

\$~28

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

%

Date of Decision: May 19, 2017

+

CM(M) No.415/2017

RAVI SETIA & ANR

..... Petitioners

Through: Mr.Amresh Mathur, Advocate.

versus

SOM NATH SETIA & ORS

..... Respondents

Through: Mr.Sanjeev Sindhvani, Senior
Advocate instructed by Mr.Sanjay
Dua, Advocate for R-1.
Mr.Shubhendu Bhattacharya,
Advocate, proxy for Mr.Kunal
Sharma, Advocate for DDA/R-3.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM(M) 415/2017

1. The petitioners have invoked the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India paying for setting aside the order dated 13th February, 2017 passed by the learned Trial Court in Civil Suit No.611896/16.

2. Vide impugned order dated 13th February, 2017, the application under Section 151 of Code of Civil Procedure filed by the petitioners (who are defendants No.1 and 2 in Civil Suit No.611896/16) has been dismissed by

the learned Trial Court observing that the application under Order IX Rule 7 CPC filed by the petitioners/defendants No.1 and 2 has already been dismissed and the order has attained finality. Learned Trial Court has also noted that the matter was remanded by the Hon'ble Supreme Court vide order dated 7th October, 2009 passed in SLP No.30142/2008 and the Trial Court cannot go beyond the terms of the order of Supreme Court. The matter was remanded at the stage of final arguments with the direction to dispose of the matter expeditiously. The Trial Court has noted that allowing such application for recalling PW-1 for cross examination would have the effect of re-opening the case and delay the matter.

3. Mr.Amresh Mathur, learned counsel for the petitioner has submitted that irrespective of the fact that petitioners/defendants No.1 and 2 were proceeded ex parte, they have a right to cross examine the witnesses already examined. It has also been contended that while remanding the case vide order dated 7th October, 2009, the Supreme Court has also observed that :

“..... all the questions of law and fact are open to both the parties to be raised before the Trial Court except the plea of order XXIII Rule 3A CPC”

4. It has been contended that the direction by the Supreme Court for expeditious trial does not have the effect of depriving the petitioners of fair opportunity to defend the suit, hence interest of justice requires that PW-1 be recalled for cross examination by the petitioners/defendants No.1 and 2.

5. Mr.Sanjeev Sindhwani, learned Senior Advocate for the respondent No.1 has submitted that the petitioner no.1/defendant No.1 has been proceeded ex parte on 19th February, 2002 and petitioner No.2/defendant No.2 has been proceeded ex parte on 26th November, 2001 and till then, they

have not filed the written statement. Only DDA/defendant No.4 was contesting the suit.

6. Learned Senior Advocate for the respondent No.1 has further submitted that the application filed by the petitioners for setting aside the exparte order was dismissed on 15th January, 2004. After the matter was remanded by the Supreme Court, the petitioners sought permission to file written statement which was declined by the learned Trial Court vide order dated 7th February, 2011. The order declining the permission to file written statement was impugned by the petitioners by filing Civil Misc.(Mains) No.302/2011 which was dismissed by this Court vide order dated 27th July, 2011 observing that the direction contained in the order of remand of the Apex Court had clearly envisaged that the suit shall be decided in accordance with law which would be as per the procedure as contained in Order XLI Rule 23 of the Code of Civil Procedure. It was also observed that questions of law and fact are the questions which were already on the Court record; admittedly defendant No.4 had filed the written statement and also led the evidence; the evidence of plaintiff was also on record; and that the facts and law, which were on the record of Trial Court, had to be proceeded and dealt with by the Trial Court.

7. Learned Senior Advocate for the respondent No.1 has submitted that the petitioners cannot seek recall of PW-1 for cross examination.

8. I have considered the rival contentions. Learned counsel for the petitioners does not dispute that the order proceeding exparte against petitioners/defendants No.1 and 2 has not been set aside as the applications filed under Order IX Rule 7 CPC have been dismissed. It is also admitted case of the petitioners that when they were proceeded exparte, they had not filed the written statement. It is also not disputed that when the matter was

remanded by Apex Court it was with the limited direction that all the questions of law and fact are open to both the parties to be raised before the Trial Court except the plea of order XXIII Rule 3A CPC and no opportunity was granted to the petitioners/defendants No.1 and 2 to defend the case either by filing the written statement by giving an opportunity to cross examine plaintiff's witnesses. This was also clarified by this Court while disposing of Civil Misc.(Mains) No.302/2011.

9. In the case K.K.Velusamy vs. N.Palanisamy (2011) 11 SCC 275 the inherent powers vested in the Court under Section 151 of Code of Civil Procedure and the principles governing exercise of discretion under Section 151 of Code of Civil Procedure have been summarised by the Supreme Court in paras 11 and 12 of the report as under:-

'11. There is no specific provision in the Code enabling the parties to re- open 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 Code 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 re-opening 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 re- open 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.

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.'

10. Since the petitioners have been proceeded ex parte before filing of the written statement and were not present at the time of examination of plaintiff's witnesses though they can take part in the subsequent proceedings as of right but they cannot be relegated back to the position and re-open the proceedings from the date when they were proceeded ex parte. The learned Trial Court has rightly dismissed the application under Section 151 of Code of Civil Procedure which if allowed would have the effect of placing the

petitioners/defendants No.1 and 2 as if they had not been proceeded exparte or they were taking part in the proceedings on the day when PW-1 was examined so as to be in a position to cross examine him.

11. As the applications under Order IX Rule 7 of Code of Civil Procedure have been dismissed, the petitioners/defendants No.1 and 2 have no option but to accept all that has happened after they were proceeded exparte and till the date when they joined the proceedings.

12. The impugned order does not suffer from any illegality or infirmity as the learned Trial Court has rightly exercised the discretion in rejecting the request of the petitioners to recall PW-1 for cross examination which otherwise would have been in violation of the directions of the Supreme Court issued vide order dated 7th October, 2009 in SLP No.30142/2008.

13. The petition is dismissed.

14. As prayed, copy of the order be given dasti to learned counsel for the parties under the signature of Court Master.

CM No.14243/2017

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 19, 2017

'st'