HIGH COURT OF DELHI

Bench: JUSTICE CHANDRA DHARI SINGH

Date of Decision: 20th December, 2023

C.R.P. 243/2017

HDFC BANK LTD ..... Petitioner

versus

UNION OF INDIA ..... Respondent

Legislation and Rules:

Section 115 of the Code of Civil Procedure, 1908 (CPC)
Banking Regulation Act, 1949
Companies Act, 1956

Subject: The civil revision petition under Section 115 of the CPC filed by HDFC Bank Ltd against Union of India, concerning a dispute over the invocation of Bank Guarantees (BGs).

Headnotes:

Civil Revision Petition under Section 115 of CPC - Challenge to orders passed by Additional District Judge in CS No. 57416 of 2016 - Dispute over invocation of Bank Guarantees provided by Petitioner for Punwire Mobile Communications Limited and Punwire Paging Services Limited (sister concerns) to Union of India (DoT) - Petitioner alleges wrongful invocation and non-receipt of invocation letters - DoT's complaint to Banking Ombudsman and subsequent Award in favor of DoT challenged by Petitioner Bank in Civil Suit transferred to District Court, Patiala House - Civil Suit's current status involves dispute over witness examination sequence and filing of affidavits [Paras 1-28, 32-42].

Evidence and Witness Examination - Dispute over timing and sequence of filing affidavits for witnesses DW-1 and DW-2 by Union of India - Petitioner's objection to late filing of DW-2's affidavit and presence during DW-1's cross-examination - Trial Court's decision to allow DW-2's affidavit challenged in present petition [Paras 32-42, 58-70, 92-122].

Legal Analysis - Revisional jurisdiction under Section 115 CPC - Scope and limits discussed with reference to the case of Major S.S. Khanna v. Brig. F.J. Dillon and other precedents - Emphasis on jurisdictional errors for revision, not mere erroneous decisions - Application of principles to present case - Finding no jurisdictional error in Trial Court's decisions regarding witness examination order and affidavit filings [Paras 58-70, 92-122, 129-133].

Decision - Petition dismissed on grounds of non-maintainability and lack of merit - Upholding Trial Court's orders regarding witness examination and affidavit filing process in ongoing Civil Suit [Para 134].

Referred Cases:

- Major S.S. Khanna v. Brig. F.J. Dillon (1964) 4 SCR 409
- Subishi Impex Pvt. Ltd. v. Osram India Pvt. Ltd. (2017) SCC OnLine Del 11128
- Kailash Chandra Sarma v. Biraj Krishna Das (2008) SCC OnLine Gau 450
- M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das (2020) 1 SCC 1

Representing Advocates:

For Petitioner: Mr. Amit Chadha, Sr. Advocate with Mr. Kumar Kislay, Mr. Angad Baxi, and Mr. Dhruv Nayyar
For Respondent: Mr. Rakesh Kumar, CGSC with Mr. Sunil

CORAM:
HON'BLE MR.

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant civil revision petition under Section 115 of the Code of Civil Procedure, 1908 (hereinafter "CPC"), has been filed on behalf of the petitioner seeking the following reliefs:-

"*a) set aside the Impugned Orders dated 26 August 2017 (received on 13 September 2017) and 22 May 2017 passed by Sh. Jitendra Kumar Mishra, Learned Additional District Judge,*
Patiala House Courts in CS No. 57416 of 2016;

b) grant ad-interim ex-parte relief in terms of prayer (a) above during the pendency of the present Petition;
c) grant ad-interim ex-parte stay on the proceedings in CS No. 57416 of 2016 before the Patiala House Courts during the pendency of the instant revision petition;

d) pass such other or further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

FACTUAL MATRIX

2. The petitioner is a banking company registered under the Companies Act, 1956 and is a Scheduled Bank under the Banking Regulation Act, 1949. The present petition is being instituted by Mr. Priyank Kapoor, who is the authorised representative of the petitioner. The respondent is Union of India, through the Department of Telecommunications (hereinafter "DoT").

3. The DoT had granted the Radio Paging service licenses to M/s Punwire Mobile Communications Limited (hereinafter "PMCL") and M/s Punwire Paging Services Limited (hereinafter "PPSL") in the year 1995-96, and both the companies are sister concerns.

4. The DoT had issued 13 radio-paging licenses to these companies to operate radio-paging service in one city and twelve circles. These licenses were terminated on 21st September, 2001 and 10th October, 2001 due to the liquidation of both these companies on 21st September, 2001 and 5th July, 2001 respectively.

5. The petitioner, i.e., the plaintiff before the learned Trial Court had provided the respondent Union of India, i.e., the defendant before the learned Trial Court, six BGs on behalf PPSL and twelve BGs in favour of PMCL thereby a total of eighteen BGs were given by the petitioner.

6. Both of these companies had made payment of the license fees for the initial eight quarters, but subsequently, no payment was received from these companies and the DoT invoked all the BGs (hereinafter "BGs") amounting to Rs. 34,68,72,730/- in the year of 2000, and letters invoking BGs were sent to the Bank of Punjab, Chandigarh (i.e., the predecessor of the petitioner – HDFC Bank Limited) before expiry of the period of BGs. However, the petitioner bank did not encash the BGs and denied the receipt of invocation letters.

7. Since, the Bank of Punjab, Chandigarh (i.e., the predecessor of the petitioner – HDFC Bank Limited) did not send the proceeds of the BGs, the DoT lodged a complaint with the Banking Ombudsman on 24th May, 2001; 18th June, 2001, and 6th July, 2001; in respect of both these companies.

8. The Banking Ombudsman passed an award on 17th October, 2003 in favor of the DoT and directed the petitioner bank to pay the proceeds of the BGs with the compensation of Rs. 10 lakhs.

9. The Bank of Punjab, Chandigarh (i.e., the predecessor of the petitioner – HDFC Bank Limited), thereafter, filed a Civil Suit bearing CS(OS) 322/2004, before this Court, thereby, challenging the above said Award passed by the Banking Ombudsman, and claimed that the BGs stood discharged and extinguished by variation of contract, and also in absence of a valid claim of demand during the validity thereof.

10. In the said Civil Suit, the DoT and the Banking Ombudsman were impleaded as defendants. The said suit being valued at Rs. 50,01,000/-, was transferred to the District Court, Patiala House, New Delhi, on 16th December, 2015 due

to the revision of pecuniary jurisdiction of Delhi Courts, and the same is now registered as CS no. 57416/2016.

11. On 28thSeptember, 2010 the respondent submitted its list of witnesses, thereby, making Ms. Kalpana Singh as DW-1. DW-1 was on deputation to the DoT and Mr. T.S Krishnamurthy was named as DW-2.

12. Vide order dated 14th December 2010, the respondent was directed by to file its evidence by way of affidavit within 4 weeks, and the matter was listed for the respondent‟s evidence. Admittedly, the respondent did not file its evidence, and in the in the interest of justice it was granted one more opportunity, where after the matter was listed on 14th July, 2011.

13. The respondent did not file its evidence yet again, and vide order dated 14th July, 2011, it was granted last opportunity to the respondent to conclude its evidence on the next date of hearing, i.e., 24th October, 2011. Even after multiple opportunities vide order dated 14th July, 2011; 24th October, 2011; and 28th February, 2012; the respondent failed to comply with the above said directions. On 28th February, 2012; the respondent was again granted final opportunity to file its evidence subject to costs of Rs. 20,000/-, and the matter was listed for 27th August, 2012 for further proceedings.

14. Thereafter, the respondent filed affidavit of evidence of DW-1 on 8th August, 2012 and DW-1 was partly examined in chief on 27th August, 2012. It is stated by the petitioner that DW-2 was present the entire time during the examination of DW-1.

15. On 5th February, 2013 the respondent *inter alia* filed an application bearing IA no. 1993/2013 before the learned Trial Court, to replace the affidavit of DW-1 that had already been tendered with another affidavit, which according to the petitioner contained completely new case other than what was set out in the earlier affidavit.

16. In view of the substantial changes in the affidavit, the petitioner objected to the replacement of the affidavit. On 6th February, 2013 after hearing both parties, the application was dismissed as withdrawn with the liberty to the respondent to file a supplementary affidavit which was only clarificatory in nature and giving exhibit numbers in a proper manner. The matter was listed for 12th July, 2013.

17. Thereafter, adjournments were sought by the respondent on 12th July, 2013 and 22nd November, 2013, and the respondent was granted last and final opportunity to the respondent to conclude the evidence on 15th April, 2014.

18. On 15th April, 2014 DW-1 was further examined in chief and partly cross examined on 21st May, 2015; 23rd July, 2015" 8th November 2016. Thereafter, adjournments were sought by the respondent on 18th January, 2017 and 21st February, 2017; subject to cost of Rs. 5,000/-.

19. On 22nd May, 2017, DW-1, whose cross examination was pending, was absent. The respondent filed an affidavit of evidence of DW-2, for the first time, to which the petitioner objected. The petitioner had objected to the same on the ground that DW-1 was a witness of fact appearing as a Power of Attorney holder of the respondent and was under cross examination.

Therefore, DW-2"s affidavit on the same fact, at this stage, could not be taken on record, that too, after more than six years of directions passed by the learned Trial Court to file evidence by way of affidavit.

20. The petitioner further pleaded that multiple opportunities had been given to the respondent from 14th December, 2010 to complete its evidence but it failed to do so. Moreover, severe prejudice would be caused to the petitioner, if the affidavit of DW-2 is permitted to be filed on the same set of facts.

21. The learned Trial Court, vide order dated 22nd May, 2017 (first impugned order), dismissed the afore-stated objections raised by the petitioner and imposed a cost of Rs. 800/- for raising such objections.

22. Thereafter, DW-2 was brought forward to tender his affidavit. It is stated by the petitioner that, at this moment, it realized that DW-2 was the same person who had been assisting DW-1 throughout her cross examination. The respondent had not informed either the Court or the petitioner that DW-2 was a proposed witness for the respondent. The petitioner further states that though DW-2"s name appeared in the list of witnesses but the petitioner did not, till then, know that the person assisting DW-1 was the same person whose name had been mentioned in the list of witnesses.

23. Accordingly, the petitioner raised an objection on this ground before the learned Court below and the learned ADJ stated that this objection would be decided at the next date, i.e. 21stAugust, 2017 (later adjourned to 26thAugust, 2017). On 26th August, 2017, the learned Court below passed the second impugned order, thereby, rejecting the objections raised by the petitioner as mentioned herein above.

24. Aggrieved by the impugned orders dated 22nd May, 2017 and 26th August, 2017 the petitioner has filed the instant civil revision petition challenging the same.

25. The petitioner has raised the grounds of challenge in paragraphs „A to V‟ of the petition. The rejoinder dated 26th April, 2019, filed by the petitioner denying the averments made by the respondent in its reply is on record. The written submissions dated 29th September, 2023 filed by the petitioner is also on record.

26. The respondent has filed its reply dated 15th November, 2017 is on record, wherein, the contentions and objections against the impugned orders is denied in paragraphs „A to H‟ and „1 to 18‟. The written submissions dated 3rd October, 2023 filed by the respondent is also on record.

SUBMISSIONS

(On behalf of the petitioner)

27. Learned senior counsel appearing on behalf of the petitioner submitted that the learned Trial Court erred in passing the impugned orders since it failed to take into consideration the entirety of the facts and circumstances of the instant dispute.

28. It is submitted that despite multiple opportunities, the respondent had first, failed to file the evidence affidavit of its witnesses and thereafter, failed to ensure the presence of DW-1 for the purpose of cross examination.

Despite its deliberate dilatory tactics and unlawful conduct, more than sufficient indulgence was granted by the learned Trial Court to it and multiple „last opportunities‟ were given to lead evidence.

29. It is submitted that when the matter was listed on 26th August, 2017 the petitioner had pleaded before the learned Court below that there was a delay of more than 6 years in filing the evidence affidavit of DW-2, i.e., from December, 2010 to May, 2017. Ample opportunities had been given to the respondent since 14th December, 2010 to file its evidence by way of affidavit but only the affidavit of DW-1 had been filed.

30. It is submitted that at no stage during the multiple hearings held between the year 2010 till 2017, the respondent did not ever inform either its intention to lead evidence through DW-2 or the fact that DW-2, was present during each hearing when the cross examination of DW-1 was conducted.

31. It is submitted that DW-1 was a witness of fact, appearing as a power of attorney holder of the respondent and was under the process of cross examination. Therefore, DW-2‟s affidavit on the same fact could not now be taken on record, that too, after the laps of 6 years.

32. It is submitted that severe prejudice would be caused to the petitioner if the affidavit of DW-2 on the same facts of deposition of DW-1 was permitted to be filed.

33. It is submitted that the learned Court below failed to appreciate that since, the respondent is Union of India, it would not mean that it would be permitted to take undue advantage and fill up the lacunae in its evidence by filing a subsequent affidavit at a belated stage.

34. It is submitted that the whilst passing the impugned orders, the learned Court below erred by not taking into consideration that all the witnesses of fact, deposing by way of an affidavit to prove the same of facts must file their affidavits together, otherwise the other party would be severely prejudiced.

35. It is submitted that DW-1 was still under cross examination and the respondent had neither concluded her examination nor was it producing her to complete the cross examination.

36. It is further submitted that not only DW-2 was present throughout the cross examination of DW-1, but he also assisted DW-1 throughout her cross examination and the evidence of DW-2 was on the identical issue/point as the evidence being led by DW-1.

37. It is submitted that having had the benefit of attending the cross examination of DW-1 and being aware of the line of questioning being put forth by the petitioner‟s counsel, the respondent had, in the affidavit of DW2, *malafidely* attempted to cover up all the lacunae and loop holes in its case that had been exposed during the cross examination of DW-1.

38. It is submitted that the learned Court below failed to appreciate the law that witnesses should be called in one by one and that no witness who is to give evidence should be present when the deposition of a previous witness is in process.

39. It is submitted that by virtue of Section 15(3) of the Commercial Courts Act, 2015, (hereinafter “the Act”) amended provisions of the Order XVIII Rule 4(1)(A) of the CPC, will squarely apply to the present proceedings. Further, amended provision under Order XVIII Rule 4(1)(B) of the CPC, prohibits a party from leading additional evidence by way of affidavit on any further witness. Therefore, introduction of DW-2‟s evidence affidavit at a subsequent stage after a lapse of 6 years is impermissible.

40. It is submitted that Section 135 of the Indian Evidence Act, 1872, (hereinafter “Evidence Act”) postulates for order in which witnesses are produced shall be regulated by the law and practice for the time being. At the time of impugned orders, amended Order XVIII Rule 4(1)(A) and (B) of the CPC were applicable and thus, attracted to the present proceedings. As submitted above, in exercise of powers under Section 135 of the Evidence Act, the learned Trial Court vide orders dated 14th December, 2010; 17th March, 2011; 14th July,

2011; 24th October, 2011; 28th October, 2012, and 28th February, 2012, gave repeated opportunities to the respondent to file the affidavits of its witnesses.

41. It is submitted that the reasoning given in the impugned orders is perverse, arbitrary, irrational, and has no basis whatsoever in law, equity or justice.

42. It is submitted that in view of the foregoing submissions, the instant petition may be allowed and the reliefs as prayed for may be granted.

(On behalf of the respondent)

43. *Per Contra* the learned counsel appearing on behalf of the respondent vehemently opposed the instant petition and submitted that the same is liable to be dismissed being devoid of any merits.

44. It is submitted that the petitioner‟s contentions are baseless due to the reason that the learned Court below has exercised its jurisdiction in accordance to the settled legal propositions with regard to the provisions governing recording of evidence in the CPC and there is no infirmity in the impugned orders passed by it.

45. It is submitted that the learned Trial Court has taken into consideration the entire facts and circumstances and only after such due consideration, it reached to the conclusion, whereby, it dismissed the petitioner‟s objections.

46. It is submitted that the present revision petition is liable to be dismissed on the grounds that the petitioner has failed to bring up any substantial question of law or any wrong exercise of the provisions of law by the learned Court below.

47. It is further submitted that the present revision petitioner is even other non-maintainable as the learned Trial Court has not decided the suit in question and it is a well settled law that this Court cannot exercise its revisional jurisdiction to interfere with an order passed at the interlocutory stage.

48. It is submitted that the Commercial Court Act, 2015 came into force w.e.f. 23rd October, 2015. However, before the said date, the evidence of the petitioner was already concluded and the evidence of the respondent had started and was going on as the DW-I was under cross-examination.

49. It is submitted that on 18th January, 2017, an application was filed on behalf of the respondent stating that DW-I, cannot appear as she was on leave and DW-2 had gone to Tamil Nadu to attend family function. No objection to the production of DW-2 was taken by the petitioner during the course of hearing held on 18th January, 2017 before the Trial Court.

Considering the facts of the case, the application filed by the respondent was allowed and the presence of DW-I and DW-2 was exempted by the learned Trial Court. Therefore, it is evident that the respondent had made it clear even on 18th January, 2017 that the DW-2 was to be produced and no objection to the same was taken by the petitioner.

50. It is submitted that on 22nd May 2017, DW-2 filed his evidence by way of affidavit. The objection to the filing of the affidavit was taken by the petitioner on the ground that the witness was appearing to assist DW-I on every date. The learned Court below vide order dated 22nd May, 2017 disallowed the objections of the petitioner and permitted the respondent to file the affidavit of DW-2 and lead the evidence.

51. It is submitted that case was last heard, by the learned Trial Court on26th August, 2017 when further objections were taken by the petitioner to the filing of the evidence by way of affidavit by DW-2, which were also rejected by the learned Trial Court. It was stated on behalf of Union of India that DW-2 never assisted DW-I and that he was already retired in the year 2011. The learned Trial Court observed that whosoever officer appeared on behalf of Union of India has no personal interest in the case as it is the Union of India, i.e., all the citizens of India having interest and accordingly, all the contentions raised on behalf of the petitioner were rejected

52. It is submitted that in the present case, when the evidence on behalf of the respondent had been started, the unamended provisions of Order XVIII Rule 4 of the CPC, were applicable and therefore, no objection on the basis of amended provisions of Order XVIII Rule 4 of the CPC, was taken by the petitioner at the time of hearing on 22nd May, 2017 and 24th August 2017. The only objections taken by the petitioner were based on the Order XVII Rule 3 and Order XVIII Rule 3A of the CPC, which were rightly rejected by the learned Trial Court. The respondent refers to and relies upon the orders dated 22nd May, 2017 and 24th August, in this regard.

53. It is submitted that as rightly observed by the learned Court below, Order XVIII Rule 3A was not applicable in the present case as neither DW-I nor DW-2 was a party in the case and Union of India, which is not a real person has to act through its officers.

54. It is submitted that the learned ADJ has also rightly observed that evidence of the respondent had not been closed and the respondent could call its witnesses till the evidence was closed.

55. It is further submitted that reliance upon amended provisions of Order XVIII Rule 4(1A) for simultaneous filing of affidavits of all the witnesses of a party was not in existence at the time of filing of affidavit of DW-1. Even after coming into force of the Act, 2015, there was no direction by the learned Court below for filing of the affidavits of all the witnesses of the respondent. Therefore, the provisions of Order XVIII Rule 4(1A) and 4(1B) have no bearing in the present case.

56. It is submitted that mere accompanying DW-1 to Court below along with a batch of officers carrying more than 10 files weighing around 100 Kilograms does not mean that DW-2 was assisting DW-1 during her crossexamination.

57. In view of the submissions made above, it is submitted that the instant petition is devoid of any merit and the same be dismissed.

ANALYSIS AND FINDINGS

58. The matter was heard at length with arguments advanced by the learned counsels on both sides. This Court has also perused the entire material on record. This Court has duly considered the factual scenario of the matter, judicial pronouncements relied on by the parties and pleadings presented by the learned counsel of the parties.

59. Before embarking upon the technical paraphernalia of the instant case, it is imperative to set out the scope of Section 115 of the CPC, under which the petitioner has challenged the impugned orders before this Court. The said Section has been reproduced for reference hereunder:

"***115. Revision.—***[4] *[(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—*

(a) to have exercised a jurisdiction not vested in it by law, or
(b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

[1]*[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.]*

[2][(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

[3][(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.]

Explanation.— In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue in the course of a suit or other proceeding.]"

60. Section 115 of the CPC invests all High Courts with revisional jurisdiction. It declares that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court wherein no appeal lies, to satisfy itself on three aspects; (i) that the order passed by the subordinate Court is within its jurisdiction; (ii) that the case is one in which the Court has power to exercise its jurisdiction; and (iii) that in exercising jurisdiction the Court has not acted illegally, that is, breach of some provision of law, or with material irregularity, that is by committing some error of procedure in the course of trial which is material in that it may have affected the ultimate decision.

61. The provision thus takes within its limited jurisdiction, the irregular exercise or non-exercise of it, or the illegal assumption of it. It is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. In other words, it is only in cases where the subordinate Court has exercised jurisdiction not vested in it by law, or has failed to exercise jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the jurisdiction of the High Court may be properly invoked.

62. In the landmark case of ***Major S.S. Khanna v. Brig. F.J. Dillon*, *(1964) 4 SCR 409, the Hon"ble Supreme Court stated that the said Section consists of two parts, first prescribes the condition in which jurisdiction of the High Court arises, i.e., there is a case decided by the subordinate Court in which no appeal lies to the Court of higher jurisdiction, second sets out the circumstances in which the jurisdiction may be exercised by the High Court. If there is no question of jurisdiction, the concerned decision cannot be corrected by the High Court in the exercise of revisional powers. The relevant paragraphs of Major S.S. Khanna (Supra) have been reproduced herein:***

"***6.*** *The jurisdiction of the High Court to set aside the order in exercise of the power under Section 115 of the Code of Civil Procedure is challenged by Khanna on three grounds:*

(i) that the order did not amount to "a case which has been decided" within the meaning of Section 115 of the Code of Civil Procedure;

(ii) that the decree which may be passed in the suit being subject to appeal to the High Court; the power of the High Court was by the express terms of Section 115 excluded; and

(iii) that the order did not fall within any of the three clauses (a), (b) and (c) of Section 115.

The validity of the argument turns upon the true meaning of Section 115 of the Code of Civil Procedure, which provides:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

The section consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises i.e. there is a case decided by a subordinate Court in which no appeal lies to the High Court, the second sets out the circumstances in which the jurisdiction maybe exercised. But the power of the High Court is exercisable in respect of "any case which has been decided". The expression "case" is not defined in, the Code, nor in the General Clauses Act. It is undoubtedly not restricted to a litigation in the nature of a suit in a civil court : Balakrishna Udayar v. Vasudeva Aiyar [LR 44 IA 261] ; it includes a proceeding in a civil court in which the jurisdiction of the Court is invoked for the determination of some claim or right legally enforceable. On the question whether an order of a Court which does not finally dispose of the suit or proceeding amounts to a "case which has been decided", there has arisen a serious conflict of opinion in the High Courts in India and the question has not been directly considered by this Court. One view which is accepted by a majority of the High Courts is that the expression "case" includes an interlocutory proceeding relating to the rights and obligations of the parties, and the expression record of any case includes so much of the proceeding as relates to the order disposing of the interlocutory proceeding. The High Court has therefore power to rectify an order of a Subordinate Court at any stage of a suit or proceeding even if there be another remedy open to the party aggrieved i.e. by reserving his right to file an appeal against the ultimate decision, and making the illegality in the order a ground of that appeal. The other view is that the expression "case" does not include an issue or a part of a suit or proceeding and therefore the order on an issue or a part of a suit or proceeding is not a "case which has been decided", and the High Court has no power in exercise of its revisional jurisdiction to correct an error in an interlocutory order."

63. The term „jurisdiction" has not been defined in the CPC. The definition of the same has been defined by the Hon"ble Supreme Court and various High Courts by way of judgments. The said term means „the power of a Court to hear and decide a case or to pass a certain order" and „the right or authority to apply laws and administer justice". The expression „jurisdiction" is a verbal

cast of many colors the adoptive definition of the same has to be interpreted subjectively, i.e., depending upon the nature of the facts and circumstances of each case.

64. It is a settled principle of law that the lower Courts have jurisdiction to decide the case, and in context of the provision of revision, even if the Court below decides the case wrongly, they do not exercise their jurisdiction illegally or with material irregularity. Section 115 of the CPC, deals with the High Court‟s power of revision. Briefly stated, in a case which is not subject to appeal, the High Court is empowered to call for the records of the case decided by the Court below, and if the Court below has exercised a jurisdiction vested in it by law, or failed to exercise jurisdiction vested by law or acted with material irregularity, etc. in the exercise of its jurisdiction, the High Court may interfere.

65. The CPC, however, enables the High Court to correct, when necessary, the errors of jurisdiction committed by subordinate Courts and provides the means to an aggrieved party to obtain rectification in a nonappealable order. In other words, for the effective exercise of its superintending powers, revisional jurisdiction is conferred upon the High Court. The said principle has been reaffirmed by the Hon‟ble Supreme Court in the judgment of ***Manick Chandra Nandy v. Debdas Nandy,*** **(1986) 1 SCC 512**. The Hon‟ble Court in the said judgment had observed as follows:

> “*5. We are constrained to observe that the approach adopted by the High Court in dealing with the two revisional applications was one not warranted by law. The High Court treated these two applications as if they were first appeals and not applications invoking its jurisdiction under Section 115 of the Code of Civil Procedure. The nature, quality and extent of appellate jurisdiction being exercised in first appeal and of revisional jurisdiction are very different. The limits of revisional jurisdiction are prescribed and its boundaries defined by Section 115 of the Code of Civil Procedure. Under that section revisional jurisdiction is to be exercised by the High Court in a case in which no appeal lies to it from the decision of a subordinate court if it appears to it that the subordinate court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction vested in it by law or has acted in the exercise of its jurisdiction illegally or with material irregularity. The exercise of revisional jurisdiction is thus confined to questions of jurisdiction. While in a first appeal the court is free to decide all questions of law and fact which arise in the case, in the exercise of its revisional jurisdiction the High Court is not entitled to reexamine or reassess the evidence on record and substitute its own findings on facts for those of the subordinate court. In the instant case, the respondents had raised a plea that the appellant's application under Rule 13 of Order IX was barred by limitation. Now, a plea of limitation concerns the jurisdiction of the court which tries a proceeding, for a finding on this plea in favour of the party raising it would oust the*

jurisdiction of the court. In determining the correctness of the decision reached by the subordinate court on such a plea, the High Court may at times have to go into a jurisdictional question of law or fact, that is, it may have to decide collateral questions upon the ascertainment of which the decision as to jurisdiction depends. For the purpose of ascertaining whether the subordinate court has decided such a collateral question rightly, the High Court cannot, however, function as a court of first appeal so far as the assessment of evidence is concerned and substitute its own findings for those arrived at by the subordinate court unless any such finding is not in any way borne out by the evidence on the record or is manifestly contrary to evidence or so palpably wrong that if allowed to stand, would result in grave injustice to a party."

66. The scope and extent of the revisional powers of this Court has been discussed in depth in the foregoing paragraphs. Now, adverting to the facts of the instant case.

67. Briefly stated, it has been submitted by the learned senior counsel appearing on behalf of the petitioner that the learned Trial Court has exercised its jurisdiction illegally and with material irregularity while impugned orders dated 22nd May, 2017 and 26th August, 2017, in as much has the learned ADJ has permitted DW-2, who was present throughout the cross examination of DW-1, to appear as DW-2, and to depose on the same factual issue that was being deposed by DW-1.

68. It is the case of the petitioner that the respondent had introduced its list of witness on 28th September, 2010. After multiple opportunities, the respondent filed evidence by way of affidavit of DW-1. However, the respondent chose not to file evidence by way of affidavit of DW-2. Pertinently, DW-2 was present and assisted DW-1 all along the cross examination of DW-1, without even disclosing that he is also a witness in the trial. It has been contended that in the proceedings conducted on 22nd May, 2017, the petitioner raised objections to the introduction of evidence affidavit of DW-2 at a belated stage i.e., after six years. However, such objection was not entertained by the learned Trial Court. Further, when the DW-2 was produced for cross examination, the petitioner realized that he has been assisting DW-1, during her cross examination. Thus, in the proceedings dated 26thAugust, 2017 a specific objection was raised by the petitioner, as introduction of the DW-2 would severely prejudice its right and is in derogation of well settled principles of law. However, the respondent made an incorrect statement that DW-2 had never assisted DW-

1.

69. The petitioner has argued that DW-2 has been introduced with an objective to cover up the lacunae which were exposed during the cross examination of DW-1. DW-1 and DW-2 are both witness to prove the same set of facts and therefore must file their affidavit together. It is submitted that a mere perusal of the evidence affidavit of DW-2 would reveal that it has been drafted to pre-empt the questions raised by the petitioner, during cross examination of DW-1. Even as per the DW-2, he was acting on behalf of the respondent, i.e., Union of India. It is settled law that the Government acts through its officers. Therefore, in the present facts, for the actions which were conducted by the respondent through DW-2, he should have been produced before any other witness, as mandated by Order XVIII Rule 3-A of the CPC. The petitioner has alleged that the respondent did not disclose identity of DW-2, and attempted to play fraud before Court of law by such non- disclosure , in order to prejudice the rights of the petitioner. Therefore, the respondent cannot be allowed to introduce DW-2 as its witness at this stage

70. The petitioner submits that it is a well settled principle of law, followed by all Courts and tribunals throughout the country that, witnesses should be called in one by one, and no witness who is to give evidence should be present when the deposition of a previous witness is being taken. Learned senior counsel has placed his reliance upon the judgments passed in ***Anita Roy vs. Samir Majumdar***,**2019 SCC OnLine Del 7608**; ***Asif Balwa vs. CBI***,**2012 SCC OnLine Del 903**; ***Vidhyadhar v. Manikrao,*** **(1999) 3 SCC 573** and ***Maharashtra Small Scale Industries Development CorporationLtd. v. M. Surda Corporation***,**1983 SCC OnLine Bom 149**.

71. In rival submissions, it has been submitted by the respondent that present revision petition is not maintainable as the learned Court below has not decided the suit in question. It is a well-established point of law that this Court by exercising its powers under section 115 of the CPC, will not interfere at the interlocutory stage.

72. It is submitted that the respondent had filed an application, wherein, it had argued before the learned Court below that DW-I, cannot appear as she was on leave and DW-2 had gone to Tamil Nadu to attend family function. At this stage, the petitioner did not object to the production of DW-2. Hence, taking into consideration the said fact, the learned Court below deemed it appropriate to allow the application of the respondent and accordingly, the presence of DW-I and DW-2 was exempted. Therefore, it is evident that the respondent had made it clear even on 18th January, 2017 that the DW-2 was to be produced and no objection to the same was taken by the petitioner.

73. The respondent has strongly relied upon the observation made by the learned Court below in the impugned order dated 26th August, 2017 that Order XVIII Rule 3A is not applicable in the present case as neither DW-l nor DW-2 was a party in the case and Union of India, which is not a real person has to act through its officers. Further, the provisions of Order XVIII Rule 4(1A) and 4(1B) have no bearing in the present case since there was no direction by the learned Court below for filing of the affidavits of all the witnesses of the respondent. The respondent has further argued that DW-2 was accompanying DW-1 to carry the case files and the same cannot mean that DW-2 was assisting DW-1 in her examination.

74. It has been submitted on behalf of the respondent that merely because the learned Court below refused to exercise its discretion in passing the orders in favour of the petitioner, the question of illegal or irregular exercise of jurisdiction by the learned Trial Court cannot be raised. The same cannot be brought within the ambit of Section 115 of the CPC, as the petitioner has not been able to raise any ground which requires this Court to exercise its powers under its revisional jurisdiction, thereby correcting the alleged jurisdictional error in the orders under challenge. Learned counsel for the respondent has relied upon the judgment of this Court passed on **21st September, 2017** passed in **CM (M) no. 1018/2017**, in the case titled ***Subishi Impex Pvt. Ltd. V. Osram India Pvt. Ltd.***

75. The relevant portion of the impugned orders dated 22nd May, 2017 and 26th August, 2017, have been reproduced as under:

Impugned order dated 22nd May, 2017–

> "*Ld. counsel for the defendant filed affidavit on behalf of tbeDW-2. Ld. Sr. counsel on behalf of the plaintiff strongly objects for filing ofaffidavit of DW-2 on the ground that the case is pending for DE for the lastsix years and it is the defendant who has not taken care to file affidavit of all the witnesses. He further objects that filing of the present affidavit is an attempt to improve or fill up the lacunae left during evidence of DW-1 which arises during cross-examination conducted by the plaintiff of DW1 and to fill up such lacunae affidavit of DW-2 is filed. He further submits that many times opportunities have been given to file affidavits of all defendants witnesses but only affidavit, of DW-5 was filed which was later on corrected by the defendant only and thereafter crossexamination continued but DW-1 did not turn up. For which the cost is also imposed and now affidavit of DW2 is being filed.*
>
> *During arguments Ld. counsel for the plaintiff agrees that except provision of Order 17 Rule 3 of CPC, there is* no impediment in entire CPC which stop the filing of affidavit or examination of DW-2, Order 17Rule 3 of CPC is perused and according to Ld'. Senior counsel for-the plaintiff, affidavit of DW-2 cannot be filed.*

He further submits that filing, of affidavit of DW2 is seriously prejudice the case of the plaintiff as if it could have been filed in one go then definitely the case of the plaintiff would have been proved earlier.

Today the case is fixed for DE and no order, has been passed till now which closed the right of the defendant to lead evidence besides DW1.CPC also does not provide as such. Moreover,' it is prerogative of the defendant to call the witnesses till DE is closed. It is also admitted fact that list of witnesses filed on behalf of the defendant and name of DW2 is mentioned therein. Therefore, the objection is disallowed and the plaintiff is burdened with a cost of Rs.800 to be deposited with DL3A as objection has been raised without any basis.

At this' stage an application under Section 151 of CPC is moved on behalf of the defendant seeking waiver of cost of Rs. 5,000/-which was imposed on the last date of hearing as the witness had gone for Tamil Nadu as the witness was transferred to another department. This is no ground at all as the witness has been transferred then still he is in service and his duty to discharge the obligations.

Therefore, it is a frivolous application and the same is dismissed with further cost of Rs. 1000/- to be deposited with DLSA. Both the parties are directed to submit receipt of cost on the next date of hearing."

Impugned order dated 26th August, 2017 –

"*Ld. counsel for the plaintiff advanced arguments for about 20minutes in terms of order dated 22.05.2017. He refers Lalmani vs. Bejal Ram Chaudharl and another 1934 SCC Online All 153 ; AIR 1934 ALL840 : 1934 All LJ 750 decided by the Hon'ble Allahabad High Court on August 25, 1933 & March 12, 1934 and Atchyutana Pitchaiah Sarma vs.Gorantla Chinna Vperayaa and others decided by the Hon'ble High Court of Andhra Pradesh at Hyderabad in C.R.P. No. 1346/1960 on January. 6, 1961.*

He submits that at this stage affidavit of DW-2 is filed who was appearing in the case regularly to assist DW-1 and therefore, now he is appearing as a witness. When he was regularly present in the Court then the case of the plaintiff will be prejudiced. He further refers Order 18 Rule 3A of CPC and submits that if a party wishes to appear as a witness then the said party has to appear prior to any other witness.

Ld. counsel for the defendant objects the contentions, raised by Ld. Sr. counsel for the plaintiff and submits that DW2 never assistedDW-1 and he was already retired in 2011.

It is contended by Ld. Sr. counsel for the plaintiff that DW-2 was present when examination and cross-examination of DW-1 was being conducted. It is denied by Ld. counsel for the defendant.

In this case neither DW-1 nor DW-2 is party. Union of India is a party. Therefore, Order 18 Rule 3A of CPC is itself does not applicable in this case.

Union of India is a person who has to be acted through its own officers and definitely if a counsel has to appear then officers of Union of India has to assist. Moreover Union of India is not a real person who has to appear but only officers have to appear and to assist the counsel. Therefore, the judgments cited by Ld. counsel for the plaintiff are not applicable in this case. Moreover, whosoever officer appeared on behalf of Union of India has no personal interest in this case obviously as it is a Union of India i.e. all the citizens of Union pf India having interest and, therefore, whatsoever contentions raised by Ld. counsel for the plaintiff, are not sustainable and are rejected.

Since the evidence in this case is to be recorded, therefore, let witness be examined through Ld. Local Commissioner as the case is more than 10 years old. The plaintiff shall bear the expenses of Ld-LocalCommissioner.

As per the guidelines issued vide circular no. 1047/Arr.Com/NDD/PHC dated 06.02.2017 let the evidence be recorded by appointment of Local Commissioner. Mr. Mohit Gupta, Advocate mobHeNo.9810766878 is appointed as Local Commissioner. The fees of the Local Commissioner shall be Rs.3000/- per sitting payable in advance. The Local Commissioner shall record evidence from 04:00 to 06:00 p.m in the Court room itself. Ahlmad/Nazir/Reader shall make available himself with the court fee and diet money to Ahlmad/Nazir/Reader for the said purpose is fixed Rs.500/-. Local Commissioner shall record verbatim in question and thereafter record answers verbatim. In case there is objection the said objection shall be recorded verbatim which shall be adjudicated by this Court. Local Commissioner on the same day shall supply the copy of the evidence recorded to both the parties at his own cost. Local Commissioner shall submit typed as well as original version in the Court. Plaintiff shall bear the expenses of Ld. Local Commissioner.

In case any party seeks adjournment or recording of evidence is adjourned then the party at fault shall pay the expenses of the commission for the said date. Parties, shall inform to the Ld. Local Commissioner about the date for recording of evidence…"

76. Upon bare perusal of the impugned order dated 22nd May, 2017, it is observed that the learned Trial Court dismissed the objections contended by the petitioner that the respondent, i.e., the defendant therein, cannot be permitted to filed evidence by way of an affidavit of DW-2. The petitioner had objected that DW-2 had remained present through the entire examination of DW-1, hence he cannot be allowed to be deposed on the same facts since DW-2 will try to fill up the lacunae which arose during the examination of DW-1. The learned Court below did not entertain the said objections and observed that no formal order had been passed by the Trial Court where the right to lead evidence of the respondent was closed beside DW-1 and the CPC also does not provide any such provision. Further, it is the discretion of the

defendant to call its witnesses in any manner, till such opportunity is closed. It further held that the petitioner was well informed way before the examination of witnesses began since the name of DW-2 was mentioned in the list of witnesses filed.

77. Further, perusal of the impugned order dated 26th August, 2017, reveals that the petitioner had raised the objection that at this stage affidavit of DW-2 is filed who was appearing in the case regularly to assist DW-1 and therefore, now he is appearing as a witness when he was regularly present in the Court then the case of the petitioner will be prejudiced. He further referred to Order XVIII Rule 3A of the CPC and submitted before the learned Trial Court that if a party wishes to appear as a witness, then the said party has to appear prior to any other witness. While rejecting the contentions of the petitioner, the learned Trial Court observed that Union of India is not a real person and it has to be acted through its officers and such officers are tasked to assist in the proceedings. It further observed that the above said officers do not have any personal interest in the matter. Therefore, the learned Court below while passing the above said impugned order held that the provision under Order XVIII Rule 3A of the CPC, is not applicable in the suit.

78. Since, the relevant facts necessary for the adjudication of the case have been reiterated hereinabove, therefore, at this stage, this Court deems it fit to analyze the issues involved herein.

MAINTAINABILITY OF THE INSTANT PETITION

79. A preliminary objection has been raised by the respondent that the impugned orders under challenge before his Court are interlocutory orders passed at interlocutory stage and hence, the same cannot be challenged under the revisional jurisdiction of this Court due to the bar imposed under the law. The petitioner while rebutting the same has submitted that this Court has the power to convert the instant revision petition into a petition under Article 227 of the Constitution of India and the same is permissible under the law, reliance in this regard has been placed upon the judgment passed by the Hon‟ble Supreme Court in the matter of ***Col. Anil Kak (Retd.) v. Municipal Corporation of Indore***, **(2005)12 SCC 734**.

80. Since, the suit before the learned Trial Court is of commercial nature and is governed by the provisions of the Act, 2015, therefore, with respect to the above it is imperative to refer to the provision mentioned under Section 8 of the Act, 2015, which imposes a bar against a revision petition against an interlocutory order. The said provision is as under:

"***8. Bar against revision application or petition against an interlocutory order.—****Notwithstanding anything contained in any other law for the time being in force, no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such challenge, subject to the provisions of section 13, shall be raised only in an appeal against the decree of the Commercial Court.*"

81. In this regard, this Court has referred to the judgment passed by the Division Bench of this Court in the matter of ***Black Diamond Trackparts Pvt. Ltd. v. Black Diamond Motors Pvt. Ltd.,*** **2021 SCC OnLine Del 3946**, wherein, the bench held as under:

"***10.*** *Expressly bars the remedy of "civil revision application or petition". It was deemed apposite to hear the counsels on, whether by use of the word "petition" in addition to the words "civil revision application", though with a "or" between them, the purport of Section 8 supra was to also bar the remedy of Article 227 petition with respect to proceedings in a commercial suit at the level of the District Judge. The remedy under Article 227 of the Constitution of India, it was felt, was similar/identical/at par with the remedy of a civil revision application under Section 115 of the CPC and it was thus deemed appropriate to frame the question no. (i) aforesaid and hear the counsels thereon. Similarly, it was deemed apposite to hear the counsels on the reasoning which prevail with the Single Judge, that since appeals against orders in a commercial suit at the level of the District Judge are to be heard by the Commercial Appellate Division, petitions under Article 227, if maintainable, emanating from proceedings in such suits should also be heard by the Commercial Appellate Division.*
Accordingly, question no. (ii) aforesaid was framed.

x x x

29. *A petition under Article 227 of the Constitution of India is a discretionary remedy and which discretion is ordinarily not exercised when an alternative remedy is available under the*
CPC. In, Surya Dev Rai supra as well as in Punjab National Bank v. O.C. Krishnan (2001) 6 SCC 569, Om Prakash Saini v. DCM Limited (2010) 11 SCC 622, Major General Shri Kant Sharma supra, Hameed Kunju v. Nazim (2017) 8 SCC 611 and Virudhunagar Hindu Nadargal Dharma Paribalana Sabai v. Tuticorin Educational Society (2019) 9 SCC 538, it has been held that Article 227 cannot be invoked where the remedy of appeal or revision are available. Thus, de hors Section 8 of the Commercial Courts Act, a petition under Article 227 would not have been entertained against an order of dismissal of an application under Order VII Rule 10 of the CPC, for the reason of the statutory remedy of revision petition being available to the petitioners/defendants. The exercise by the High Court of power/jurisdiction under Article 227 is subject to well known/well settled rules of self-discipline and practice. Such jurisdiction/power is not to be exercised in derogation of statutory provisions. In Koyilerian Janaki v. Rent Controller (Munsif), Cannanore (2000) 9 SCC 406, it was held that it was not appropriate for the High Court to have interfered with the order in exercise of powers under Article 227 when the proceedings

arose under a special Act which did not provide for second appeal or revision to the High Court; that the purpose behind not providing such remedy was to give finality to the order passed under the Act. Similarly, in Niyas Ahmed Khan v. Mahmood Rahmat Ullah Khan (2008) 7 SCC 539, it was held that the power of superintendence under Article 227 cannot be exercised in a manner ignoring or violating the specific provisions of the statute and that the High Court, while purporting to exercise powers under Article 227 to keep inferior Courts and Tribunals within the limits of their authority, should not itself cross the limits of its authority. To the same effect is Sunita Rani v. Shri Chand (2009) 10 SCC 628. In A. Venkatasubbiah Naidu v. S. Challappan (2000) 7 SCC 695 it was held that though no hurdle could be put against the exercise of the constitutional powers of the High Court, it was a well recognized principle which gained judicial recognition, that the High Court should direct the party to avail himself of statutory remedies, before resorts to a constitutional remedy. The petition under Article 227 was held to be not maintainable owing to the availability of the remedy of appeal under the CPC. In Surya Dev Rai supra also it was held that to safeguard against a mere appellate or revisional jurisdiction being exercised in the garb of exercise of supervisory jurisdiction under Article 227, the Courts have devised self imposed rules of discipline on their power; supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved. It was held that the High Court should have regard to legislative policy formulated on experience and expressed by enactments where legislature in exercise of its wisdom has deliberately chosen certain orders and proceedings to be kept away from exercise of appellate and revisional jurisdiction in the hope of accelerating the conclusion of proceedings and avoiding delay and procrastination which is occasioned by subjecting every order at every stage of proceeding to judicial review by way of appeal or revision. To the same effect is Ajay Bansal v. Anup Mehta (2007) 2 SCC 275.

30. *The reasoning in the aforesaid judgments gave rise to the question, that since the remedy of revision under Section 115 of the CPC though available under the CPC against the order of dismissal of application under Order VII Rule 10 of the CPC, has been taken away under the Commercial Courts Act, whether a petition under Article 227 would lie.*

31. *We are of the view that once the Commercial Courts Act has expressly barred the remedy of a revision application under Section 115 of the CPC, with respect to the suits within its ambit, the purpose thereof cannot be permitted to be defeated by opening up the gates of Article 227 of the Constitution of India. The scope and ambit of a petition under Article 227 is much wider than the scope and ambit of a revision application under Section 115 of the CPC; whatever can be done in exercise of powers under Section 115 of the CPC, can also be done in exercise of powers under Article 227 of the Constitution. Allowing petitions under Article 227 to be preferred even against orders against which a revision application under Section 115 CPC would have been maintainable but for the bar of Section 8 of the Commercial Courts Act, would nullify the legislative mandate of the Commercial Courts Act. Recently, in Deep Industries Limited v. Oil and Natural Gas Corporation Limited (2020) 15 SCC 706, in the context of petitions under Article 227 of the Constitution of India with respect to orders in*

an appeal against an order of the Arbitral Tribunal under Section 17 of the Arbitration & Conciliation Act, 1996, it was held that if petitions under Article 226/227 of the Constitution against orders passed in appeals under the Arbitration Act were entertained, the entire arbitral process would be derailed and would not come to fruition for many years. It was observed that though Article 227 is a constitutional provision which remains untouched by an non-obstante Clause 5 of the Arbitration Act but what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing First Appeals under the Arbitration Act, yet the High Court would be extremely circumspect in interfering with the same taking into account the statutory policy, so that interference is restricted to orders which are patently lacking in inherent jurisdiction. Thus, though we are of the view that gates of Article 227 ought not to be opened with respect to orders in commercial suits at the level of the District Judge against which a revision application under CPC was maintainable but which remedy has been taken away by the Commercial Courts Act, but abiding by the judgments aforesaid, hold that it cannot be said to be the law that jurisdiction under Article 227 is completely barred. However the said jurisdiction is to be exercised very sparingly and more sparingly with respect to orders in such suits which under the CPC were revisable and which remedy has been taken away by a subsequent legislation i.e. the Commercial Courts Act, and ensuring that such exercise of jurisdiction by the High Court does not negate the legislative intent and purpose behind the Commercial Courts Act and does not come in the way of expeditious disposal of commercial suits.

***32.** We thus hold the petition under Article 227 of the Constitution of India to be maintainable with respect to the order impugned in CM(M) No. 132/2021. However the discretion, whether in the facts and circumstances such petition is to be entertained or not, having under the roster been vested in the Single Judge, we leave it to the Single Judge to exercise such discretion…*"

82. The power of judicial superintendence granted to this Court under Article 227 of the Constitution of India must not be exercised to upset conclusions, howsoever erroneous they may be, unless there was something grossly wrong or unjust in the impugned order shocking the Court's conscience or the conclusions are so perverse that it becomes absolutely necessary in the interest of justice for the Court to interfere. The powers under Article 227 have to be used sparingly. In a catena of judgments passed by the Hon‟ble Supreme Court such as in ***Pipe Fitting Co. v. Fakhruddin M.A. Baker***, **(1977) 4 SCC 587** and in ***Mohd. Yunus v. Mohd. Mustaqim***, **(1983) 4 SCC 566**, it has observed throughout that the above mentioned supervisory jurisdiction conferred to the High Court‟s under

Article 227 of the Constitution of India is limited to overseeing that an inferior court or tribunal functions within the limits of its authority and is not meant to correct an error, even if apparent on the face of the record. A mere wrong decision without anything more is not enough to attract this jurisdiction.

83. Considering the admitted situation under a Statue, the remedy of revision has been taken away by the Commercial Courts Act, 2015, and therefore, in order to preserve the legislative intent and give effect to the purpose behind the Commercial Courts Act, of expeditious disposal of commercial suits, this Court is not inclined to entertain the submissions of the petitioner of treating this revision petition as a writ petition under Article 227 of the Constitution of India.

84. In light of the above provision, this Court is of the view no case is made out for invoking either the revisional jurisdiction under Section 115 of the CPC, or the supervisory jurisdiction of this Court under
Article 227 of Constitution. In the event such a petition is entertained, it would be contrary to the intent of Section 8 of the Act, 2015. Therefore, the instant petition is liable to be dismissed on the grounds of maintainability.

ON MERITS OF THE PETITION

85. The issues involved in the present civil revision petition are multifold. *Firstly*, this Court has to examine whether Order XVIII Rule 3A is applicable to the facts of the instant case while taking into consideration that the respondent is Union of India who appears in litigations through its officers. *Secondly*, whether the petitioner‟s objection in view of Order XVIII Rule 4(1A) of the CPC, that the respondent was supposed to file the evidence of DW- and DW-2 simultaneously holds any merit. *Thirdly*, whether the learned Trial Court erred in allowing the respondent to lead evidence of DW-2 when the cross examination of DW-1 was pending.

86. The relevant provisions which have to be discussed for the adjudication of the issues involved 9in the instant case are Order XVIII Rule 3A, Rule 4, Rule 4(1B) and Rule 4(1B) of the CPC, and the same have been reproduced as under:

“***ORDER XVIII –*** *Hearing of the suit and examination of witnesses*

[1][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.]

*[2]**[4. Recording of evidence.—***

(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

**[(1A) The affidavits of evidence of all witnesses whose evidence is proposed to be led by a party shall be filed simultaneously by that party at the time directed in the first Case Management Hearing.*

(1B) A party shall not lead additional evidence by the affidavit of any witness (including of a witness who has already filed an affidavit) unless sufficient cause is made out in an application for that purpose and an order, giving reasons, permitting such additional affidavit is passed by the Court…."

87. Bare perusal of Rule 3A of Order XVIII states that the said provision directs the party, wishing to examine himself as a witness, to give evidence as a witness in the first instance before he examines other witnesses, it vests the Court with the power to permit a party to the suit to give evidence as a witness on his behalf at a subsequent stage, by recording reasons. Rule 4 (1A) of Order XVIII of the CPC, has been referred to by the petitioner and the same stipulates that it is the mandate that the affidavit of evidence of all the witnesses whose evidence is proposed to be led by a party shall be filed simultaneously.

88. Before proceeding further, it is relevant to note that though the petitioner has also pleaded his case by referring to *Order XVIII Rule 4(1B)*, but this Court is of the considered view that the petitioner has been unable to prove as to how the same is relevant since at no instance the learned Trial Court has allowed either DW-1 or DW-2 to file additional evidence. Furthermore, at one instance, when the respondent, i.e., the defendant before the learned Court below, attempted to file fresh evidence by way of an affidavit vide IA no. 1993/2013, to replace the affidavit of DW-1, that had already been tendered with another affidavit, which according to the petitioner contained completely new case other than what was set out in the earlier affidavit. The learned Trial Court, in view of the substantial changes in the affidavit, and taking into consideration the objections raised by the petitioner *qua* the same, passed the order, whereby, the said application was dismissed as withdrawn with the liberty to the respondent to file a supplementary affidavit which was only clarificatory in nature and giving exhibit numbers in a proper manner. Hence, the petitioner‟s contentions with respect to the additional evidence are not sustainable, and accordingly rejected.

89. Further, the respondent, during the course of trial, had argued that when the evidence on behalf of the respondent had been started, the unamended provisions of Order XVIII Rule 4 of the CPC, were applicable and therefore, no objection on the basis of amended provisions of Order XVIII Rule 4 of the CPC can be taken by the petitioner. The said submissions made on behalf of the respondent does not hold force in the eyes of this Court in view of Section 15 (3) and 16 of the Act, 2015, as per which the amendment was made applicable to all the suits pending at the time of transfer to the Commercial Courts under the Act, 2015. As per the Schedule of the Act, 2015, Rule 3A, 4 (1A) and 1(B) of Order XVIII of the CPC, were inserted by way of the amendment. The said provisions are extracted as under for reference:

> "***15. Transfer of pending cases.—****(1) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.*
>
> *…*
>
> *(3) Where any suit or application, including an application under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of Specified Value shall stand transferred to the Commercial Division or Commercial Court under sub-section (1) or sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer.*
>
> ***16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes.—****(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.*
>
> *(2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value…..*"

90. The first and third issues are with respect to the similar objections and principles of law, hence both shall be discussed and analyzed together. The *first* issue is whether Order XVIII Rule 3A is applicable to the facts of the instant case while taking into consideration that the respondent is Union of India who appears in litigations through its officers. The *third* issue is whether the learned Trial Court erred in allowing the respondent to lead evidence of DW-2 when the cross examination of DW-1 was pending. Both the issues shall be discussed and analyzed together.

91. In regard to the ***first*** issue, ordinarily, a party who wishes to be examined as a witness should offer himself first, before the other witnesses are examined. It is however, considered unnecessary to make any such statutory provision. This should be the ordinary rule; but a rigid provision on the subject does not seem to be desirable. Therefore, Rule 3A of Order XVIII was brought in by way of amendment under the Commercial Courts Act, 2015. The same has also been observed by the High Court of Bombay in the matter of ***Vijaysingh Gordhandas v. Dwarkadas Mulji,*** **2001 SCC OnLine Bom 524**.

92. The legislative object of bringing on Rule 3A is to ensure that a litigant should not be permitted to bide his time and to fill in the lacuna or cover the loopholes after the other witnesses are examined.

93. As noted above, the petitioner is alleging that the Union of India is a party to the suit before the learned Trial Court and it is appearing through DW-1 and DW-2, therefore, both the witnesses will be considered as a party and parties who wish to appear as witness their own case. Hence, it claims that since DW-2 was present throughout the examination of DW-1, therefore, allowing DW-2 to lead evidence after DW-1 is a clear violation of Order XVIII Rule 3A. The petitioner has submitted that at this stage affidavit of DW-2 is filed who was appearing in the case regularly to assist DW-1 and therefore, now he is appearing as a witness. When he was regularly present in the learned Court below then the case of the plaintiff will be prejudiced. The learned senior counsel for the petitioner while referring to Order XVIII Rule 3A of the CPC, submitted that if a party wishes to appear as a witness then the said party has to appear prior to any other witness.

94. The learned Trial Court whilst dismissing the objections raised by the petitioner held and observed that in the case before it, neither DW-1, nor DW-2 is a party. It held that Union of India is a party, therefore, Order XVIII Rule 3A of the CPC, is itself not applicable to the peculiar facts of the instant case. It further observed that Union of India is a person who has to be acted through its own officers and definitely a counsel has to appear then the officers of Union of India have to assist. Since Union of India is not a real person who has to appear rather only the officers of the concerned department have to appear and assist the counsel. It is also held that the witnesses do not have any personal interest in the case and therefore, it rejected the arguments of the petitioner.

95. Before delving further into the discussion of the analysis of the present issue, it will be imperative for this Court to look into the observations made by

the learned Trial Court with respect to the Union of India being a party and its appearance through its officials.

96. Union of India is a juristic person, meaning that it is a non-human legal entity recognized by the law and entitled to rights and duties in the same way as any other human/citizen of India. By conferring legal personality, legal systems have expanded the definition of a "legal person" beyond natural persons. Juristic persons so created do not possess human nature. But their legal personality consists of the rights and duties ascribed to them by statute or by the Courts to achieve the purpose sought to be achieved by the conferral of such personality. It is important to understand the circumstances in which legal personality has been conferred and consequently the rights and duties ascribed to the inanimate objects on which this conferment takes place.

97. Legal personality is not human nature. Legal personality defines itself as recognition by the law of an object or corpus as an embodiment of certain rights and duties. Rights and duties which are ordinarily conferred on natural persons are in selected situations, conferred on inanimate objects or collectives, leading to the creation of an artificial legal person. An artificial legal person is a legal person to the extent the law recognizes the rights and duties ascribed to them, whether by statute or by judicial interpretation. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which a personality receives legal recognition.

The Hon'ble Supreme Court in the matter of ***M. Siddiq (Ram Janmabhumi Temple-5 J.) v. Suresh Das*, (2020) 1 SCC 1**, while defining the definition and scope of inclusion of a non -human entity as legal personality observed as under:

"*110. Legal systems across the world evolved from periods of darkness where legal personality was denied to natural persons to the present day where in constitutional democracies almost all natural persons are also legal persons in the eye of the law. Legal systems have also extended the concept of legal personality beyond natural persons. This has taken place through the creation of the "artificial legal person" or "juristic person", where an object or thing which is not a natural person is nonetheless recognised as a legal person in the law. Two examples of this paradigm are, where a collection of natural persons is collectively conferred a distinct legal personality (in the case of a cooperative society or corporation) and where legal personality is conferred on an inanimate object (in the case of a ship). The conferral of legal personality on things other than natural persons is a legal development which is so well recognised that it receives little exposition by courts today. The legal development is nonetheless well documented.*

Salmond in his work titled Jurisprudence notes:

"Conversely there are, in the law, persons who are not men. A joint-stock company or a municipal corporation is a person in legal contemplation. It is true that it is only a fictitious, not a real person; but it is not a fictitious man. It is personality, not human nature, that is fictitiously attributed by the law to bodies corporate.

***

But we may go one step further than this in the analysis. No being is capable of rights, unless also capable of interests which may be affected by the acts of others. For every right involves an underlying interest of this nature. Similarly no being is capable of duties, unless also capable of acts by which the interests of others may be affected. To attribute rights and duties, therefore, is to attribute interests and acts as their necessary bases. A person, then, may be defined for the purposes of the law, as any being to whom the law attributes a capability of interests and therefore of rights, of acts and therefore of duties." [J.W. Salmond, Jurisprudence, Steven and Haynes (1913).]

(emphasis supplied)

111. A legal person possesses a capability to bear interests, rights and duties. Salmond makes a crucial distinction between legal personality and the physical corpus on which legal personality is conferred:

"The law, in creating persons, always does so by personifying some real thing. Such a person has to this extent a real existence, and it is his personality alone that is fictitious. There is, indeed, no theoretical necessity for this, since the law might, if it so pleased, attribute the quality of personality to a purely imaginary being, and yet attain the ends for which this fictitious extension of personality is devised. Personification, however, conduces so greatly to simplicity of thought and speech, that its aid is invariably accepted. The thing personified may be termed the corpus of the legal person so created; it is the body into which the law infuses the animus of a fictitious personality."

***

Legal persons, being the arbitrary creations of the law, may be as of as many kinds as the law pleases. Those which are actually recognised by our own system, however, all fall within a single class, namely, corporations or bodies corporate. A corporation is a group or series of persons which by a legal fiction is regarded and treated as itself a person. If, however, we take account of other systems of our own, we find that the conception of legal personality is not so limited in its application." [J.W. Salmond, Jurisprudence, Steven and Haynes (1913).]

(emphasis supplied)

x *x* *x*

112. At a purely theoretical level, there is no restriction on what legal personality may be conferred. What is of significance is the purpose sought to be achieved by conferring legal personality. To the extent that this purpose is achieved, legal personality may even be conferred on an abstract idea. However, Salmond notes that legal personality is usually conferred on objects which are already the subject of personification or anthropomorphisms in layman's language out of "simplicity for thought and speech". The question whether legal personality is conferred on a ship, idol, or tree is a matter of what is legally expedient and the object chosen does not determine the character of the legal personality conferred. The character of the legal personality conferred is determined by the purpose sought to be achieved by conferring legal personality. There is thus a distinction between legal personality and the physical corpus which then comes to represent the legal personality. By the act of conferring legal personality, the corpus is animated in law as embodying a distinct legal person possessing certain rights and duties.

x x x

115. The jurisprudential concept of treating a collective of entrepreneurs as a single unit for the purposes of legal recognition was already well established by the time the first business corporations came into existence and did not warrant examination by the courts...."

116. The independent legal personality of a corporation has never been dependent on recognition by courts. The legal personality of the corporation was originally granted by a positive act of the Government..."

x x x

125. There exists another reason to confer legal personality. Objects represent certain interests and confer certain benefits. In the case of some objects, the benefits will be material. The benefit may extend beyond that which is purely material. An artificial legal person, whether a ship or a company cannot in fact enjoy these benefits. The ultimate beneficiaries of such benefits are natural persons. However, requiring a court, in every case, to make the distinction between the artificial legal person and the natural persons deriving benefit from such artificial person is inordinately taxing, particularly when coupled with the increasing use of corporations and ships. This leads us to the third rationale for conferring legal personality convenience. The conferral of legal personality on objects has historically been a powerful tool of policy to ensure the practical adjudication of claims. By creating a legal framework, it equipped the court with the tools necessary to adjudicate upon an emerging class of disputes. It saved considerable judicial effort and time by allowing Judges to obviate the distinction between artificial and natural persons where it was not relevant. The conferral of legal personality was thus a tool of legal necessity and convenience. Legal personality does not denote human nature or human attributes. Legal personality is a recognition of certain rights and duties in law. An object, even after the conferral of legal personality, cannot express any will but it represents certain interests, rights, or benefits accruing to natural

persons. Courts confer legal personality to overcome shortcomings perceived in the law and to facilitate practical adjudication. By ascribing rights and duties to artificial legal persons (imbued with a legal personality), the law tackles and fulfils both necessity and convenience. By extension, courts ascribe legal personality to effectively adjudicate upon the claims of natural persons deriving benefits from or affected by the corpus upon which legal personality is conferred. The corollary of this principle is that the rights ascribed by courts to the corpus are limited to those necessary to address the existing shortcomings in the law and efficiently adjudicate claims…"

98. The petitioner has opposed the impugned orders which state that Union of India, and not DW-1, or DW-2, is the party in the present case and that Union of India is not a real person who needs to appear in this case. Against this, the petitioner has raised the contention that when a party is a juristic person, then it must decide which of its witnesses it wants to produce as party in person, i.e., appear as a representative of the party, (Union of India herein), in the case.

99. Upon perusal of the above, it is crystallized that the Union of India is a body in principle which, not being a real person, can only be represented by its officials. The settled position of law with regard to juristic persons clearly excludes any such requirement of a juristic person necessarily having to present a representative or official as a party in person before a Court. The said principle has been observed by the Hon"ble Supreme Court in ***M. Siddiq (Ram Janmabhumi Temple-5 J.) (Supra)***.

100. Therefore, it has been adequately settled in law that the concept of a juristic person has been created to ensure ease of adjudication, and allow an organization or an inanimate object, such as Union of India in the present case – to be treated as a „personality", having rights, duties and interests. This, however, does not mean, or mandate the juristic person having a, or being a „real person" or a „human being" as that would go against the very objective of convenience for which this concept has been evolved. 101. Thus, Union of India, who is a juristic person, being a party in a case is, in itself, adequate and it does not require that a „real human being" be given the onus of being the party in person to represent the Union of India in court. It is a well-settled practice that Union of India is represented by its counsels and there is no mandate of any official or anyone else, having to be assigned the title of party in person. Accordingly, the claim of the petitioner under Order XVIII Rule 3A of the CPC, is rendered infructuous in the present case, as the said provision talks about the „party" not being allowed to appear after the other witnesses, unless after obtaining permission from the Court. This has

been also held in a recent judgment of this Court in ***Pradeep v. Savitri Sidana,*** **2023 SCC OnLine Del 5672,** relevant extract of which is as under:

"*12. On plain reading of the said provision, it is apparent that the said provision applies where the party wishes to examine himself/ herself as a witness at the trial.*"

102. The rule is that the concerned party has to first enter the witness box before he would examine any other witness as his witness. However, Rule 3A is an exception to that Rule. On plain language of the aforesaid provisions it would appear that permitting examination of the party itself, after he has already examined other witness as his witness, is not entirely prohibited. However, it is entirely the discretion of the Court to permit the party concerned to enter the witness box at a subsequent point of time, provided, however, the Court is satisfied that there exists sufficient ground for taking such a course of action, and that the reasons so weighed with the Court will have to be recorded in the order permitting such a prayer. 103. Accordingly, in the present case, the party, i.e. Union of India is a juristic person, who cannot appear for itself as a witness, thus the abovesaid provision is not applicable to the peculiar facts of the instant case. Keeping in mind the same, the learned Trial Court rightly recorded the reason for its decision of dismissing the petitioner‟s objections and this Court is inclined to uphold the same due to the absence of any illegality therein.

104. Since, it has been deliberated that Rule 3A of Order XVIII of the CPC, is not applicable, therefore, at this stage, this Court shall look into the other objection raised by the petitioner, i.e., the ***third*** issue which is whether the learned Trial Court erred in allowing the respondent to lead evidence of DW-2 when the cross examination of DW-1 was pending.

105. It was argued on behalf of the petitioner that the respondent has abused the process of law and the procedure prescribed *qua* the examination of witness in a sequence.

106. A Coordinate Bench of this Court in the matter of ***Subishi Impex Pvt. Ltd. v. Osram India Pvt. Ltd.,*** **2017 SCC OnLine Del 11128**, while dealing with the question as to can another witness be brought in before the examination of one witness is complete held that there is no such prohibition ascribed under the rules of procedure describing the examination of witness and the sequence or order of examination thereto. It observed as under:

"*5. The petitioner/defendant applied for review of the aforesaid order contending that once cross-examination of PW-1 Sushil Kumar Ratan had commenced, the respondent/plaintiff has no prerogative to drop the said witness and the said witness would remain bound to appear*

till his cross-examination was completed by the Court and he was discharged by the Court. It was further contended that the respondent/plaintiff could not be allowed to bring other witness to depose the same fact which has been deposed by PW-1 Sushil Kumar Ratan in his examination-in-chief and whose cross-examination was incomplete."

x x x

15. I am unable to read therein any rule prohibiting a party from dropping a witness, even if his examination-in-chief has been recorded and he has been partly cross-examined.

16. I am further of the view that there is an inherent difference between a prosecution for an offence and a civil suit. While in a prosecution, the State as prosecutor is required to place before the Court all the materials collected by it in investigation i.e. not only the material which is in favour of the prosecution but also the material which is in favour of the accused or the charged person, there is no such requirement in a civil dispute. Thus, the judgments supra relating to prosecutions, in my view, would have no applicability to a civil suit.

x x x

19. …Here, PW-1 has not become unavailable for any such reason but owing to the respondent/plaintiff having chosen to give him up. Another difference in the present case is that here it is the petitioner/defendant who wants to rely on the uncompleted cross-examination of PW-1. However, in my view, the principle would remain the same. The only additional factor which the Suit Court, while determining the probative value of the evidence of PW-1 will have to consider is, whether any adverse inference is to be drawn against the respondent/plaintiff for having so given up PW-1. While doing so, the possibility of PW-1, in his further cross-examination by the counsel for the petitioner/defendant, clarifying the part of the cross-examination which the petitioner/defendant wants to rely upon, and of the respondent/plaintiff reexamining PW-1 will also have to be considered…."

107. In this regard, the petitioner herein has been unable to produce any provision of law which empowers this Court to direct the respondent to follow a particular order of examination of its witnesses or which empowers the Court to compel a party to give evidence.

108. As far as the law is concerned, there is no such provision in the rules of evidence or in the CPC which prescribes the manner or sequence of examination of a witness; therefore, this Court is of the view that the same is the prerogative of the party leading the evidence.

109. Since a fact in issue can be proved by a party either through his evidence or through the evidence of his witness, party to the suit has the option or freedom of choice as to how he should prove his case. So, it is not within the purview

of the Court to give a direction to the party to give evidence as a witness in the first instance, before examining witnesses on his behalf.

110. Furthermore, under Section 137 of the Evidence Act, the provision of re-examination is given and the same is a right vested with a party. Taking the same into consideration, it is apparent that no such prejudice shall be caused to the petitioner in the event the DW-2‟s evidence is allowed before the examination of DW-1 is concluded. The same is apparent due to the reasons that *firstly,* this Court has no right to instruct or direct a party or to prevent a witness from testifying as the same would tantamount to violation of the basic principles of law, and the same is to be abhorred. *Secondly,* the petitioner shall, by law, has the right to cross examine DW-2, and such right of the petitioner has not been either closed, or taken away by the learned Trial Court. *Thirdly,* it is the prerogative of the learned Trial Court that it can give less affect to the testimony and deposition of DW-2, if the same is found to be contrary or irregular in view of the rules of evidence.

111. Keeping in mind the above said observations, this Court is of the view that it may not consider the objections raised by the petitioner *qua* the presence of DW-2 during the examination of DW-1 and allowing the respondent to lead the evidence of DW-2 when the examination of DW-1 remained incomplete. The only additional factor which the learned Court below, while determining the value of the evidence of DW-2 will have to consider is, whether any adverse inference is to be drawn against the petitioner/plaintiff for having not completing the evidence of DW-1 and letting the evidence of DW-2 to be taken on record after lapse of 6 years. It is pertinent to mention herein that examination of DW-2 is necessary for the purpose of proper adjudication. Further, this Court is of the view that if the examination of DW-2 is denied for technical failure, the same would result in miscarriage of justice.

112. The petitioner in this regard has been unable to make out his case that a great prejudice shall be caused to it in the event DW-2‟s evidence is allowed, rather, this Court is of the considered view that in case the opportunity of leading evidence of DW-2 is denied to the respondent, it may lead to gross injustice to the respondent which cannot be cured and the same would be unjustified since it will amount to illegality which goes to the root of the matter.

113. Therefore, in light of the above it is held that no adverse inference shall be caused to the petitioner and the learned Trial Court was well within its jurisdiction to allow the evidence of DW-1 since the same is its discretion. In view of the observations made by this Court in the preceding paragraphs, it is apparent that the learned Trial Court had recorded its reasons for allowing

DW-2 to appear as a witness after taking into consideration all the relevant facts and circumstances. This Court does not find any infirmity in the reasons record by the learned Court below in allowing the respondent‟s witness.

114. In regard to the ***second*** issue which is whether the petitioner‟s objection in view of Order XVIII Rule 4(1A) of the CPC, that the respondent was supposed to file the evidence of DW-1 and DW-2 simultaneously, the analysis of the same is as under.

115. Upon perusal of the record, it has been observed that the list of witnesses filed by the respondent on 28th September, 2010 includes the names of DW-2 and a few other witnesses in addition to DW-1. This list was filed at the very inception of the trial at the directions of the learned Trial Court, and both the above facts have been admitted by the petitioner as well.

116. Post the filing of the same, the respondent was directed by the leaned Court to file its evidence by way of affidavits on 14th December, 2010; 17th March, 2011; 14th July, 2011; 24th October, 2011 and 28th February, 2010, following which the affidavit of DW-1, i.e., Ms. Kalpana Singh was finally filed on 8th August, 2012.

117. At this stage, it is pertinent to note that the petitioner neither advanced any contention against, nor objected to the non-filing of the affidavits of the other witnesses in the list filed by the respondent. The proceedings continued and despite several adjournments for the next six years, and persistent non-appearance/erratic appearance of DW-1 and DW-2, the petitioner did not raise any objections regarding the non-filing of affidavits for the other witnesses.

118. It is noted that the petitioner had ample opportunities to object or raise its concern *qua* the non-filing of the DW-2‟s evidence or non-filing of the evidence till the year 2015, which it failed to do. Moreover, after the enactment of amended Order XVIII Rule 3A, i.e., in the year 2015; the petitioner again never objected to the same, and it was only in the year 2017, when the respondent filed the evidence affidavit of DW-2, that the petitioner objected to the same on the ground that such filing cannot be allowed because the DW-2‟s evidence has been filed after a lapse of 6 years from the date of direction by the learned Trial Court, and that the same is also barred as per Order XVIII Rule 4 (1A) of the CPC.

119. It is observed by this Court that it was not before 22nd May, 20172017, when DW-2 was finally bought before the court to tender his affidavit, that the

petitioner raised an objection to the non-filing of the evidence affidavit till now, and against it being filed at that stage.

120. Considering the above, the petitioner cannot be allowed to raise the objection at such a later stage, despite the issue having been persistent for the last 7 years. The list of witnesses had been filed in the year 2010, by the respondent, and it is reasonably presumed that the petitioner was well aware that affidavits had to be filed for all of these witnesses.

121. Furthermore, on 5th February, 2013 the respondent had filed an application bearing IA no. 1993/2013, to replace the affidavit of DW-1 that had already been tendered with another affidavit, which according to the petitioner contained completely new case other than what was set out in the earlier affidavit. In view of the substantial changes in the affidavit, the petitioner objected to the replacement of the affidavit. On 6th February, 2013 after hearing both parties, the application was dismissed as withdrawn with the liberty to the respondent to file a supplementary affidavit which was only clarificatory in nature and giving exhibit numbers in a proper manner. Even then the petitioner did not raise his objections.

122. Also, the petitioner has submitted before this Court that DW-2 was present throughout the examination of DW-1 and therefore, the evidence of DW-2 cannot be allowed to be taken on record since the same is a tactic to cover up the lacunae which arose during the examination of DW-1.

123. In this regard, this Court is of the considered view that witnesses cannot be removed on mere grounds of presence at the time of another witness‟s deposition. Section 135, Evidence Act, to which reference has been made in the foregoing paragraphs rules the order of examination of witness and it provide that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law by the discretion of the Court. The same has been reproduced as under:

> “***135. Order of production and examination of witnesses. —*** *The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.*”

124. Section 135 deals with the order of production and examination of witnesses in a proceeding. There is always a power vesting in the Court to direct the witnesses, who are present in the Court, to go out of the Court when the evidence of other witnesses is being recorded. The Courts have been

consistently exercising such powers. The said power is exercised as a rule in criminal cases with a view to avoid prejudice to the accused and to ensure fairness of trial. In civil cases, the Court can exercise the power depending upon the facts of each case.

125. The High Court of Gauahti in the matter of ***Kailash Chandra Sarma v. Biraj Krishna Das,* 2008 SCC OnLineGau 450**, with regard to the provision enshrined under Section 135 of the Evidence Act, observed that in the absence of any law, it would be the sound exercise of discretion of the learned trial Court that the cross-examination of the witnesses, whose examination had already been started, if possible, shall be allowed to be completed before starting cross-examination of the other witnesses. 126. It is imperative to take into consideration that this does not authorise a Court of law to refuse the examination of any particular witness who might have done something which is not very desirable. The said principle has also been followed by the High Court of Bombay in the matter of ***Maharashtra Small Scale Industries Development Corporation Ltd. v. M. Surda Corporation,* 1983 SCC OnLine Bom 149**. Thus, a mere contravention of the said provision does not allow the Court to prevent a witness from appearing before it, as that would amount to a gross injustice to the other party, by denying them the opportunity to lead evidence.

127. In view of the above, it is held that despite that no objection was raised by the petitioner until DW-2 attempted to file his evidence affidavit. Therefore, this objection cannot be accepted at such a later stage, as it would constitute unreasonable delay and a gross misuse of both the time of the Court as well as the relevant provisions of law. This Court does not find any merit in the objections raised by the petitioner *qua* the instant issue and the such contentions of the petitioner are accordingly rejected being bereft of any merits.

128. The approach of the petitioner is very hyper technical which this Court is not inclined to entertain. Considering the aforesaid, it is held that there is no illegality or „material" irregularity in the eyes of this Court that could be drawn from the perusal of the impugned orders, and accordingly, this Court is of the considered view that the learned Trial Court has rightly passed the impugned orders.

CONCLUSION

129. The mere fact that a decision of the Trial Court is erroneous due to a question of fact or of law does not amount to any illegality or a material

irregularity. Only those matters are to be allowed under the revisional jurisdiction of the High Court, wherein, there has been an irregular exercise, or non – exercise, or the illegal assumption of the jurisdiction by the Court below. It is a settled law that under Section 115 of the CPC, this Court has to look only into the issue of the jurisdiction of the Court below in deciding any application and shall not go into the merits of the case.

130. It has been deliberated by way of the aforementioned judgments and discussions of facts that there are no errors of jurisdiction, as explained in brief in the foregoing paragraphs, and there is no force in the arguments advanced by the petitioner, hence, not inviting the attention of this Court. This is particularly true when this Court has already arrived at a finding that the examination of the said witness appears to be necessary for the purpose of determining the real question of controversy between the parties. 131. Therefore, it is held that the petitioner has been unable to make out a case for grant of relief of revision of the impugned orders under Section 115 of the CPC. The learned Trial Court has exercised its jurisdiction in accordance with the law and hence, the arguments advanced by the petitioner against the impugned orders are rejected.

132. In light of the above discussion of facts and law, impugned orders dated 22nd May, 2017 and 26th August, 2017, passed by the learned ADJ-01, Patiala House Court, New Delhi, in CS no. 57416/2016, is hereby, upheld.

133. Accordingly, the instant petition stands dismissed on the grounds of non-maintainability and also being devoid of any merits. Pending applications, if any, also stand dismissed.

134. The judgment be uploaded on the website forthwith