

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION No.1212 OF 2018

C.S. Construction Co.

... Petitioner

Vs.

1. Ramniranjan Haritwal
since deceased, through
1A. Sitadevi R. Haritwal & Ors.

... Respondents

Mr.K.D. Shah for the Petitioner

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: JULY 3, 2018

P.C. :

1. This Writ Petition is directed against the order dated 12.12.2017 passed by the learned Judge of the Bombay City Civil Court, Mumbai, below exhibit 31 in Suit No.8194 of 1995. The evidence of the plaintiff is over. So also, the evidence of the defendant is over and the defendant has examined one witness i.e., DW2. In his examination in chief, he made statement that in his presence, the cash amount which is a subject matter of the suit, was returned to the plaintiff's partner. It is the case of the plaintiff that the name of this witness was never mentioned in the

written statement and therefore, the evidence of that witness was a surprise and so, the plaintiff wants to examine some other witness by way of rebuttal to show that the said witness was not working in the concerned firm. Therefore, the plaintiff moved application seeking permission to examine another witness. The said application was opposed by the defendant. The learned Judge after hearing both the sides, passed a detailed order rejecting the said application and hence, this Writ Petition.

2. The learned Counsel for the petitioner/plaintiff submits that DW2 was not working in the concerned firm and that evidence is required to be brought on record to prove the case of the plaintiff and to prove malafides of the defendants. The learned Counsel further submits that this name was never known to the plaintiff and all of a sudden, this person has entered the box. The learned Counsel submits that the trial Court has erroneously rejected the application disregarding the principles of inherent power u/s 151 of the Civil Procedure Code and so also, under Order 18 of having inherent discretionary power.

3. In support of his submissions, the learned Counsel relied on the judgment of the Supreme Court in the case of **K.K. Velusamy vs. N. Palanisamy**¹.

4. None appears for the respondents, though served.

5. Heard submissions. Perused the impugned order. So also, the application and the record produced herein. It appears from the record and the submissions of the learned Counsel, list of the witnesses neither by the plaintiff nor the defendant were produced before the Court. No doubt, the evidence of DW2 was a great surprise to the plaintiff. However, the plaintiff has every right to cross-examine the said witness and as per the submissions of the learned Counsel, the witness was cross-examined by the plaintiff. If the witness is brought as a surprise, it is upto the Court to appreciate such evidence where the foundation is not laid either in the plaint or in the written statement. As the case may be. Under Order 18 Rule 17 of the CPC, the trial Court has power to recall any witness to adjudicate the issue before it in a better way. However, the Court may not recall any witness , if the Court thinks

¹ (2011) 11 SCC 275

it is not necessary. Under the Civil Procedure Code and the Indian Evidence Act, the sequence of examination of witnesses is laid down after the evidence of the parties who has right to begin, the other party is required to lead evidence. This sequence is not to be changed unless the Court thinks it necessary to put some other witness by recalling. It is upto the Court to consider the evidence and the facts to appreciate the evidence which is unfolded before it.

6. In the case of **K.K. Velusamy vs. N. Palanisamy (supra)**, the Supreme Court dealt with section 151 of the Civil Procedure Code where the party was seeking reopening of evidence and recalling the evidence for cross-examination in view of certain material admissions by the witnesses, which were recorded in digital voice recorder subsequent to the conclusion of evidence. The court also considered the scope of Order 18 Rule 17 under which the Court is empowered to recall the witness. In the said case, there was some additional evidence of recoding of evidence after conclusion of evidence. Moreover, the application was for recalling of the witness and the power of recalling vests with the Court under Order 18 rule 17. In the present case, the plaintiff

wanted to bring additional witness to rebut the evidence given by DW2.

7. After going through the order of the trial Court, I am of the view that there is no illegality and it does not require any interference. Hence, the Writ Petition is dismissed.

(MRIDULA BHATKAR, J.)