

WRIT PETITION NO. 6721 OF 2016
WITH
CIVIL APPLICATION NO. 1682 OF 2016

A Company registered under the Companies Act 1 of 1956 and having its branch office at 96, Jolly Maker Chamber No.2, Nariman Point, Bombay-400 021 and having its registered office at 51, G.I.D.C. Industrial Estate, Nandesari, Baroda.

...Petitioner.

A body corporate registered under The law relating to limited liability Company and having its office at National House, Tulloch Road, Near Regal Cinema, Bombay.

...Respondent.

- Mr.Vishal Kanade a/w. Ms.Bhairavi Pathak i/b.I.R. Joshi & Co. for the Petitioner.
- Mr.Rajshekhar V. Govilkar a/w. Ms.Shaba N. Khan a/w.Mr.Kunal Nawale for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 6th FEBRUARY, 2018.

1] Heard learned counsel for the Petitioner and the Respondent.

2] By this Writ Petition filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 17th February 2016 passed by the City Civil Court, Mumbai, below application Exhibit-4 in S.C. Suit No.7569 of 1981.

3] The application at Exhibit-4 was preferred by the present Petitioner, who is the Plaintiff before the trial Court. The said application was filed for recall of the Plaintiff's witness Mr.Rakesh Agarwal for the limited purpose of proving two documents, namely, the letter dated 4th January 1982 addressed by the then Advocate of the Respondent to the Advocate of the Petitioner and reply dated 5th January 1982 of the Advocate of Petitioner sent to the said letter.

4] It is a matter of record that, earlier also the Notice of Motion No.2354 of 2009 was taken out by the Petitioner for adducing the additional evidence of these two letters after his evidence was closed. The said Notice of Motion was allowed by this Court, as the suit at the relevant time was pending in this Court and as per the order passed by this Court on 15th April 2011 the Petitioner was permitted to adduce additional evidence in order to prove these two letters. Thereafter, the Petitioner filed the affidavit of additional evidence. According to the Petitioner, at that time, he was under the impression

that the original letters were produced along with the affidavit. However, during the course of his cross-examination, it was noticed that the original letters were not produced, but only photocopies were produced. As a result even after conclusion of his cross-examination, the right was reserved by learned counsel for the Respondent, to further cross-examine the Petitioner's witness Mr.Rakesh Agarwal, if the original letters are tendered by the Petitioner. The said request was accepted, as can be seen from the order passed by the trial Court in the course of the cross-examination on 15th April 2015.

5] Thereafter, the Petitioner examined one witness by name Ms.Bhairavi Pathak, who was working as an Advocate Assistant with M/s.I.R. Joshi & Company, since last 14 years, to produce on record the original letters dated 4th January 1982 and 5th January 1982, along with her affidavit. She has produced those original letters, stating that at the relevant time one Ms.P.L. Bachani, Advocate Assistant was handling this matter and on account of her sudden death on 20th February 2014, the originals remained to be produced. The Petitioner's witness Rakesh Agarwal was, however, examined under the impression that the originals were produced along with his affidavit of additional evidence. This witness Ms.Bhairavi Pathak was cross examined on behalf of the Respondent. However, as the only

purpose for her examination as a witness was of production of these original two letters which were in the Office of the Advocate, now the Petitioner wants to recall his witness Mr.Rakesh Agarwal for the limited purpose of proving these original two letters dated 4th January 1982 and 5th January 1982.

6] This application was strongly resisted by the Respondent contending *inter-alia* that already three opportunities were given to the Petitioner but the Petitioner has neither produced the original letters nor proved them and hence no further opportunity was warranted. Moreover, it was submitted that, the application under Order-18 Rule-17 is not tenable as the said power of recall of the witness lies exclusively with the Court.

7] The trial Court accordingly rejected the said application vide its impugned order.

8] In this Writ Petition, I have heard learned counsel for the Petitioner and the Respondent.

9] Admittedly, these two letters were relevant for the purpose of deciding the dispute involved between the parties and hence this Court has, vide its order dated 15th April 2011, allowed and permitted

the Petitioner to adduce additional evidence in respect of these two letters. It is a matter of record that thereafter the Petitioner has filed affidavit of evidence and along with it these two letter were also produced under the *bonafide* impression that they were the originals. However, when it was pointed out in cross-examination that these two letters are not the originals but the photocopies thereof, the Petitioner got the original letters produced, which were in the office of his Advocate and for that purpose witness Ms.Bhairavi Pathak is also examined and she has explained the reason, under which the originals remained in the office and the photocopies came to be produced. Her evidence was led only for the purpose of producing the original letters, from the proper custody. She was not examined to prove those letters. Now only to prove those letters, the Petitioner wants that witness Mr.Rakesh Agarwal may be recalled.

10] If one considers the earlier order passed by this Court holding that these letters are relevant and therefore granted permission to the Petitioner to lead additional evidence in respect of these letters and if one considers the above said sequence of facts, then interest of justice requires that merely on account of the negligence or inadvertence on the part of the Petitioner, the Petitioner should not be deprived of the opportunity to prove these letters and

for that purpose his recall of PW-1 Mr.Rakesh Agarwal become necessary. The interest of justice always requires that the dispute between the parties should come to an end completely, finally and effectively and no one should suffer on account of any negligence or inadvertence which might have occurred in the course of the proceeding. In this case, if one considers that the cross-examination of the witness Mr.Rakesh Agarwal was concluded with an endorsement that if the original letters are produced, the right of Respondent to cross-examine him is reserved, then it follows that at that time also there was understanding that such original letters will be produced and then the Respondent will further cross-examine the witness. Therefore, there is no question of any prejudice being caused to the Respondent. In the interest of justice, it is always desirable that one last opportunity may be given to the Petitioner to prove these two letters and for that purpose to recall the witness.

11] As regards the objection raised by learned counsel for the Respondent that under Order-18 Rule-17 C.P.C., only the Court has power to recall such witness for the purpose of putting any question to him, in this case also it is ultimately the Court which exercises the power. It may be suo-moto or on the application moved by the parties. Ultimately it is the opinion and finding of the Court which matters to

decide whether it is necessary that the witness be recalled for the purpose of proving these two documents. Therefore, herein the case also, it is the Court which is exercising the power, may be at the instance of the Petitioner. So the objection will not come into play.

12] However, considering that the matter is dragged from the year 2011 when the earlier order of granting additional evidence by way of these two documents was passed, it is also necessary to compensate the Respondent for the delay, which has happened in the matter.

13] Accordingly, the Writ Petition is allowed. The impugned order passed by the trial Court is set-aside and application at Exhibit-4 is allowed, subject to the Petitioner paying the costs of Rs.25,000/- (Rs. Twenty Five Thousand only) to the Respondent, within two weeks from the receipt of this order by the trial Court. In case of failure on the part of the Petitioner to pay these costs within the stipulated period, this order will stand automatically vacated.

14] In view of disposal of Writ Petition, nothing survives in the Civil Application and therefore, it stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]