made out, he may secure such permission at a later stage.

8. Coming now to the judgment primarily relied upon in *Jagannath Nayak's case* (supra), it is evident that heavy reliance has been placed on the legislative history and in particular the report of the Law Commission. It is perhaps instructive to quote the relevant part of the 54th Law Commission Report on the point:—

> "18.2. We shall first refer to an important point regarding examination of the parties. The matter was considered in the earlier Report, but, as we take a different view, we propose to discuss it again.
>
> 18.3. 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. The Commission, in its Report on the Code, however, considered it unnecessary to make any such statutory provision. It noted that this should be the ordinary rule, but thought that a rigid provision on the subject would not be desirable.
>
> 18.4. We think that the amendment recommended in the 14th Report should be carried out. Since the proposed rule will be confined to ordinary cases, the hardships arising from special features of the case, should not present a problem. Having regard to the persistent and notorious malpractice indulged in by litigants in this respect—malpractice which borders on dishonesty—we think that the time has come to insert a statutory provision."

A reference to *Smt. Gurdial Kaur* v. *Pyara Singh* (2) would indicate that apart from the statutory provisions, precedent had earlier ruled that the plaintiff must first come in the witness-box to depose to his case and be followed by corroborative evidence. However, it was equally noticed that practice sometimes ran contrary to this desirable rule and in the absence of a statutory provision the same could not be held as illegal. The legislative history and the above quoted comments

(2) A.I.R. 1962 Pb. 180.

of the Law Commission would indicate that they plainly took notice of this situation and the 27th Report of the Law Commission observed that though this should be the ordinary rule yet a rigid provision on the subject would not be desirable. The 54th Report, however, thought that the time had come when a statutory provision might be made, but did not necessarily say that it should be couched in absolute rigidity. Instead the observation would indicate that this rule would be confined to ordinary cases and the hardship, if any, arising therefrom was sought to be ameliorated by making an exception to this rule by way of seeking permission of the Court for appearance by the party as his own witness at a later stage. The relevant portion of the Report does not in any way indicate that the stage at which the permission was to be secured was either fixed or inflexible by necessary intendment. Indeed this seems to have been left entirely open. With great respect to Ray, J., in the Orissa case, we are unable to find anything in the legislative history and the reports of the Law Commission which would indicate that any inflexible rule with regard to the stage of seeking permission was sought to be laid down.

9. The learned Single Judge in *Jagannath Nayak's case* (supra) had then sought support for his view on the ground that the rule was mandatory and not directory. Assuming it to be so, it is clear that the mandate laid therein regarding the party appearing before his other witnesses has been itself provided with an exception where permission can be accorded by the Court for adequate reasons. When the provision itself provides both the mandate and an exception to the rule, the one cannot be divorced from the other. The significant thing to highlight here is that the question at issue is not with regard to the ordinary rule that a party shall appear before any witness on his behalf but pertains to the stage at which permission to appear at a later stage is to be secured. Whilst the ordinary rule with the exception may be deemed as mandatory, there is nothing inflexible in rule 3-A with regard to the stage of the permission. For the reasons aforesaid, with great respect we are compelled to record our dissent from the view expressed in *Jagannath Nayak's case* (supra).

10. We are inclined to hold that a too narrow view of a procedural provision would not tend to subserve to the interest of justice. The stage at which the requisite permission under the statute 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.

11. We are, therefore, of the view that such permission may be sought at any stage and if the Court finds merit in the same it would not be debarred from acceding to such a prayer.

12. No other point has been urged.

13. Finding no merit in this revision petition we hereby dismiss the same but leave the parties to bear their own costs.

H. S. B.

Before S. S. Sandhawalia, C.J. and S. S. Dewan, J.

AVON SCALES COMPANY, SONEPAT,—*Petitioner*

versus

STATE OF HARYANA and others,—*Respondents.*

Civil Writ Petition No. 2381 of 1975

August 7, 1978.

Haryana General Sales Tax Act (20 of 1973)—Sections 1(3) and 40—Retrospectivity given to section 40—Whether valid—Statutory remedy of appeal not availed of—Assessee—Whether entitled to relief under the extraordinary writ jurisdiction.

Held, that subject to the constitutional restrictions, power to legislate includes the power to legislate both prospectively as well as retrospectively. Except for the bar aforesaid the Legislature has plenary jurisdiction to give retrospectivity to its provisions. As such, the retrospective operation given to section 40 of the Haryana General Sales Tax Act, 1973 is valid. (Para 6).

Held, that if an impugned order is appealable, the writ petitioner must necessarily be confined to his ordinary remedy by way of appeal. Merely because he had chosen not to resort to the same or had allowed the said remedy to become time barred by preferring the writ petition, is no ground for affording him the extraordinary remedy in the writ jurisdiction merely because of his own default. (Para 7)

Petition under Articles 226 and 227 of the Constitution of India praying that this Hon'ble Court be pleased to :—

(i) *Send for the records of the respondents relating to the impugned order, Annexure 'P/6' and after a perusal of the same the impugned order, Annexure 'P-6', be quashed;*