

Km. Sangeeta Khanna & Another ... vs Ram Bharat on 17 August, 2022

Author: Sharad Kumar Sharma

Bench: Sharad Kumar Sharma

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL
Civil Revision No.30 of 2022

Km. Sangeeta Khanna & anotherRevisionists
Vs.

Ram BharatRespondent

Mr. Sagar Kothari, Advocate, for the revisionists.
Mr. Parikshit Saini, Advocate, for the respondent.

Hon'ble Sharad Kumar Sharma, J (Oral)

This is plaintiff's revision, which stood admitted by this Court by an order dated 14th June 2022.

2. Learned counsels for the parties, have consented upon that they don't have any objection, in case, if the revision itself is considered by this Court, on its own merit at this stage.

3. In view of the aforesaid consensus, yesterday the Counsels were heard at length, and the matter was spread over to be continued to be argued today.

4. The plaintiff to the present civil revision preferred under section 115 of the CPC, had put a challenge to the impugned order dated 12th April 2022, as it has been passed by the court of Civil Judge (Senior Division), Haridwar, in Original Suit No.274 of 2019, "Sangeeta Khanna & others Vs. Rambharat", whereby the plaintiff's application being paper No.88(c) 2, which was said to have been preferred under Order 18 Rule 3A of the CPC, has been rejected.

5. The learned counsel for the revisionist, had put a challenge to the impugned order of rejection of his application paper no.88(c) (2); on the ground that the basic purpose and intention of the legislative amendment carried, with effect from 1st July 1977, resulting into an insertion of the Rule 3A to Order 18 of the CPC, had altogether a different objective to be met with in order to eradicate the abuse of the process of law, in the regular civil proceedings, which are being tried by the learned Trial Court or any other regular civil court for that purposes.

6. The grievance of the revisionist is that in the principal Civil Suit no.274 of 2019, the defendants have put in appearance, and have submitted the list of witnesses, which they intended to adduce in

support of their case by recording their oral testimony, in support of their contention, and as per the list of witnesses DW1 and DW2, were said to be the independent witnesses, who were not the impleaded defendant to the suit itself. The sole defendant was named at Serial Number 3, in the list of witnesses, who was supposed to be adduced as witness by the defendant in support of their contentions raised in the written statement.

7. The argument of the learned counsel for the revisionist is that the permission to adduce evidence of the DW3 i.e. the sole defendant to the proceedings of the suit, could not be permissible to be adduced after the recording of the statement of DW1 and DW2, in the absence of there being the prior compliance of the provisions contained in the second part of the Rule 3A of Order 18 of the CPC. Order 18 Rule 3A, of the CPC is extracted hereunder:-

"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."

8. If the provisions contained under Order 18 Rule 3A of the CPC, as per the opinion of this Court, which was inserted by virtue of the amendment made by the amending Act of 1977, it provided that any party may adduce oral evidence, in a case, but it shall be only after he concludes the oral evidence, if any, submitted in the Court, so it permits concisely under the distinct heading. He submits that the recording of the statement by a witness party to the proceedings, at a later stage could only be permissible, unless the court assigns the reasons, after permitting the witnesses to be examined later, for the reasons to be recorded to appear in person, after recording of the statement of any other witnesses, by way of an oral testimony.

9. The basic purpose of Order 18 Rule 3A of the CPC, as inserted by Act no.104 of 1976, with effect from 1st February 1977, it basically intended to avoid an abuse of process of law court, which is to be normally resorted to by the Civil Courts, in the procedures, which are governed by the provisions of the CPC to be read with the provisions of General Rule Civil.

10. It has been argued by the learned counsel for the revisionist, that the recording of the witnesses, and particularly, the defendant, herein, who was shown to be DW 3; in the list of witnesses produced by him only, he couldn't have been permitted to record his statement, after recording of the oral statement of the other defendant witnesses i.e. DW1 and DW2, who were not the party to the proceedings to the suit; because in an eventuality if the recording of the witnesses of the sole defendant i.e. DW3, is permitted to be carried, in the absence of there being a prior permission being granted by the Court, it would rather prejudice the proceedings itself, because he argues that if such a procedural permission is permitted to be overridden by permitting to record the statement of the sole defendant DW3, later on after the recording of the statement of the DW1 and DW2, who were not the defendants to the suit, it would rather deceive the very purpose of the insertion made by the Act No.104 of 1976.

11. In support of his intentions, he submits that the very basic legislative purpose for inserting the aforesaid provisions, it finds reference from the 54th Law Commission report, where it recommended certain amendments to be inserted in the CPC, and particularly, he has made reference to the recommendation of the Law Commission, as contained in its paragraph 18.4, which is extracted hereunder:-

"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 litigant's in this respect - malpractice which borders on dishonesty - we think that the time has come to insert a provision."

12. In fact, if the simplicitor language of the Law Commission report is taken into consideration, the very purpose of insertion of the Rule 3A to Order 18 of the CPC, was with a particular procedural objective to be met with in order to eradicate the probable procedural malpractices or nefarious act of the parties to the proceedings, which may, as a consequences of the subsequent recording of the statement of the principal defendant, after the recording of the witnesses of the DW1 and DW2, herein, may have an effect of patching up of the previous lacuna of statement of other defence witnesses.

13. It may deceive the very purpose of the insertion carried under Rule 3A of Order 18 of the CPC, because it may be utilized as an instrument by the principal defendant to fill up the lacunaes of the statement recorded by the DW1 and DW2, or any other such defendant witnesses, who have recorded their statement prior to the recording of the statement of the principal defendant to the proceedings of the civil suit.

14. The law in this field, does not absolutely create a bar, that after the recording of the witnesses of the other witnesses of the defendant, the defendant himself can record his statement, but his recording of the statement of defendant is contained with a rider which has been provided under second part of Rule 3A of the CPC, that such a permission of recording of the statement, could only be permitted, subject to the condition, that there is a permission by the court and for which the court is incumbent to record it's reason before giving any such permission to record the statement of the witnesses of the sole defendant as DW3, after recording of the evidence of the DW1 and DW2.

15. Admittedly in the instant case, and even as apparent from the impugned order on the face of it, the rejection order does not spells out that at any stage of time, prior to permitting DW3, to record his statement; any such prior permission provided under second part of Order 18 Rule 3A of the CPC, for recording of the statement of the defendant, by appearing in the witness box, could be permitted to be recorded, after the recording of the statement of the DW1 and DW2, and that too in the absence of there being a prior permission, as contemplated by Rule 3A to Order 18 of the CPC.

16. Hence, in that eventually, he submits that his application preferred under Order 18 Rule 3A of the CPC, was wrongfully rejected by the learned court below for the reason being that in the absence

of there being a prior permission of the court, the DW3 i.e. the (sole defendant), cannot be permitted to record his statement, because it deceives the very legislative intent of insertion to Order 18 of Rule 3A of the CPC.

17. Even, if the reasons, which has been assigned, therein, in the impugned order if that is taken into consideration, particularly, in the context of the reason, which has been given in paragraph 7 of the impugned order, in fact the learned trial court has not considered the implications of the second part of the Rule 3A of Order 18 of the CPC, that its is a satisfaction of the precondition, of grant for the permission only after assigning reasons, to permit recording of the statement of the witness, the sole defendant as DW3, and no such finding as such has been recorded, that the second part of Rule 3A of Order 18 CPC, was ever complied with by the learned Trial Court, prior to permitting the DW3 to record his statement in the proceedings of the Civil Suit No.274 of 2019, and even no such finding, as such has been even recorded by the learned Trial Court, and the only logic, which has been given for rejecting the application of the revisionist under Order 18 Rule 3A of the CPC, is that the plaintiff, can always avail an opportunity of cross examination of the witness at a later stage of the proceedings.

18. This premonition expressed by the learned trial court, that the plaintiff can always avail the opportunity of the cross examination of the DW3, after permitting him to record his statement in contravention to the provisions contained under Order 18 Rule 3A of the CPC, would be in absolute contravention to the provisions contained under Order 18 Rule 3A of the CPC, and no such statement of the DW3 could be permitted to be recorded after the recording of the statement of the DW1 and DW2, who were not even the principal defendants impleaded in the suit.

19. Hence, the very basis assigned by the learned trial court, of Civil Judge (Senior Division) in the impugned order dated 16th April 2022, by carving out an exception for rejecting the application of the revisionist, under the pretext that the said lacunae can be patched up by permitting the plaintiff to cross examined the DW3 at a later stage. This Court is of the view that, that in itself cannot be permitted to be carried in contravention to the basic objective, as envisaged by the provisions contained under Order 18 Rule 3A of the CPC.

20. The counsel for the revisionist had in support of his contentions has referred to, the two judgments as reported in 2000 SCC online Bombay page 33, "Sanjay Narayanrao Barde & another Vs. Vimal Kesharao Balram & others", wherein, while referring to paragraph 12, it has been observed that the provisions contained under Order 18 Rule 3A of the CPC, is directory in nature, and it is being also held by the same judgment that it is only mandatory for the purposes of compliance of the second part of the intention contained under Order 18 Rule 3A of the CPC, of seeking a prior permission from the court for recording of the statement of principle defendant later on.

21. Hence, the question which was referred to be answered by the coordinate Bench of the Bombay High Court, was formulated in paragraph 5 of the judgment with regards to as to what implications, will the provisions under Order 18 Rule 3A of the CPC would have, as an effect of the subsequent examination of the witnesses, which could be made by the parties, of its own examination.

Paragraph no.5, of the said judgment is extracted hereunder:-

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

(i) Whether the provisions of Rule 3-A of Order 18, Civil Procedure Code 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?

22. The question, thus, dealt with in paragraph 5, which has been extracted above, has been answered by the coordinate Bench of the Bombay High Court in paragraph 9 and 12, of the said judgment, which is extracted hereunder:-

"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 M/s. Kwaliti Restaurant v. Satinder Khanna, AIR 1979 Punj and Har 72, 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 v. Alimulla, 1978 All LJ 547 as also in the case of Romesh Kumar v. Chanan Lal, MANU/JK/0002/1991: AIR 1991 J&K 4.

Moreover, even the Division Bench of the Orissa High Court in the case of Maguni Dei v. Gouranga Sahu, MANU/OR/0065/1978 : AIR 1978 Ori 228 took a view that the provisions of Rule 3-A of Order 18, C.P.C. 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.

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.

23. Though, while holding the provisions of Order 18 Rule 3A of CPC, to be directory in nature, but this Court is of the view, that, if the implications of paragraph 12, of the said judgment is taken into consideration, though the law doesn't specifically creates a bar of non recording of the statement of the principal witness, subsequent to the recording the statement of the other independent witnesses, who were not the party to the proceedings, but the second part of the provisions contained under Order 18 Rule 3A of the CPC (extracted above), would be mandatory in nature, that such type of permission could only be granted, by the trial court, subject to the satisfaction of a prior condition as specifically contemplated by the Law Commission report, to be read with in consonance with the intentions contained under Rule 3A of Order 18 of the CPC, that the Court could permit the same but only after recording of the statement of the witness, after the examination of the other witnesses subject to the condition that there is a prior permission by the Court and that too after recording of the reasons.

24. The learned counsel for the revisionist has further referred to yet another judgment of the Bombay High Court as reported in 1984 SCC Online Bombay page 276, "Hari Shrawan Sutar Vs. Ramdas Tukaram Patil". In this case too almost akin situation has arisen which has been dealt in in paragraph 4 and 5, of the said judgment of the coordinate Bench of the Bombay High Court, which is extracted hereunder:-

"4. The provisions of Rule 3-A of Order 18 of the Code were inserted by Amending Act No. 104 of 1976 to the Code. That lays down a Rule of law with regard to the order of witnesses to be examined in the Court. It applied to both the plaintiff as well as the defendant.

5. In cases where a party, either plaintiff or defendant, wishes to appear as a witness, the provisions of this rule require that such a party would appear for giving evidence before any other witness is examined. The Rule has been couched in mandatory terms and would, ordinarily, govern the matter of tendering evidence. When the rule is required to be departed from, the Court has to record the reasons and permit such a party to be kept back for the examination as a witness. The reasons in such matter may be various, including the non-availability of the plaintiff. Though the provisions of Rule 3-A of Order 18 of the Code are salutary and intended to be applied as such so as to achieve the object thereof, the Rule itself confers jurisdiction upon to Court to permit such a party to appear and examine himself at a later stage. The purpose of

the Rule appears to be to have the evidence of the party first. It is the party who can unfold the case. Such unfolding by other evidence should follow after the party is examined. If party be the witness, the amended provision confers primacy upon it and enacts a priority in that regard. Ordinarily, the same will have to be followed."

25. While dealing with the effect of the insertion by the amending Act No.104 of 1976, it had rather laid down, that it has been inserted as a rule of law; with regards to the aspect of order of recording of the witnesses, who are to be examined by the Court, and at what stage of time, if the implications of the said provisions, which has been held to be directory in nature, is taken into consideration in the light of the observations made in paragraph 5 of the impugned judgment, it has rather carved out an exception contrary to law that ordinarily tendering of such evidences at a later stage though, it is not absolutely barred under law, but there has to be a prior condition to be satisfied by the judicial dictum of the court, which ceased with the trial, and in the absence of satisfying those prior conditions the purpose of rule to appear, as an evidence for recording the statement, would be in contravention to the provisions of the Order 18 Rule 3A of the CPC, in the absence of there being a prior permission, having been granted by the court after recording its reasons, for such permission.

26. In response to it, the learned counsel for the respondent had made a reference to the judgment rendered by the Division Bench of the Patna High Court in the matters of "Pravesh Kumari Vs. Rishi Prasad" as reported in 1986 LJR page 221, in which the Court, was considering an issue to the following effect as to whether the evidence of the plaintiff therein carries any weight in view of the mandatory provisions contained under Order 18 Rule 3A of the CPC? In fact the implications of the Division Bench judgment of Patna High Court was at the stage, when the implications of Order 18 Rule 3A of the CPC, was being considered, was the stage when, the learned trial court has already recorded the statement of the DW 13, therein, in contravention to the provisions contained under Order 18 Rule 3A of the CPC, the issue which was then for consideration before the Division Bench, was that whether at an appellate stage, such a statement which has been recorded by the trial court in contravention to the provisions contained under Order 18 Rule 3A of the CPC, could at all be considered and read in evidence by the appellate court while appreciating the rival case of the parties, in fact this judgment of the Division Bench, was based upon altogether a different factual matrix, rather it was not dealing with a situation, in the light of the provisions contained under the second part of the Rule 3A to Order 18 of the CPC, as to what implications would a prior permission of the court would have to, before permitting a witness to record his statement after recording of the statement of the prior witnesses before the court below. The relevant fact dealt with in Para I of the judgment is extracted hereunder:-

"1. The plaintiff-appellants filed a suit for declaration of title with respect to the suit property and that the defendants have no right and title over the same. The defendants filed written statement denying the claim of the plaintiff-appellants. In view of the order that I intend to pass, it is not necessary to mention facts in any detail. All that need be said is that the plaintiff was examined as P.W. 13 after 12 witnesses on his behalf had already been examined. It further appears that the plaintiff had not taken leave to appear at a later stage as provided under Order XVIII, Rule 3A of the CPC. While appearing as a witness, the plaintiff deposed in support of

his case and proved number of documents, including Chowkidari receipts, Exts. 2/A to 2/E. Before the trial Court, a point was raised as to whether the evidence of the plaintiff, who was examined as P.W. 13 carried any weight. The trial Court framed an issue which reads as follows : --

"Whether the evidence of the plaintiff as P.W. 13 carries any weight in view of the mandatory provision of Rule 3A of Order XVIII of the C.P.C."

The trial Court on the basis of the decision reported in 1978 BLJR 600 held that Rule 3A of Order XVIII of the Code of Civil Procedure was mandatory. It, therefore, held that the evidence of P.W. 13 carried no weight and, therefore, it directed the same to be expunged from the evidence. The trial Court, however, after expunging the evidence looked to the other evidence on record, including the exhibits that were proved by P.W. 13. According to the trial Court, the evidence on record proved the case of the plaintiff and, therefore, it decreed the suit.

27. In the absence of the said judgment having considered the impact of the provisions contained under Order 18 Rule 3A of the CPC, in the light of the provisions contained under the second part of the Rule 3A of Order 18 of the CPC, the said judgment, would be in much contradiction to the factual circumstances of the present case, and hence it cannot be said to be a ratio decided by the Division Bench of the Patna High Court, which could be made applicable in the circumstances of the present case, because it was an aspect which was being considered while exercising its appellate jurisdiction after recording of the statement of witnesses at later stage in contravention to the provisions contained under Order 18 Rule 3A of the CPC.

28. The learned counsel for the respondent had made further references to yet another judgment rendered by the Punjab and Haryana High Court as reported in 2004 (Supreme) Punjab and Haryana page 328, "Gurmail Chand Vs. Ashok Verma" in fact in this writ petition the coordinate Bench of the Punjab and Haryana High Court, while exercising its power under Article 227 of the Constitution of India while exercising its supervisory jurisdiction was considering the implications of the order dated 12th February, 2004, whereby the defendant application by way of an objection raised as a sequence of the examination of the witnesses of the plaintiff, while relying upon the provisions contained under Order 18 Rule 3A of the CPC, was rejected.

29. In fact, this judgment too happens to be under a different factual backdrop, rather this judgment could be read as against the case of the respondent themselves, herein, because the issue of consideration under Article 227 of the constitution of India, was rejection of the objection against the application under Order 18 Rule 3A of the CPC, which may not be an akin circumstances to be applied in the circumstances of the present case, and particularly, if the factual backdrop which was a subject matter of the consideration before the court below as dealt in paragraph 1 is read in consonance to the observations made in paragraph 5 of the said judgment. Paragraph 1 and 5 of the aforesaid judgment is extracted hereunder:-

"1. This petition filed under Article 227 of the Constitution of India prays for quashing the order dated 12.2.2004 passed by the Civil Judge (Jr. Division),

Chandigarh dismissing the application of the defendant-petitioner wherein objection was raised with regard to the sequence of examination of witnesses of the plaintiff-respondent by relying on the provisions of Order XVIII Rule 3A of the Code of Civil Procedure, 1908 (for brevity 'the Code'). It is appropriate to mention that plaintiff-respondent has filed a civil suit for permanent injunction against the defendant- petitioner restraining him from interfering in the possession of the suit land allegedly owned by him. Plaintiff-respondent has produced the first witness who was examined-in-chief on 12.6.2003 and on the request of the counsel for the defendant-petitioner the examination-in-chief was deferred and he was cross-examined on 5.9.2003. Thereafter the plaintiff- respondent examined another witness also, the order passed by the learned Civil Judge reads as under:

"Heard. Certainly provisions of Order XVIII Rule 3A CPC requires contesting party to be examined first before he or she examines his remaining witnesses. It is also required that when it is not done, the court shall record reasons. However, in the instant case, first witness was examined-in-chief on 12.6.2003 and their cross-examination was deferred on the request of ld. counsel for defendant on both occasions. Subsequently, PW1 was cross-examined on 5.9.2003. Though case was adjourned to 13.11.2003 for PWs but on that day case again adjourned to 22.12.2003. Cost paid. On the undertaking given by ld. counsel for the petitioner, case is adjourned to 22.12.2k3 for PWs subject to payment of Rs. 500/-. Ld. counsel for the defendant received the costs of Rs. 500/- on the very same day. Since on dated 22.12.2003 the undersigned was on leave, so case adjourned to 12.2.2004 i.e. for today. In between on dated 13.11.2003, defendant moved the present application. To my mind, if the defendants had any grievance regarding sequence of examination of plaintiff, she should have objected to it on the very day of examination of first witness or even on the next date of hearing at the time of examination of second witness. He even cross-examined, the first witness and further accepted the cost of Rs. 500/- as there was no witness of plaintiff on that day. Not only this, he also sought repeated adjournments for examination of plaintiffs witness. Now after receiving costs and letting two witness box, the defendant is estopped by his own act and conduct to raise this point, more so when plaintiff is present in the court for his examination. Accordingly objection is disallowed."

5. The argument of the learned counsel that me plaintiff-respondent was not cited as a witness has not impressed me because it goes without saying that the plaintiff could prove the averments made in the plaint by appearing as his own witness. Merely, because his name was not cited in the list of witnesses would not mean that an opportunity to raise the objection with regard to the sequence of examination of witnesses has been lost, Moreover under Order XVI Rule 1(3) read with Rule 1A, a witness can always be examined without being summoned and it would not be a valid "ground to discard the testimony of such a witness. In this regard reference may be made to the judgment of the Supreme Court in the case of Vidhyadhar v. Manikrao, MANU/SC/0172/1999 : 1999(3) S.C.C. 573 (at PP 588-589). Therefore, the argument is without any merit."

30. Learned counsel for the respondent has referred to yet another judgment as reported in 1989 (Supreme) Jammu and Kashmir page 127, "Romesh Kumar Vs. Chaman Lal", whereby the coordinate Bench of the Jammu and Kashmir High Court, was considering the situation where an issue of ejectment from the shop was the subject matter of consideration before the Sub Judge, where the controversy was being considered from the prospective of the interpretation to be given to Order 18 Rule 3A of the CPC, which was dealing with the situation that, where the party himself wishes to appear as a witness, whether he shall so appear, before any other witnesses are examined.

31. The said judgment in paragraph 2 has observed that, if for the reasons to be recorded by the court, the party who wants himself to be examined in the witness, is unable to do so, prior to the examination of the other witnesses, he is not precluded to be examined at a later stage, but only with the permission to be granted by the court for recording his statements. Paragraph no.2 of the said judgment is extracted hereunder:-

"2. I have heard the learned counsel for the parties. The controversy centres around presently in this case is regarding the interpretation of Order 18. Rule 3-A, C.P.C. According to this provision of law where a party himself wishes to appear as a witness he shall so appear before any other witness on his behalf has been examined but the Court can, for reasons to be recorded, permit him to appear as his own witness at a later stage. Learned counsel appearing for the petitioner has argued that this provision of law is mandatory in nature as word "shall" has been used and according to him plaintiff had to appear as his own witness before he had produced other witnesses. His further plea is that the plaintiff has not given cogent reasons for recording his statement after examination of his witnesses and the order of the Court in permitting him to appear as a witness is thus against the above said provision of law, Learned counsel for the respondent, on the other hand, has contended that procedural law cannot be mandatory in nature and abovesaid Rule 3-A is directory in nature as it allows a party to appear as his own witness at a later stage with the permission of the Court for which only reasons are to be recorded and the plaintiff in the present case has shown sufficient reasons for the same."

32. Wherein, while the provisions of Order 18 Rule 3A of the CPC, while holding it to be directory, the second part of the Rule 3A of the CPC, of the stage of the seeking permission of the Court, for which only a reason is to be recorded by the court, has been held to be a condition precedent for recording of the statement of the person or a party to the proceedings as a witness who wants to be examined himself, and that too after recording of the witnesses, who were not party to the proceedings. Hence, this judgment too is of no avail, because it was not dealing with the issue in the context, in which it has been argued by the learned counsel for the revisionist, as to whether at all, a party to the proceedings could be permitted to be examined at a later stage after recording of the witness of the other witnesses of the defendants included in the list of witnesses prior to recording of the statement of the defendant himself, and that too without the leave of the court, which was specifically mandated under Rule 3A of Order 18 of the CPC.

33. Hence, this judgment too, has not considered the implications of the necessity of the prior permission by the court and that too with regard to the necessity of recording of the reasons permitting the defendant to record his statement after adducing of the oral testimony of the other witnesses prior to recording of his own statement.

34. This Court is of the view that after having considered the aforesaid implications, there has had to be an exception carved out while interpreting the provisions contained under Order 18 Rule 3A of the CPC, which could be split over for its consideration into two parts:-

The recording of a witness, who is not a party to the proceedings though is permissible under Order 18 itself, but the issue would be at what stage, the statement such witness who is not party to the proceeding, could at all be entertained. The recording of the statement of the witnesses prior to the recording of the statement of a party to the proceedings, whose name is included in the list of witnesses at a later stage, I am of the view that the second part of Order 18 Rule 3A of the CPC; is mandatory in nature, in a situation or in a given case, where in the trial, where the statement of the witnesses, who are not the party to the proceeding are recorded prior to recording of the statement of the witness, who is party to the proceeding, subsequent recording of the statement though is not absolutely barred, but it could be only be permitted to be resorted to after satisfying the prior conditions contained under Order 18 Rule 3A of the CPC, and hence the second part of the Rule 3A of the CPC, would be a condition precedent and it would be a procedural mandate to meet the objective of the Law Commission's report, which intended to incorporate Rule 3A to Order 18 of the CPC, as per its 54th report.

35. In that view of the matter the impugned order of rejecting the application of the plaintiff revisionist under Order 18 Rule 3A of the CPC, is bad in the eyes of law. Hence the impugned order is quashed. The revision is allowed. However, with an exception that since I have already held, that there is no absolute bar created in recording of the statement of the defendant as DW3, after recording of the statement of the DW1 and DW2, who are not the party to the proceedings, the said permission could be granted to the DW 3 to record his statement, but only after satisfying with the second part of Rule 3A of the CPC, of getting a prior permission from the court which could be only accorded by the court, after recording its reason.

36. Subject to the aforesaid exception, the revision stand allowed.

(Sharad Kumar Sharma, J.) 17.08.2022 NR/