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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Decision: April 27, 2017

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CM(M) No.238/2017

**AMRISH AGARWAL TRADING
AS MAHALAXMI PRODUCT**

..... Petitioner

Through: Mr.Akhil Sibal, Senior Advocate
instructed by Mr.S.K.Bansal, Mr.Ajay
Amitabh Suman and Mr.Veerendra
Sinha, Advocates.

versus

M/S VENUS HOME APPLIANCES PVT LTD

..... Respondent

Through: Mr.R.K.Agarwal and Ms.Parul
Singh, Advocates.

**CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI**

JUDGMENT (Oral)

CM(M) No.238/2017

1. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India assailing the order dated 23rd January, 2017 whereby the learned Trial Court has dismissed the application filed by the petitioner (who is defendant in case bearing TM No.1111/2016) under Order XVIII Rule 17 read with Section 151 of Code of Civil Procedure for recalling of DW-3 Sh.Vinod Sindhvani to produce the original documents.
2. Mr.Akhil Sibal, learned Senior Counsel for the petitioner has assailed the order dated 23rd January, 2017 on the following grounds:-

(i) Civil Suit for perpetual injunction was filed by the respondent/plaintiff on **9th December, 2002** wherein the issues were settled on **21st April, 2008**. The plaintiff's evidence was closed on **21st January, 2014**.

(ii) DW-3 Sh.Vinod Sindhwani was examined as defence witness on 8th August, 2016 wherein, during his cross examination, he was question about the original invoices to which he replied that the record being old has been destroyed, hence he was unable to produce.

(iii) After the defendant evidence was closed on 8th August, 2016, DW-3 Sh.Vinod Sindhwani could manage to trace out the original record, photocopies of which have already been filed in the Trial Court.

(iv) Final arguments in the case have not commenced so far and soon after the original record was traced out, the application under Order XVIII Rule 17 CPC was filed for taking on record the additional affidavit with the original documents.

(v) Learned Trial Court has dismissed the application without considering that the petitioner/defendant was not bringing on record any new material but was producing the original documents, carbon copies/photocopies of which have already been filed.

(vi) Production of original document and that too which were asked to be produced during cross examination of DW-3, does not amount to filling up the lacuna in the case of defendant.

(vii) Learned Senior Counsel for the petitioner/defendant has relied upon K.K.Velusamy vs. N.Palanisamy (2011) 11 SCC 275 in support of his contentions.

3. Mr.R.K.Aggarwal, learned counsel for the respondent, while relying upon the decision in the case of K.K.Velusamy vs. N.Palanisamy (2011) 11 SCC 275, M/s. Bagai Construction Thr. its Proprietor Lalit Bagai vs.

M/s.Gupta Building Material Store AIR 2003 SC 1849 and Raunaq Automotive Components Ltd. vs. J.P.S.Kanwar in FAO (O) 524/2015 decided on 16th September, 2015, has raised the following contentions:-

- (i) As per the decision of Supreme Court in K.K.Velusamy vs. N.Palanisamy and of Division Bench of this Court in Raunaq Automotive Components Ltd. vs. J.P.S.Kanwar the power has to be exercised sparingly in appropriate cases and is not intended to be used to fill up the omissions in the evidence of a witness who has already been examined.
- (ii) The provisions of Order XVIII Rule 17 CPC is not 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 was not produced at the appropriate stage.
- (iii) The provisions of Section 151 CPC cannot be used for reopening the evidence or for recalling the witnesses.
- (iv) The evidence sought to be produced was not the kind of evidence which was not previously known to the petitioner or which could not have been produced by him despite due diligence. Rather it was the petitioner who has already placed the photocopy/carbon copy of such record.
- (v) Once DW-3 Sh.Vinod Sindhvani has deposed before the Court that the original record has already been destroyed, then how he could trace out that record subsequently if he could not do so at the appropriate stage.
- (vi) The case is at the stage of final arguments and purpose of filing this application at such a belated stage is only to delay the trial.
- (vii) The application filed alongwith additional affidavit of DW-3 was nothing but an attempt to cover up the negligence and lacuna, hence has rightly been dismissed.

4. I have considered the rival contentions and perused the case law cited by the parties.

5. The limited question arising for consideration in this appeal is whether the original documents, carbon copies/photocopies of which had already been placed on record by the defendant, could be permitted to be brought on record after the defence evidence was closed and DW-3 in his cross examination has stated that the record being old, and account books are destroyed after 8-10 years, he was unable to produce the same.

6. For purpose of disposal of this application, it is necessary to refer to the statement of DW-3 recorded on 8th August, 2016, which is as under:-

'DW-3 : Sh.Vinod Sindhwani S/o Sh.C.S.Sindhwani, age 63 years, R/o 240, Chukhuwala, Bhagat Singh Marg, Dehradun (Uttarakhand); Education – B.A.; Occupation –Business of Electrical Goods in the name of S.S.Enterprises.

On SA

I tender my evidence by way of affidavit Ex.DW3/A. It bears my signatures at points A & B. I have seen photocopies of invoice No.467 part of Ex.DW1/2(colly.) and photocopies of invoices no.419 and 4164 part of Ex.DW1/5 (Colly.) and carbon copies of the same with defendant counsel now shown and say that goods detailed therein were received by me from defendant vide those invoices. Original/carbon copy of invoice No.1412 given Ex.DW4/B in affidavit of witness has neither been filed nor produced so no such exhibit given to its photocopy. Photocopy of invoice no. 529 was earlier part of Ex.DW1/2 (Colly.) but today neither its original nor carbon copy has been shown to the witness.

XXX by Sh.R.K.Aggarwal, ld. Counsel for plaintiff.

I have not brought the original invoices which I had received. I had entered the purchases vide aforesaid invoices in my books of accounts. After 8 or 10 years, the books of accounts were destroyed due to which I am unable to produce the books of accounts containing entries of aforesaid invoices. It is incorrect to suggest that the aforesaid invoices are bogus and/or fictitious. I paid in cash for purchase of goods vide aforesaid invoices.

It is incorrect to suggest that I am deposing falsely.

Sd/-
RO&AC

Sd/-
ADJ(Central)-01 Delhi
09.08.2016'

7. Mr.Akhil Sibhal, learned Senior Counsel for the petitioner has submitted that he does not want to re-examine DW-3 but only wants to produce him for producing the original documents (total five documents), and for further cross examination. Since there had not been any inordinate delay or gap from the date the defence evidence was closed and date when the application for production of original documents was filed by the petitioner/defendant, the petitioner/defendant may be permitted to place on record the original documents.

8. The original documents, which have been traced out and copy of which have already been placed on record of Trial Court, have been listed in para 5 of the application under Order XVIII Rule 17 CPC and are as under:-

- (i) Invoice No.4637 dated 20.08.1995 with cash book entry
- (ii) Invoice No.529 dated 16.01.1988 with ledge entry
- (iii) Invoice No.419 dated 03.12.1986 with cash book entry
- (iv) Invoice No.1472 dated 01.03.1990 with cash entry
- (v) Invoice No.4164 dated 11.12.1993

9. In a recent decision reported as Ram Rati vs. Mange Ram & Ors. AIR 2016 SC 1343 the question that came up for consideration before the Supreme Court was whether a witness can be recalled under Order XVIII Rule 17 CPC for further elaboration of aspects left out in evidence already closed. After discussing the earlier decisions in the case of Vadiraj Naggappa Vernekar (Dead) through L.R.s vs. Sharadchandra Prabhakar Gogate and (2009) 4 SCC 410, K.K.Velusamy vs. N.Palanisamy (2011) 11 SCC 275 (decision in K.K.Velusamy's case has been relied upon by both the parties herein), it was held in paras 14 and 15 of the report as under:-

“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 (supra) at paragraph-11, which reads as follows:

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 (supra), they have been succinctly summarized as follows under paragraph-12:

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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.”

10. The proceedings under Article 227 of the Constitution of India is an extraordinary discretionary constitutional remedy to advance justice and not to thwart it.

11. Production of the original documents, copies of which have already been placed on record, after the original could be traced out by the witness and that too before the final arguments could commence may be necessary for proper adjudication of the case. The petitioner/defendant through DW-3 would be tendering the original documents (five in number), copies of which have already been filed. It is the respondent/plaintiff who would get the opportunity to cross examine the witness on those documents. In fact, had the witness not deposed that the old record is destroyed after 8-10 years, on request, even the learned Trial Court would have given an opportunity to the witness to make another attempt to trace out the old record/original documents and then continue with further cross examination.

12. The civil suit for injunction was filed in the year 2002 wherein plaintiff's evidence was closed in the year 2014. Thereafter the defendant has concluded its evidence by 8th August, 2016. Thus, filing of an application before even the final arguments could commence, cannot be termed to be a long gap so as to attribute any motive to the petitioner/defendant that the purpose of filing the application is to delay the disposal of this old case.

13. Apprehension of the respondent/plaintiff that the application, if allowed may have the effect of delaying disposal of the trial, can be taken care of by this Court by subjecting the petitioner to the conditions so as to ensure that on the next date of hearing fixed before the learned Trial Court not only the witness i.e. DW-3 Sh.Vinod Sindhwani is present with the original documents but even the cross examination is completed by learned counsel for the respondent/plaintiff on the same day. At the same time, the respondent/plaintiff can be compensated by awarding cost.

14. In view of the above discussion, the impugned order dated 23rd January, 2017 passed by the learned Trial Court dismissing the application of the petitioner/defendant with cost of ₹10,000/- is liable to be set aside and the same is hereby set aside.

15. The petitioner/defendant is allowed to produce DW-3 Sh.Vinod Sindhvani alongwith original documents for tendering the original documents in evidence and further cross examination on the next date of hearing fixed before the learned Trial Court, which is stated to be 27th May, 2017, subject to payment of cost of ₹1 lac.

16. After the original documents (referred in paragraph No.7), copies of which have already been placed in the Trial Court Record, are tendered, learned counsel for the respondent/plaintiff shall be at liberty to cross examine DW-3 on the said documents.

17. The cost of ₹1 lac shall be paid by the petitioner/defendant to learned counsel for the respondent on or before 27th May, 2017 before commencement of further examination of DW-3.

18. It is made clear that if the cost is not paid on or before 27th May, 2017 before tendering the original documents and commencement of cross examination of DW-3, this petition shall stand dismissed.

19. However, if learned counsel for the respondent/plaintiff is not willing to accept the cost, in that case, the learned Trial Court shall direct the petitioner/defendant to deposit the cost by 29th May, 2017 with Pragati Institute for Severally and Profoundly Mentally Retarded (ISPMR), Female Wing, Asha Kiran Complex, Sector-1, Rohini, Delhi-110085 (payment of cost should be made by cheque in favour of “H.O./D.O. for School & Home Mentally Retarded Children” in Account No.394501010013010). The opportunity to cross examine DW-3 shall be availed by the

respondent/plaintiff on 27th May, 2017. The proof of deposit the cost shall be deposited in the Court by 30th May, 2017.

20. The parties shall not seek any adjournment on 27th May, 2017 except that if Presiding Officer happens to be on leave on that date, in that case, the matter shall be taken on the next working day.

21. The petition is allowed, subject to the above directions.

22. A copy of this order be sent to the concerned Trial Court for information and compliance.

23. As prayed, a copy of the order be also given dasti to learned counsel for the parties.

CM No.7745/2017 (Stay) & CM No.7746/2017 (for summoning of record)

Dismissed as infructuous.

PRATIBHA RANI, J.

APRIL 27, 2017

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