

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 8808 OF 2015

1.Ashok Lalta Pandey
2.Rameshwar Lalta Pandey. ...Petitioners

Versus

1.Zarina Abdullah Janai
2.Mehroo Abdulla Janai
2(a) Zarina Abdullah Janai
2(b) Zeenat Tayyab Chotani
3.Zeenat Tayyab Chotani. ...Respondents

Mr.Mayur Khandeparkar with Mr.Mehul Shah i/b. Mr.G.T.Meshta, for the Petitioners.

Mr.Rohan Kelkar with Mr.Asad Mazgaonwala i/b. Kartikeya & Associates, for Respondent Nos.2A & 3.

CORAM : G.S.KULKARNI, J.

DATE : 30th JANUARY, 2018

Oral Judgment :

1. Heard learned Counsel for the parties. Petitioner no.1 who is defendant no.3 and petitioner no.2 who is defendant no.1 in the eviction suit being R.A.E. & R. Suit No.1022/1558 of 2009 instituted by the respondents against the petitioners are before the Court challenging the order dated 24 August 2015 passed by the learned Judge of the Small Causes Court, Mumbai, whereby the application of petitioner no.2/defendant no.1 for reopening of the evidence of the defendants,

by allowing defendant no.3 to file his affidavit of examination-in-chief and to be cross examined by the plaintiffs, stands rejected.

2. In nutshell the facts are:

On 4 September 2009 the respondents-landlords filed the suit in question in the Small Causes Court at Mumbai against the petitioners (defendant no.3 and defendant no.1) and one Smt.Sindhupati Pathak(defendant no.2). It is not in dispute that all the defendants had appeared in the suit in response to the suit summons.

3. For the sake of convenience the parties are referred as they stand before the trial Court.

4. A written statement was filed on behalf of defendant nos.1 and 2 as also a separate written statement was filed on behalf of defendant no.3 in or about January,2011. After the issues were framed, the parties intended to lead their evidence. Defendant no.1 tendered his evidence by filing affidavit in lieu of examination in chief. On 11 June 2015, defendant no.1 was cross-examined and the cross examination of defendant no.1 was completed on 7 July 2015. In

concluding the cross examination, the learned trial Judge recorded that “*Defendant closed their evidence. Matter adjourned for arguments.*” The roznama of the proceedings of the trial court shows that on 7 July 2015 when the cross examination of defendant no.1 was complete, the Advocate for the defendants was absent. It is not in dispute that all the defendants were represented by a common advocate.

5. Thereafter, the suit was listed for final arguments on 20 July 2015 when on the request of the defendants, an adjournment was granted for final argument on 29 July 2015 when written arguments (Exhibit 44) were filed on behalf of the defendants and the suit was adjourned to 30 July 2015 for plaintiffs' arguments. On 30 July 2015 the Court proceeded to hear the arguments, when the advocate for both the parties were present. The Court has recorded in the roznama that written arguments are filed on behalf of the defendants. On 31 July 2015 “arguments on behalf of the plaintiffs were fully heard and on the oral request of the defendants' advocate, the matter was adjourned for defendants' arguments, if any.” However, what happened on 3 August 2015 is something peculiar. An application below 'Exhibit 45' was filed by defendant no.1 stated to be filed on behalf of defendant no.3, praying for reopening of evidence and further praying that

defendant no.3 be allowed to file his affidavit of examination-in-chief and be cross examined. The prayer in the said application reads thus:-

“(a) that the evidence of Defendants be re-opened and the Defendant No.3 be allowed to file his Affidavit of examination-in-chief and to be cross examined by the plaintiffs.”

6. In paragraph 1 of the said application, defendant no.1 stated that though the suit was listed for arguments, however, after the cross examination of defendant no.1, defendant no.3 was required to file his affidavit of examination in chief, however at that time he was not keeping good health and was not in a position to file affidavit of evidence. As the defendant no.3 has recovered to health and was in a position to file affidavit of examination in chief and to face a cross examination to prove his case, it was just and proper that evidence of defendant no.3 be reopened and defendant no.3 be allowed to file his affidavit in support of the case and that no prejudice would be caused to the plaintiffs if the application is granted.

7. This application of defendant no.1 as filed on behalf of defendant no.3 was opposed by the plaintiffs contending that the application was misconceived and malafide. In opposing the application, the plaintiffs stated that defendant no.3 had filed written

statement and it is the case of defendant no.3 in the written statement that he was residing in the suit premises and was working in Mumbai. It was contended that the defendants had full unrestricted opportunity to lead further evidence after the evidence of defendant no.1 as also the defendants were represented by the same advocate. It was contended that the defendants have obviously considered their position and had taken a decision as clearly seen from their conduct that they do not want to lead further evidence and/or they do not want to examine defendant no.3 and thus, the evidence was closed. It was stated that the plaintiffs have advanced arguments and have completed the same and at this stage the defendants cannot turn around and attempt to reopen the case. It was stated that this was clearly an afterthought and an attempt to cover up the lacunae after listening to the arguments in a desperate attempt to salvage a lost case. It is also stated that there was no application by defendant no.3 making such a prayer. Plaintiffs further contended that the arguments were completed and only some discussion on points of law had remained to be completed. It was thus prayed that granting of such an application would cause serious misuse of justice as would also cause irreparable loss or injury and prejudice to the plaintiffs.

8. What is interesting is that this reply affidavit of the plaintiffs was sought to be contested by defendant no.3 entering the arena and making his presence felt by filing his independent affidavit. Defendant no.3 inter alia contended that as he was sick and due to weakness his elder brother /defendant no.1 though had informed him to file evidence sometime in June,2015, and though he was agreeable to attend the Court, but due to weakness he was not in a position to move out of the suit premises. He stated that one Dr.B.N.Shah was treating him and advised him not to attend the Court. He further stated that on 5 July 2015 his elder brother/defendant no.1 told him that affidavit of evidence on his behalf (defendant no.3) is being prepared and therefore, defendant no.3 needs to attend the court, when again defendant no.3 expressed his inability to do so as he was not in a position to walk properly. It is stated that thereafter, somewhere in the last week of July,2015, defendant no.1 again contacted defendant no.3 for this purpose. Again defendant no.3 was contacted on 10 August 2015, by which time, defendant no.3 was feeling better and hence agreed to attend the Court and file evidence and also to face cross examination. He stated that he could not file evidence due to the said unavoidable circumstances and thus he be permitted to file affidavit of examination in chief.

9. The learned trial Judge after hearing the parties and considering the pleadings on the said application did not find favour in any of the contentions which were raised on behalf of the defendant no.1 and rejected the said application. In doing so, the learned trial Judge has interalia observed that the application in question for reopening of evidence was filed after conclusion of final arguments. Referring to the decision of the Supreme Court in “**K.K.Velusamy Vs. N.Palanisamy**”¹ the learned trial Judge observed that in the facts of the case in hand, the said decision would not be applicable in which the Supreme Court had laid down the principles of law in regard to the exercise of powers by the Civil Court under the provisions of Order 18 Rule 17 and Section 151 of the Code of Civil Procedure. Accordingly, the learned trial Judge has rejected the application of defendant no.1 to reopen the evidence.

10. Learned Counsel for the petitioners in challenging the impugned order would submit that there is a basic infirmity in the trial Court overlooking the fact that when the evidence of defendant no.1 was closed on 7 July 2015 the advocate for the defendants was absent, nonetheless, the Court recorded that “*Cross examination over. No re*

1 (2011)11 SCC 275

examination. Defendant closed their evidence. Matter adjourned for arguments.” It is submitted that in fact at this point of time, it was necessary for the learned trial Judge to permit defendant no.3 to file his evidence and not to observe that the evidence of defendants was closed, more particularly, when the written statement of defendant no.3 was already on record and he was independently contesting the suit. The second submission is that the law laid down by the Supreme Court in the case of *K.K.Velusamy Vs. N.Palanisamy* (supra) has been overlooked by the learned trial Judge inasmuch as the Supreme Court has held that to meet the ends of justice and to prevent the abuse of process of the court, the court was vested with a power to reopen the evidence even after the conclusion of the arguments of the parties. It is next submitted that defendant no.3 with the members of his family, is in possession of the suit premises and serious prejudice would be caused to him if the evidence is not reopened and an opportunity is not granted to defendant no.1 to lead his evidence. It is thus submitted that the impugned order be set aside and the application as made by defendant no.2 for reopening of defendants evidence be allowed.

11. On the other hand, learned Counsel for respondents/plaintiffs drawing my attention to the relevant dates and

the trial Court's roznama, submits that the application in question as made by defendant no.1 on behalf of defendant no.3 to reopen the evidence, was not a bonafide application. It is submitted that defendant no.3 though had filed written statement, however throughout had kept himself away from the proceedings of the suit. It is submitted that defendant no.3 never filed an independent application making a prayer that the evidence be reopened and defendant no.1 has filed the application in question which itself was not maintainable. Defendant no.3's subsequently appearing in the application and filing rejoinder affidavit, was also no good. It is submitted that the order passed by the trial Court on 7 July 2015 that the defendants had closed their evidence, was well-known to the defendants who were represented by a common advocate. It was further submitted that being aware of the said order, the defendants had proceeded for final arguments which was held on 20 July 2015, 29 July 2015, 30 July 2015 and 31 July 2015. It is submitted that however on 31 July 2015 although the arguments were fully heard, the Court has clearly recorded that at the request of the defendants' advocate the suit was adjourned to 3 August 2015 *"for defendants' arguments, if any."* It is thus submitted that the roznama itself would make it clear that after the entire final argument of the respective parties was over, including the written arguments

being placed before the Court, such an application for reopening of the evidence was made. It is submitted that the decision of the Supreme Court in *K.K.Velusamy Vs. N.Palanisamy* (supra) would not be applicable in the facts of the present case as rightly held by the learned trial Judge. Learned Counsel for the respondents relying on the decision of the Supreme Court in “*Salem Advocate Bar Association, T.N. Vs. Union of India*”² submits that the position in law is that the provisions of Order 18 Rule 17A of the Code of Civil Procedure have been deleted, with an object that unnecessary applications are not filed so as to prolong the trial. In referring to the decision in “*Bagai Construction through its proprietor Lalit Bagai vs. Gupta Building Material Store*”³ it is submitted that when the defendants had sufficient opportunity during the entire trial to lead evidence and as such an opportunity was not availed, it would not be open to a litigant to invoke the provisions of Section 151 of the Code of Civil Procedure read with Order 18 Rule 17. It is accordingly submitted that the impugned order need not be interfered.

12. Having heard the learned Counsel for the parties, and having perused the relevant documents as placed on record, it appears

² (2003)1 SCC 49

³ (2013)14 SCC 1

to be not in dispute that throughout there was plentiful opportunity available to the defendants to lead their evidence, having filed their respective written statements. In fact, defendant no.1 had led his evidence and was cross-examined on various dates as clear from the roznama from 11 June 2015 to 7 July 2015. It is also not in dispute that all the defendants were represented by a common advocate. On 7 July 2015 the cross examination of defendant no.1-plaintiff was concluded and the trial Court recorded that the defendants closed the evidence and the suit was adjourned for arguments. On 20 July 2015 i.e. on the adjourned date, the parties appeared and on the request of the defendants an adjournment was granted for final arguments on 29 July 2015. At this point of time before the final arguments could commence, no grievance was made either by defendant no.1 or defendant no.3, that defendant no.3 be permitted to reopen the evidence. In fact on 29 July 2015 the Court not only took up the final hearing of the suit, but also the defendants filed written arguments which were common written arguments on behalf of the defendants, and the suit was adjourned to 30 July 2015 for plaintiffs remaining arguments. The roznama dated 30 July 2015 records that the defendants made their arguments and that the suit was heard fully and it was adjourned to 31 July 2015 on which date the plaintiffs'

arguments were fully heard and on the oral request of the defendants' advocate it was adjourned to 3 August 2015 "for defendants' arguments, if any". This clearly indicates that what remained was only to close the suit for judgment. However, on the adjourned date that is on 3 August 2015 surprisingly an application in question came to be presented by defendant no.1 (filed on behalf of defendant no.3) praying that the defendants' evidence be reopened and defendant no.3 be allowed to file his affidavit in lieu of examination in chief and to be cross examined. What is significant is that defendant no.3 never came forward to make such an application that he wants to lead evidence. Defendant no.1 was always present in the suit, he led his evidence and was cross examined. The reasons as set out in this application of defendant no.1 to reopen the evidence by permitting defendant no.3 to be cross examined, was that defendant no.3 was not medically fit to lead evidence and to be cross examined and that now on 3 August 2015 (date of filing of the application) he was in a fit condition to lead his evidence and to be cross examined. To support this contention, a medical certificate issued by one Dr.B.N.Shah, M.B.B.S. dated 10 August 2015 was placed on record. This medical certificate also does not inspire confidence as the medical certificate itself is post the application dated 3 August 2015 which records that defendant no.3

was under the treatment of the said doctor for fever and anemia from 5 July 2015 to 10 August 2015. Considering these facts, the learned trial Judge has rightly observed that it was difficult to believe the case of the defendants that defendant no.3 was in a condition of being so medically unfit to give instructions either to Advocate or other defendants to move an application that he intended to lead evidence till the suit was posted for final argument. It cannot be overlooked that if defendant no.1 could file the application in question in the absence of defendant no.3, then it was always possible for defendant no.1 to move such an application earlier and not on the day when the suit would be closed for judgment as sought to be moved on 3 August 2015.

13. It is a settled position in law that when a litigant would approach the Court in such a situation and more particularly in the present case when the suit had proceeded for final hearing and final hearing itself was concluded, as the roznama would clearly indicate, it was expected that the defendants do so bonafide. Considering the sequence of the events and the manner in which the suit proceeded for final hearing, there appears to be much substance in the contention as urged on behalf the plaintiffs that the application as moved on behalf of defendant no.1 to reopen the evidence, was a mischievous attempt only

to fill up lacunae in the case though the application was coloured with the pleas of equity and injustice. It is quite clear that the same application could have been moved by defendant no.1 immediately after the evidence was closed and the defendants need not have proceeded with the final hearing of the suit and even to the extent of submitting their written arguments. It is only when the entire argument was over and the Court would proceed to close the suit for judgment, such an application is filed that too not by defendant no.3 who is not forthright in saying that he was in a position of absolute incapacity to give instructions to his advocate. Surely, this attempt on the part of the defendants, to rope in a plea on behalf of defendant no.3 by defendant no.1, that now defendant no.3 be permitted to lead evidence by reopening the evidence of the defendants, appears to be lacking in bonafides and appears to be a systematic attempt to gain some unfair advantage. In fact it also appears to be quite clear that on none of these days, when the suit was listed for final hearing that is on 20 July 2015, 29 July 2015 and 30 July 2015, an attempt was made to make such an application, when admittedly in the rejoinder affidavit as filed before the trial court defendant no.3 stated that he was made aware in June,2015 that he was required to file affidavit of evidence.

14. Further it is also quite clear that on 31 July 2015 when the suit actually would have been closed for judgment, the defendants for the reasons best known to them sought an adjournment without informing the court or rather keeping the courts in dark of the reason as to why adjournment is being sought. If fairness was to prevail on the part of the defendants at the stage when the arguments are almost closed, then the defendants would have surely pointed out to the Court that the adjournment has been sought to make an application for reopening of the evidence. In fact on none of the days when the suit was listed for final arguments, such intention was made known or informed to the Court and only on 3 August 2015 when the court was to close the suit for judgment, the Court was taken by a surprise by presenting such an application for reopening the evidence. Thus, the lack of bonafides on the part of the defendants is writ large from the entire conduct. The defendants were crafty and were casual with the process of the Court. It cannot be disputed that what was being sought, in the peculiar circumstances, was a discretionary relief and therefore, such an application ought to have been supported by strong bonafides. Considering the pleadings as also the documents on record, in my opinion, the plaintiffs are correct in their contention that the application of the defendants was not bonafide.

14. In regard to the contention as urged on behalf of the petitioners relying on the decision of the Supreme Court in *K.K.Velusamy Vs. N.Palanisamy* (supra) it cannot be disputed that the Court would have ample power under Order 18 Rule 17 read with Section 151 of the Code of Civil Procedure to recall any witness either the Court exercising the power on its own motion or on an application which may be filed by one of the parties to the suit, however, the Supreme Court has observed that “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. In paragraph 12 of the decision, the Supreme Court observed that Section 151 of the C.P.C. cannot be routinely invoked for reopening of the evidence or recalling witnesses. In summarizing the law in that regard in sub-paragraph (f) of paragraph 12 the Court held that 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 bonafides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court. In paragraph 15, the Supreme Court has held that there can always be exceptions in exceptional or

extraordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized with reference to exercise of power under Section 151 of the Code, even if such an application is made before the conclusion of the arguments. However, the caveat which has been imposed as observed in paragraph 19 is that the application should be found to be bonafide and where 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, only then the court may exercise its discretion to recall the witnesses or permit fresh evidence by exercising power under Section 151 or Order 18 Rule 17 of the Code of Civil Procedure. At the same time, it is held that 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, such an application should be rejected. It also cannot be overlooked that from the facts of the said case before the Supreme Court and as recorded in paragraph 4 of the decision that the issue did not pertain to a case where the evidence was closed. In fact the narration of facts in paragraph 4 of the decision would indicate that the conversation was recorded on 27

October 2008 which was subsequent to filing of the written statement on 12 September 2007 and before the arguments could commence which commenced on 11 November 2008 and the issue was in relation to electronic evidence. Thus, in my opinion, learned trial Judge would not be in an error to observe that this decision would not be applicable in the facts of the present case.

15. The respondents would be well advised in relying on the decision of the Supreme Court in the case of *Salem Advocate Bar Association, T.N. Vs. Union of India* (supra) wherein the Supreme Court considering the powers of the Court under Order 18 Rule 17 of the C.P.C. and deletion of Rule 17-A has held that it would be the duty of the court to see that unnecessary applications are not filed and for such applications the provisions of Rule 17 are not invoked. The Court in paragraph 21 has observed thus:

“21. We find that in the Code of Civil Procedure, 1908, a provision similar to Rule 17-A did not exist. This provision, as already noted, was inserted in 1976. The effect of the deletion of this provision in 2002 is merely to restore status quo ante, that is to say, the position which existed prior to the insertion of Rule 17-A in 1976. The remedy, if any, that was available to a litigant with regard to adducing additional evidence prior to 1976 would be available now and no more. It is quite evident that Rule 17-A has been deleted with a view that unnecessarily

applications are not filed primarily with a view to prolong the trial.”

16. In ***Bagai Construction through its proprietor Lalit Bagai vs. Gupta Building Material Store*** (supra) the Supreme Court has held that when sufficient opportunity was available to the parties to place materials before the Court and to lead evidence during the entire trial and despite which, the opportunity was not availed, in such a situation powers of Court under Section 151 of the CPC cannot be invoked. In the said case the final arguments were heard and the matter was posted for judgment and thereafter to improve the case, the plaintiff therein had come forward with an application to avoid final judgment against it, such course was not permissible even with the aid of Section 151 of the Code. It was observed that the Supreme Court had repeatedly held that courts should constantly endeavour to follow such a time schedule and if the same is not followed, the purpose of amending several provisions of the Code would get defeated. It was held that the applications for adjournments, reopening and recalling witnesses are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. The decision of the Supreme Court surely applies to the facts in hand where defendant no.3 never came before the Court by

moving an application to reopen the evidence.

17. In the light of the above discussion, in my opinion, no case is made out for interference. Writ petition lacks merit. It is accordingly rejected. No costs.

18. At this stage, learned Counsel for the petitioners requests for continuation of ad-interim relief/stay of the suit which is in operation from 1 September 2015, as the stay is continued for a substantial period. It is in the interest of justice of justice that the same be continued for a further period of eight weeks from today.

(G.S.KULKARNI, J.)