

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.11.2016

CORAM

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

**C.R.P. (NPD) .Nos.3153 and 3154 of 2013
and
M.P.No.1 of 2013**

1. Deepa Navin
2. Seetha Damodharan
3. Sunil Damodharan
4. Vinitha Richard ... Petitioners in both the C.R.Ps.

- Vs -

1. Rajan @ Raja @ Sivanandhan
2. Radhakrishnan
3. Geetha Baskaran
4. Hema Vasu

5. The State Bank of India (Main)
Pondicherry
Represented by its Manager,
Banking at Suffren Street,
Pondicherry-605 001.

6. Canara Bank,
Puducherry,
Represented by its Senior Manager,
Jawaharlal Nehru Street,
Pondicherry.

7. The Unit Trust of India,
A Central Government Trust in Banking Business,
Represented by its Executive Trustee,
at Justice Basheer Ahmad Syed Building,
No.45, Second Line Beach,
Madras-600 001.

8. Roopa Susil
9. Palani
- 10.Ammami ... Respondents in both the C.R.Ps.

(Respondents 5 to 7 are
given up in this C.R.P.)

Prayer in both the C.R.Ps. : Civil Revision Petition is filed under Article 227 of the Constitution of India against the Fair and Decreetal Order dated 26.06.2013 and made in I.A.Nos.208 and 209 of 2013 in O.S.No.266 of 1988 on the file of the Principal Subordinate Judge, Puducherry.

For Petitioners : Mrs.Elizabeth Ravi
for M/s.S.Subbiah
For 1st Respondent : Mr.S.Subramanian

O R D E R

The fair and decreetal order dated 26.06.2013 and made in the application in I.A.Nos.208 and 209 of 2009 in the suit in O.S.No.266 of 1998 are under challenge in these two revisions.

2. The revision petitioners herein are the defendants 12, 16 to 18 in the suit, the 1st respondent herein is the plaintiff, whereas the respondents 2 to 10 are the defendants 5 to 10 and 13 to 15 in the suit.

3. The 1st respondent had filed a suit in O.S.No.266 of 1998 as against the revision petitioners and the respondents 2 to 10 herein and thereby sought the relief of partition and separate possession of his share. This suit

was contested by the defendants by filing their respective written statements.

4. After formulating necessary issues, the trial was commenced and the examination of evidences on both sides were completed. When the arguments on either side was about to be advanced, two applications in I.A.Nos.208 and 209 of 2013 came to be filed by the 1st respondent/plaintiff. I.A.No.208 of 2013 was filed under Section 151 C.P.C., to reopen the evidence on his side so as to enable him to examine further witnesses. The other application in I.A.No.209 of 2013 was filed under Order 16 Rule 3 Read With Section 151 of C.P.C., to issue summons to witnesses specified in the petition for the purpose stated in the petition. These two petitions were contested by the revision petitioners and other remaining respondents by filing their respective counter statements. After hearing both sides, the learned Trial Judge had proceeded to pass the order on 26.06.2013 and thereby both petitions were allowed. Being aggrieved by the order passed by the trial court, the defendants 12, 16 to 18 have approached this Court with this revision.

5. Heard Mrs.Elizabeth Ravi, learned counsel for

Mr.Subbiah, who is holding vakalat on behalf of the revision petitioner and Mr.S.Subramanian, learned counsel for the respondent/plaintiff.

6. Since the issue, involved in both the revision petitions, is common in nature. Both the revisions have been consolidated together, heard jointly and disposed of in this common order.

7. Admittedly, the process of recording of evidences on behalf of both sides were completed. As stated by Mr.S.Subramanian, learned counsel for the respondent, plaintiff side evidence was closed as early as on 10.06.2011, whereas the defendants side evidence was closed on 17.06.2013. Under this circumstance, the above said two applications were filed by the plaintiffs. The 1st respondent/plaintiff, in the application in I.A.No.209 of 2013 which is filed under Order XVI Rule 3 read with Section 151 of C.P.C., has stated that he might be permitted to examine the witnesses by name R.Ashokin, B.N.K.Radipe and N.K.Ragunath to dispose on Truths of Events of Dr.Corothe & Raja alias Sivanandhan and as regards their Relationship & Activities in said family.

8. Mrs.Elizabeth Ravi, learned counsel representing for Mr.Subbiah has contended that these two applications were in fact filed only for the purpose of trial proceedings and the Trial Judge without considering this aspect had proceeded to allow these two applications and that the order itself would give a licence to the 1st respondent/plaintiff to procrastinate the trial proceedings as long as he wanted. She has also adverted to that no reason had been adduced to issue process to the witnesses who were proposed to be examined on the side of the respondent/plaintiff. She has also maintained that already adequate evidences both oral and documentary were placed before the trial court on behalf of both sides. The trial proceedings were almost at fag end and only at that stage, these applications came to be filed at the instance of the revision petitioner which ought not to have been allowed for the simple reason that as contemplated under Order XVI Rule 2 and 4 C.P.C., no reasons to issue summons were given by the revision petitioner.

9. In this connection, this Court would like to have reference to the provisions of Order 16 Rule 1, 2 and 4 C.P.C. Sub-rule 1 of Rule 1 of Order 16 enacts as under:-

''[1. List of witnesses and summons to witnesses

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

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

(4) Subject to the provisions of sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the [Court in this behalf within five days of presenting the list of witnesses under sub-rule (1)].]

Rule 1A. Production of witnesses without summons

Subject to the provisions of sub-rule (3) of rule 1, any party to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents.]''

10. With reference to the above provisions, it is imperative on the part of this Court to see as to whether any reason has been assigned by the 1st respondent/plaintiff so as to comply with the requirements of sub Rule 2 of Rule 1 to Order XVI. This Court takes a risk of repetition to

say that as contemplated under sub Rule 2 of Rule 1 to Order XVI *'A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.'*

11. Paragraph No.3(a) of the affidavit filed in support of the application reads as under:

''[3](a) I truly submit that said Witnesses were not Examined by Plaintiff till now due to oversight in natural enthusiasm [as Plaintiff] to expedite Proceedings in Trial in Suit.'

(b) Thus this & necessary Application/s are filed herewith.'

In the petition, the 1st respondent/plaintiff has stated *for the purpose to appear and give the evidence on truth of event of Dr. Coroth and Raja @ Sivanandan and as regards their relationship & activities in the said family.* It may also be relevant to extract the provisions of Rule 17 of Order 18 of the code.

Rule 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.

12. It is also to be pointed out that Rule 17(A) was originally inserted in the C.P.C., by Act 104 of 1976 and subsequently omitted by Act 46 of 1999. It is therefore made clear that these two petitions are not filed to recall any witness who was already examined by the respondent/plaintiff. The application in I.A.No.208 of 2013 seems to have been filed under Section 151 of C.P.C., to reopen plaintiff's side evidence so as to enable him to summon the witnesses enlisted in the petition in I.A.No.209 of 2013. Insofar as Order XVI Rule 1 is concerned, Mrs.Elizabeth Ravi, in order to support her contention, has placed reliance upon the following two decisions:

i) Vadiraj Naggappa Vernekar (dead) through LRs. v. Sharadchandra Prabhakar Gogate (2009) 4 SCC 410. In this case, Hon'ble Mr.Justice Altamas Kabir while speaking on behalf of the Division Bench of the Apex Court has observed in paragraph Nos.26 and 27 as under:

26. As indicated by the learned Single Judge, the evidence now being sought to be introduced by recalling the witness in question, was available at the time when the affidavit of evidence of the witness was prepared and affirmed. It is not as if certain new facts have been discovered subsequently

which were not within the knowledge of the applicant when the affidavit of evidence was prepared.

27. In the instant case, Sadanand Shet was shown to have been actively involved in the acquisition of the flat in question and, therefore, had knowledge of all the transactions involving such acquisition. It is obvious that only after the cross-examination of the witness that certain lapses in his evidence came to be noticed which impelled the appellant to file the application under Order 18 Rule 17 CPC. Such a course of action which arises out of the fact situation in this case, does not make out a case for recall of a witness after his examination has been completed.

In paragraph Nos.28 and 29, his Lordship has observed that:-

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 herein above, 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 an another case in *K.K.Velusamy v. N.Palanisamy* (2011) 11 SCC 275, Hon'ble Mr.Justice R.V.Raveendran while penning down the judgment on behalf of the Division Bench of the Apex Court, has observed in paragraph Nos.12, 13 and 14 as under:

'12. The respondent contended that [section 151](#) cannot be used for re-opening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of [section 151](#) has been explained by this Court in several decisions (See : [Padam Sen vs. State of UP-AIR 1961 SC 218](#); [Manoharlal Chopra vs. Seth Hiralal - AIR 1962 SC 527](#); [Arjun Singh vs. Mohindra Kumar - AIR 1964 SC 993](#); [Ram Chand and Sons Sugar Mills \(P\) Ltd. vs. Kanhay Lal - AIR 1966 SC 1899](#); [Nain Singh vs. Koonwarjee - 1970 \(1\) SCC 732](#);

The Newabganj Sugar Mills Co.Ltd. vs. Union of India - AIR 1976 SC 1152; *Jaipur Mineral Development Syndicate vs. Commissioner of Income Tax, New Delhi* - AIR 1977 SC 1348; *National Institute of Mental Health & Neuro Sciences vs. C Parameshwara* - 2005 (2) SCC 256; and *Vinod Seth vs. Devinder Bajaj* - 2010 (8) SCC 1). We may summarize them as follows:

(a) *Section 151* is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes 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* recognizes 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 co-extensive 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 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 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 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.

13. The Code earlier had a specific provision in Order 18 Rule 17A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. That provision was deleted with effect from 1.7.2002. The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for

its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence.

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 re-opening 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 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. ''

14. In paragraph No.13, his lordship has specifically stated that this provision 'viz' Order 18 Rule 17-A was deleted with effect from 1-7-2002. The deletion of the said provision does not mean that no evidence can be received at

all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence.

15. In the instant case on hand, recording of both sides evidence were already completed and only the above said applications are filed for the purpose of examination of three witnesses, whose names are enlisted in the petition in I.A.No.209 of 2013 and the purpose has also been stated beneath the petition.

16. Mr.S.Subramanian, learned counsel for the respondents/plaintiffs has made reference to the decision of the Apex Court in K.K.Velusamy cited supra, and submitted that the provisions of Order 18 Rule 17(A) was deleted with effect from 1-7-2002 and that the deletion of the said provision did not mean that no evidence could be received after a party closed his evidence. In order to add an additional strength to his arguments, he has placed

reliance upon the decision in *Mange Ram v. Brij Mohan and others* (1983) 4 SCC 36. In paragraph 11, the Division Bench of the Apex Court has observed as under:-

'11. The analysis of the relevant provisions would clearly bring out the underlying scheme under order XVI Rules 1 and 1A, and Rule 22 of the High Court Rules would not derogate from such scheme. The scheme is that after the Court framed issues which gives notice to the parties what facts they have to prove for succeeding in the matter which notice would enable the parties to determine what evidence oral and documentary it would like to lead, the party should file a list of witnesses with the gist of evidence of each witness in the Court within the time prescribed by sub-rule (1). This advance filing of list is necessary because summoning the witnesses by the Court is a time consuming process and to avoid the avoidable delay an obligation is cast on the party to file a list of witnesses whose presence the party desires to procure with the assistance of the Court. But if on the date fixed for recording the evidence, the party is able to keep his witnesses present despite the fact that the names of the witnesses are not shown in the list filed under sub-rule (1) of Rule 1, the party would be entitled to examine these witnesses and to produce documents

through the witnesses who are called to produce documents under Rule 1A. The only jurisdiction the Court has to decline to examine the witness is the one set out in proviso to Sec. 87 (1) of '1951 Act', the discretion being confined to refusing to examine witnesses on the ground that the evidence is either frivolous or vexatious or the evidence is led to delay the proceedings. Save this the Court has no jurisdiction to decline to examine the witness produced by the party and kept present when the evidence of the party is being recorded and is not closed, and the Court has no jurisdiction to refuse to examine the witness who is present in the Court on the short ground that the name of the witness was not mentioned in the list filed under sub-rule (1) of Rule 1 of order XVI. This scheme clearly emerges from the various provisions herein discussed.''

17. But, in the present case on hand, this Court finds that the purpose for the examination of witnesses as well as issuance of summons to the witness enlisted has been clearly mentioned in the petition and this has also been clearly discussed by the trial court. Further, even if the proposed witnesses, who are to be summoned, are examined, the defendants will definitely have an opportunity of cross-examination.

18. Keeping in view of the above fact, this Court finds that the above revisions are deserved to be dismissed as devoid of any merits.

19. In the result, both the Civil Revision Petitions are dismissed, and the impugned orders are confirmed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

20. The learned Trial Judge is directed to dispose of the suit within a period of two months from the date of receipt of a copy of this order.

17.11.2016

Index:Yes / No
Internet: Yes / No
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To

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Pondicherry
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Banking at Suffren Street,
Pondicherry-605 001.

2. Canara Bank,
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T.MATHIVANAN, J. ,

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