

In the High Court of Punjab and Haryana at Chandigarh

CR-8243 of 2017(O&M)
Date of Decision:15.12.2017

Arvind Life Style Brands

---Petitioners

vs.

Mr. Satyanarain Sharma and another

---Respondents

Coram: Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Animesh Sharma, Advocate
for the petitioner

Rekha Mittal, J.

CM No. 26455-CII of 2017

Prayer in this application is for placing on record Annexure P-10 (Colly).

Allowed as prayed for.

Annexure P-10 (Colly) is taken on record subject to just exceptions.

Disposed of accordingly.

CR No. 8243 of 2017

The present petition directs challenge against order dated 25.9.2017 (Annexure P-1) passed by the Civil Judge (Junior Division),

Gurugram whereby application for recalling order dated 6.5.2017 and PW1 for further cross examination has been dismissed.

Counsel for the petitioner has submitted that respondent No. 1/plaintiff has filed a suit for possession, recovery of rent, miscellaneous charges, damages and mesne profits in respect of shop premises GF 1 and 2, Ground Floor measuring 2050 square feet approximately in Metropolitan Mall, M.G. Road, Gurugram alleging that the suit shop was given on lease by the plaintiff to defendant No. 1 for the period 1.10.2008 to 15.10.2012 as per the registered lease agreement dated 23.10.2008. On completion of pleadings of the parties, issues were framed vide order dated 26.4.2016 (Annexure P-5). Issue No. 1 deals with entitlement of the plaintiff to recover arrears of rent, occupation charges, damages, mesne profits etc. for different periods, detailed therein. It is further submitted that plaintiff Satyanarian Sharma, the material witness in the case was examined in chief and the case was fixed for 6.5.2017 for his cross examination. Counsel for the petitioner made a request for adjournment of the case but as the trial court did not accede to request of counsel for the petitioner, cross examination of Satyanarian Sharma was conducted by counsel based at Gurugram without necessary assistance of counsel for the petitioner/defendants based in Bangalore, therefore, the petitioner could not conduct proper cross examination of the witness on various important issues qua nature of possession, alleged damages and rent necessitating filing of the instant application under Section 151 of the Code of Civil Procedure (in short "CPC") for recalling PW1 for further cross examination by recalling order dated 6.5.2017. It is argued with vehemence that a

serious prejudice shall be caused to the petitioner in case Satyanarian Sharma is not recalled for further cross examination to put him various documents pertaining to arbitration proceedings particularly the documents that came into existence subsequent to filing of the written statement by the petitioner/defendants. It is argued that the petitioner is ready to compensate the respondent/plaintiff for his recall and appearance in the witness box for further cross examination. According to counsel, the inherent power under Section 151 of the CPC can be exercised for re-opening evidence for the purpose of cross examination of a witness. In support of his contention, he has referred to judgment of Hon'ble the Supreme Court of India **K.K.Velusamy vs. N.Palanisamy 2011(2) RCR (Civil) 875.** Reference has also been made to judgment of Bombay High Court **Anand son of Rangrao Ingle and another vs. Govind son of Rangrao Ingle and others 2012(S) ALLMR 228** and that of the Himachal Pradesh High Court **Satinder Singh vs. Sukhdev 1993(3) Shim LC457.**

Before advertng to the submissions made by counsel for the petitioner in the light of factual context of the case, Hon'ble the Supreme Court in **K.K.Velusamy's case (supra)** has held in paras 8 and 16, reads as follows:-

“8. 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 vs. Sharadchandra Prabhakar Gogate MANU/SC/0448/2009; 2009 (4) SCC 410. 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.

16. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a

protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.

If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.”

In the judgment of the Bombay High Court, reliance has been placed upon judgment of Hon'ble the Supreme Court **K.K.Velusamy's case (supra)**.

Reverting to the case at hand, the respondent-plaintiff filed the suit for possession and recovery of rent, damages, mesne profits etc. in August 2013. The defendants did not cause appearance and were proceeded against ex parte. The respondent-plaintiff adduced ex parte evidence and the case was fixed for arguments on 19.9.2013. The defendants filed an

application under Section 9 Rule 7 of the CPC for setting aside the ex parte proceedings. Counsel for the respondent-plaintiff raised no objection for allowing application and setting aside the ex parte proceedings and accordingly vide order dated 26.11.2013, ex parte proceedings were set aside subject to payment of costs of Rs. 2000/-. Some interlocutory applications were filed and disposed of in due course of time. On completion of pleadings of the parties, issues were framed vide order 26.4.2016 and the case was adjourned to 17.5.2016. On 17.5.2016, Satyanarain Sharma PW1 tendered into evidence his affidavit Ex. PW1/A alongwith documents Ex. P.1 to P.30. after the defendants were proceeded against ex parte as no one caused appearance on their behalf till 2.30 p.m., and the case was adjourned to 24.5.2016 for remaining ex parte evidence of the plaintiff. On the adjourned date i.e. 24.5.2016, one Mr. R.N.Yadav, Advocate, superseding the earlier counsel Sh. Atul Ahlawat, filed Memo of Appearance on behalf of the defendants and made a request for adjournment to enable the defendants to file an application for setting aside ex parte order/proceedings. On that day, one witness of the plaintiff was present but his examination was deferred subject to payment of costs of Rs. 1,000/- to be paid to the witness. Counsel for the respondent-plaintiff recorded no objection on the application under Order 9 Rule 7 read with Section 151 of the CPC for setting aside ex parte order dated 17.5.2016 and the court allowed application subject to payment of costs of Rs. 2000/-. On 19.7.2016, Satyanarain Sharma PW1 was present but on request made by counsel for the defendants, he was not cross examined and the case was adjourned to 1.8.2016 for cross examination of Satyanarain Sharma PW1,

remaining evidence of the plaintiff and payment of costs of Rs. 2000/-. On the adjourned date i.e. 1.8.2016, the defendants filed an application under Order 7 Rule 11 read with Section 151 of the CPC for rejection of plaintiff. Reply to the application was filed by the respondent/plaintiff on 8.8.2016 but the application was eventually disposed of by the trial court vide order dated 15.2.2017. On 22.3.2017, one PW Ravi Dutta was examined and cross examined and the case was adjourned to 19.4.2017. PW Satyanarain Sharma was present but he was not cross examined by counsel for the defendants. Request made by counsel for the defendants to defer cross examination of Satyanarain Sharma was strongly opposed by counsel for the respondent-plaintiff. The trial court adjourned the case to 6.5.2017 for cross examination of Satyanarain Sharma with a clear stipulation that no further opportunity shall be given for cross examination of the plaintiff. On the adjourned date i.e. 6.5.2017, as per plea of the petitioner again request was made for deferring cross examination of Satyanarain Sharma which was not allowed.

Satyanarain Sharma PW1 was cross examined at length by the contesting party and his cross examination in vernacular runs into five pages. The sequence of events narrated hereinbefore would reveal that the defendants were proceeded against ex parte twice but the respondent-plaintiff showed magnanimity by raising no objection to set aside the ex parte proceedings, may be, he was not interested to prolong the proceedings. Satyanarain Sharma PW1 remained present in the court for his cross examination on different occasions but was not cross examined by counsel for the defendants. On 19.4.2017, request made by counsel for the

defendants for deferring cross examination of Satyanarain Sharma was strongly opposed by the other side but the court taking a lenient view accepted prayer of the petitioner/defendants, fixed the case for 6.5.2017 for cross examination of Satyanarain Sharma with a clear stipulation that no further opportunity shall be given for cross examination of the plaintiff. Had the defendants been serious and committed to their cause for cross examination of Satyanarain Sharma on 6.5.2017, they were required to ensure that the briefing counsel from Bangalore, if his presence otherwise was required, was available to counsel for the defendants at Gurugram for necessary instructions/briefing well in advance even if counsel had any pre-fixed travel plan for the date fixed. I would hasten to add that in the trial proceedings, ordinarily, there is no such practice of a briefing counsel with the senior counsel conducting the proceedings. The application filed by the petitioner with regard to inability of briefing counsel(s) to come to Gurugram on 6.5.2017 does not make reference to the name of such counsel much less supported by an affidavit of counsel with regard to the circumstances under which he was rendered unable to travel from Bangalore to Gurugram on 6.5.2017 or prior thereto. That being so, plea raised by the petitioner in para 2 of the application is without any basis and devoid of merit, thus, rightly rejected by the court below.

In para 4 of the application, there is reference to the purpose for which the witness needs to be further cross examined. A relevant extract therefrom reads as follows:-

“That the applicants/defendants wish to further cross examine

PW1 in support of their case on merits in order to assist this Hon'ble Court in determining the real controversy between the parties. It is submitted that the applicants/defendants wish to further cross examine PW1 on the nature of possession, the collusion with M/s Track-on Vogue Pvt. Ltd. as well as the alleged damages and rent claimed by the plaintiff in the present suit.”

However, no such plea has been raised as to why counsel for the defendants who cross examined Satyanarain Sharma at length could not cross examine him on the alleged issue(s), sought to be raised in para 4 of the application. Conversely, contention of the petitioner that the witness is required to be confronted with certain documents in regard to arbitral proceedings does not find reference in the application. In view of the above, it can be safely held that application filed by the petitioner is not bona fide and the same has been filed with a clear intent to fill up gaps and lacunae and protracting the proceedings pending since 2013. In this view of the matter, the petitioner cannot derive any advantage to its contentions from observations made in para 16 of the judgment in **K.K.Velusami's case (supra)**. On the contrary, in view of observations in para 8 extracted hereinbefore, Order 18 Rule 17 CPC does not enable the parties to call any witness for 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. That being so, I do not find any error much less illegality in the impugned order warranting intervention in exercise of supervisory jurisdiction.

For the foregoing reasons, the petition fails and is accordingly

dismissed in limine.

(Rekha Mittal)
Judge

15.12.2017
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No