SUPREME COURT OF INDIA

Before: Justice Kurian Joseph and Justice Rohinton Fali Nariman

Ram Rati v. Mange Ram (Dead) Through Legal Representatives

Civil Appeal No. 1684 Of 2016 [@ Special Leave Petition (C) 22141 Of 2013]

23.02.2016

CPC O. 18 R. 17 – Recalling of the witness for further elaboration on the left out issues is wholly impermissible in law. The purpose of Order 18, Rule 17 CPC is very limited and is discretionary in nature. This provision can only be invoked by the Court for its convenience and not on the asking of any party. [Para 18]

Kurian Joseph, J.— Leave granted. Whether a witness can be recalled under Order 18 Rule 17 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") for further elaboration of aspects left out in evidence already closed, is the issue for consideration in this case.

2. There are two suits filed by the respective parties and pending before the Tis Hazari Courts at Delhi. Civil Suit No. 43 of 2009 was filed by the respondents herein for declaration and injunction in respect of the plaint scheduled property. In respect of the very same property, the appellant herein also filed a suit seeking permanent injunction and that suit has been numbered as Civil Suit No. 44 of 2009. The suits were consolidated for common trial, on joint request, by order dated 8-12-2007. Suit No. 43 of 2009, with the consent of the parties, was ordered to be tried in the court where Suit No. 44 of 2009 was pending by order dated 26-9-2005 of the District Judge, Delhi. Much before that, evidence in Civil Suit No. 44 of 2009 had commenced and the appellant herein had been examined as PW 1 and the respondents herein had cross-examined PW 1 as well. That evidence was closed on 16-4-2005. After the consolidation of the two suits, the respondents herein filed an application on 13-4-2010.

3. We shall extract the averments made in the said application as under:

"Application on behalf of the defendant for discharging the statement of PW 1 and examination of witness i.e. PW 1 afresh under Order 18 Rule 17 CPC read with Section 151 CPC.

Sir,

The applicant most respectfully submits as under:

1. That the plaintiff examined PW 1, Shri Chottu Ram as PW 1 on 6-12-2004. His cross-examination was concluded on 16-4-2005.

2. That this Hon'ble Court consolidated the present suit with another suit titled as Mange Ram v. Chander Kanta vide its order dated 8-12-2007.

3. That while passing the order of consolidation dated 8-12-2007, this Hon'ble Court ordered as under:

'It has been so urged on behalf of both contesting sides that trial in two cases be conducted commonly and evidence led in either case be read in both these cases.'

4. The directions or observations of this Hon'ble Court as reproduced above operate prospectively and not retrospectively.

5. That when the Hon'ble Court ordered that evidence in one case may be read in evidence in another case, then the plaintiff in Mange Ram v. Chander Kanta would be deprived of the opportunity of cross-examination of PW 1 which was concluded on 16-4-2005, much prior to the date of order of consolidation.

6. That as per settled position of law on this point and as per the terms of order of this Hon'ble Court dated 8-12-2007, either PW 1 be examined afresh or opportunity to cross-examine PW 1 may be granted to the applicant/plaintiff in Mange Ram v. Chander Kanta.

It is, therefore, prayed that PW 1 may kindly be examined afresh or opportunity to cross-examine PW 1 in Ram Rati v. Mange Ram may kindly be granted to the applicant."

4. By order dated 15-4-2008 of the Additional District Judge, Delhi in Civil Suit No. 43 of 2009 filed by the respondents, the suit as against Defendants 5 and 6 was rejected and it was held that the plaint did not disclose any cause of action against them. Defendant 5 was the plaintiff in Suit No. 44 of 2009 and Defendant 6 is her husband. That Defendant 5 is the applicant before this Court.

5. Thus, the only ground taken up in the application filed under Order 18 Rule 17 CPC is that after consolidation of the suits, the plaintiff in Civil Suit No. 43 of 2009 should get an opportunity to cross-examine PW 1 (Defendant 5 in Civil Suit No. 43 of 2009).

6. It is interesting to note that in the order dated 24-2-2010 passed by the Additional District Judge in Civil Suit No. 44 of 2009, it has been observed by the Court that the plaintiff in Civil Suit No. 44 of 2009 is no more a party to Civil Suit No. 43 of 2009 and the earlier order of consolidation of suits dated 8-12-2007 was maintained, further clarifying that the past evidence of the plaintiff in Civil Suit No. 44 of 2009, which has already been recorded, to be treated as the main suit.

7. We shall extract the order dated 24-2-2010, which reads as follows:

"Since the facts in this suit and Suit No. 43 of 2009 are intertwined even though the plaintiff is no more a party to Suit No. 43 of 2009, her claim for declaration to suit property therein may have reflection on the entitlement of the plaintiff, therefore, with the consent of both sides, the consolidation order dated 8-12-2007 is being maintained and Suit No. 44 of 2009 where past evidence of plaintiff *Ram Rati* has been recorded is treated as main suit."

8. But it has to be noted that Suit No. 43 of 2009 stands rejected against that PW 1

(Defendant 5). Not only that, being a defendant in Suit No. 44 of 2009, PW 1 had been cross-examined also by the respondent herein. What is lost, if at all it can be termed so, is the opportunity to cross-examine in the capacity as plaintiff in OS No. 43 of 2009. But that suit, as noted above, had already been rejected as against PW 1 (Defendant 5), appellant herein. Unfortunately, both the courts have taken the view that the examination of PW 1 in Suit No. 44 of 2009 having taken place prior to consolidation, the plaintiff in Suit No. 43 of 2009 did not get an opportunity to cross-examine him.

9. The trial court, by order dated 18-12-2010, allowed the application filed by the respondent … "for further elaboration on the left out points by the parties…". The High Court, in the impugned order 2013 SCC OnLine Del 6424, endorsed the view taken by the trial court, holding that: (*Ram Rati* case 2013 SCC OnLine Del 6424, SCC OnLine Del para 6)

"6. … reading the impugned order shows that the witness has been recalled, if available, for further elaboration on the left out points to both the parties."

Since the High Court and the trial court have taken a wholly wrong approach in the matter and against the settled principles of law, it has become necessary for us to restate the law as well.

10. Order 18 CPC deals with hearing of the suit and examination of witnesses. By an amendment introduced thereunder with effect from 1-2-1977, Rule 17-A was introduced permitting production of evidence not previously known or which could not be produced despite due diligence. It appears, the amendment only caused unnecessary protraction of the litigation, and hence, the said provision was omitted by the Code of Civil Procedure (Amendment) Act, 1999 with effect from 1-7-2002. However, Rule 17 was retained which reads as follows:

"17. Court may recall and examine witness.—The court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the court thinks fit."

11. The respondent filed the application under Rule 17 read with Section 151 CPC invoking the inherent powers of the court to make orders for the ends of justice or to prevent abuse of the process of the court. The basic purpose of Rule 17 is to enable the court to clarify any position or doubt, and the court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. "No prejudice is caused to either party" is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground.

12. In Vadiraj Naggappa Vernekar *v*. Sharadchandra Prabhakar Gogate (2009) 4 SCC 410 , (2009) 2 SCC (Civ) 198, this principle has been summarised at paras 25, 28 and 29: (SCC pp. 414-15)

"25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

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28. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

29. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination."

13. In K.K. Velusamy *v*. N. Palanisamy (2011) 11 SCC 275 , (2011) 3 SCC (Civ) 665, the principles enunciated in Vadiraj (2009) 4 SCC 410 , (2009) 2 SCC (Civ) 198 have *been followed, holding at paras 9 and 10: (K.K. Velusamy case (2011) 11 SCC 275 , (2011) 3 SCC (Civ) 665, SCC pp. 281-82)*

"9. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate (2009) 4 SCC 410 , (2009) 2 SCC (Civ) 198.)

10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions."

(emphasis in original)

14. The rigour under Rule 17, however, does not affect the inherent powers of the court to pass the required orders for ends of justice to reopen the evidence for the purpose of further examination or cross-examination or even for production of fresh evidence. This power can also be exercised at any stage of the suit, even after closure of evidence. Thus, the inherent power is the only recourse, as held by this Court in K.K. Velusamy (2011) 11 SCC 275 , (2011) 3 SCC (Civ) 665 at para 11, which reads as follows: (SCC p. 282)

"11. There is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications."

15. After surveying the various principles stated by this Court on Section 151 from 1961, in K.K. Velusamy (2011) 11 SCC 275 , (2011) 3 SCC (Civ) 665, they have been succinctly summarised as follows under para 12: (SCC pp. 282-83)

"(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognises the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is "right" and undo what is "wrong", that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court."

(emphasis in original)

16. Some good guidance on invocation of Section 151 CPC to reopen an evidence or production of fresh evidence is also available in K.K. Velusamy (2011) 11 SCC 275 , (2011) 3 SCC (Civ) 665. To quote para 14: (SCC p. 284)

"14. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for reopening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands on earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose."

17. Vadiraj (2009) 4 SCC 410 , (2009) 2 SCC (Civ) 198 and K.K. Velusamy (2011) 11 SCC 275 , (2011) 3 SCC (Civ) 665 have also found affirmation by this Court in Bagai Construction *v*. Gupta Building Material Store (2013) 14 SCC 1 , (2014) 2 SCC (Civ) 382.

18. The settled legal position under Order 18 Rule 17 read with Section 151 CPC, being thus very clear, the impugned orders passed by the trial court as affirmed by the High Court to recall a witness at the instance of the respondent "for further elaboration on the left out points", is wholly impermissible in law.

19. In the above circumstances, the impugned order 2013 SCC OnLine Del 6424 is set aside and the appeal is allowed.

20. We are informed that during the pendency of the appeal, the evidence has been closed and what remains is only the final arguments. In view of the above, we direct the trial court to dispose of the suits expeditiously and preferably within one month from the date of receipt of a copy of this order.

21. There shall be no order as to costs.

Equivalent:

2016 (2) KCCR 123 (SN), 2016 (3) Scale 219, 2016 (2) RAJ 400, 2016 (2) RCR (Civil) 464, 2016 (3) JT 477, 2016 (160) ALLINDCAS 10, 2016 (115) ALLLR 880, 2016 (2) ARC 31, 2016 DNJ 315, 2016 AIR (SC) 1343, 2016 (1) LAR 268, 2016 (3) ALD 162, 2016 (2) Pat LJR 298, 2016 (2) JLJR 170, 2016 (157) DRJ 7, 2016 (3) WLN 75, 2016 (3) RAJLW 2328, 2016 (5) CTC 555, 2016 (2) KCCR 115, 2016 (3) MWN (Civil) 566, 2016 (4) LW 447