

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

Civil Revision Petition No.5100 of 2018

ORDER:

This revision is filed, under Article 227 of the Constitution of India, aggrieved by the order of the XIV Additional Chief Judge (Fast Track Court), City Civil Court, Hyderabad in I.A.No.415 of 2018 in O.S.No.698 of 2008 dated 07.08.2018. I.A.No.415 of 2018 was filed by the petitioner-defendant, under Order 18 Rule 17 r/w. Section 151 CPC, to recall PW.1 for further cross-examination by the petitioner-defendant.

Facts, to the extent necessary, are that the respondent had issued a legal notice in Ex.A12 dated 12.05.2008 calling upon the petitioner to execute and register a sale deed in respect of the Suit schedule property. The petitioner got issued a reply in Ex.A14 dated 22.05.2008 demanding that the respondent furnish a copy of the alleged agreement of sale in Ex.A1 dated 27.05.2005, and certain other documents. The respondent furnished only a xerox copy of Ex.A1 along with their letter in Ex.A17 dated 08.09.2008. No other document was, however, furnished. The respondent-plaintiff filed a Suit for specific performance of the agreement of sale. The petitioner-defendant filed I.A.No.4286 of 2008 seeking a direction to the respondent to produce receipts and other documents purported to have been signed by the petitioner, and the said application was allowed by order dated 27.07.2009. The respondent-plaintiff was examined as PW.1. The said documents were, however, not produced even during the course of their evidence.

The petitioner-defendant was examined as DW.1, and her husband was examined as DW.2. It is only on 08.01.2018, that the

respondent-plaintiff filed these documents in Court and, thereafter, further cross-examined DW.1 (petitioner). During the course of cross-examination of the petitioner as DW.1, most of the documents filed in Court on 08.01.2018 were marked as Exs.A24 to A36, and she was confronted with these documents. DW.2 was confronted with the other document which was marked as EX.A37. It is the petitioner's case that the respondent-plaintiff intentionally did not produce these documents, or furnish the same to the petitioner-defendant when requested earlier, only with a view to prevent the petitioner-defendant from explaining it in her written statement or in her examination in chief; she was denied the opportunity to cross-examine PW.1 with respect to the documents produced by him later; this act of the respondent-plaintiff had caused her grave prejudice; it was necessary that she be given an opportunity to further cross-examine PW.1; and he be recalled for further cross-examination.

In its counter, the respondent-plaintiff contended that the application was filed only to protract litigation, and to delay disposal of the Suit; PW.1 was examined long back in the year 2016; documents were filed more than six months ago; there was no explanation, in the affidavit of the petitioner, as to why she did not take immediate steps after 08.01.2018 or after 20.02.2018 when cross-examination of DW.1 was completed; the petitioner had sufficient time, between examination of DW.1 and DW.2, if there was need or necessity in this regard; even after cross-examination of DW.2, the petitioner-defendant took time to produce evidence and did not produce any further evidence; instead of leading further evidence, the petitioner had filed the present application to protract proceedings even further; some of the documents, relating to the Suit transactions, were misplaced and, hence, could not be filed along

with the plaint at the time of filing of the Suit or even at the time of evidence of P.W.1; after the documents were traced, they were confronted to DW.1 during her cross-examination; these documents were, in fact, executed by the petitioner; and no cogent reasons or cause was shown to recall PW.1 for further cross-examination. The respondent, therefore, prayed that the application be dismissed.

In the order under revision, the Court below held that the petitioner had filed I.A.No.4286 of 2008 which was allowed on 27.07.2009 for production of certain documents; the respondent did not produce the so-called documents alleging that they were misplaced; pursuant to the directions of the Court dated 07.12.2017, the respondent-plaintiff had produced the said documents on 08.01.2018; for non-production of those documents, the respondent-plaintiff was not allowed to cross-examine the petitioner-defendant as DW.1; DW.1 was cross-examined before the Advocate-Commissioner, and she was confronted with the documents produced before the Court on 08.01.2018; they were marked as Exs.A25 to A35 in cross-examination; these documents belonged to the petitioner-defendant, and not the respondent-plaintiff; after recording DW.1's cross-examination, the Advocate-Commissioner had filed his report in Court on 21.02.2018; thereafter, the petitioner's husband was examined as DW.2 after taking sufficient time and several adjournments; ultimately, DW.2 was examined in-chief and cross-examined on 12.07.2018; the petitioner, thereafter, took time for leading further evidence; and, instead of leading further evidence, the present application had been filed.

The Court below held that, if at all further cross-examination of PW.1 was necessary, the petitioner-defendant ought to have taken steps at the earliest point of time i.e. soon after completion of cross-

examination of the petitioner (DW.1); for reasons best known to her, no steps were taken to recall PW.1 for the purpose of further cross-examination on Exs.A25 to A35, which documents belonged to the petitioner-defendant; no cogent reasons were shown to recall PW.1; and the present application was filed at the fag end of the trial in a routine manner.

After referring to the judgment of the Supreme Court, in **K.K.Velusamy v. N.Palanisamy**¹, the Court below observed that, in the present case, there was no ambiguity necessitating clarification by recalling PW.1 for further cross-examination; the petitioner, as the author of the document, had knowledge of these documents; she had admitted these documents in her cross-examination, and they were exhibited in evidence as Exs.A25 to A35; the Suit was of the year 2008; and, without sufficient cause, PW.1 could not be recalled for the mere asking as it would further delay the trial. The Court below dismissed the petition holding that the petitioner had not made out any case for recalling PW.1 for further cross-examination.

Sri V.Ravinder Rao, Learned Senior Counsel appearing on behalf of the petitioner, would submit that, while the Suit is of the year 2008, the respondent-plaintiff had chosen not to file the documents, except a xerox copy of Ex.A1 along with their letter in Ex.A17 dated 08.09.2008; the petitioner-defendant had filed I.A.No.4286 of 2008 seeking a direction to the respondent to produce receipts and other documents; the said application was allowed by order dated 27.07.2009; despite the order of the Court, the respondent-plaintiff did not produce the documents even when PW.1 was examined; after an Advocate-Commissioner was appointed for recording cross-examination of the petitioner-defendant as DW.1, the

¹ 2011 (4) SCJ 48 = 2011 (5) ALT 12.1 (TNSC)

Counsel for the respondent-plaintiff wanted to confront her with certain documents on 17.11.2017 without notice, though these documents ought to have been produced, as per the orders in I.A.No.4286 of 2008 in the year 2009 itself; the petitioner's Counsel had objected thereto, and the objection was recorded by the Advocate-Commissioner; on the matter being placed before the Court, its notice was drawn to the order passed in I.A.No.4286 of 2008 dated 27.07.2009, and the petitioner-defendant had contended that the documents could not be used to confront the witness contrary to the earlier order of the Court; the Court below had, by its order dated 07.12.2017, directed the respondent-plaintiff to comply with the order passed in I.A.No.4286 of 2008 holding that, unless the so called documents were produced, the respondent-plaintiff could not be permitted to confront those documents to the witness in cross-examination; the respondent-plaintiff had complied with the order of the Court on 08.01.2018; thereafter further cross-examination was recorded; during the course of cross-examination, DW.1 was confronted with the documents which were marked as Exs.A24 to A36; DW.2 was confronted with one document which was marked as Ex.A37; the respondent-plaintiff intentionally did not comply with the order dated 27.07.2009 till 08.01.2018 so as to prevent the petitioner from explaining it in her written statement or in her chief-examination; there was no opportunity to the petitioner to cross-examine PW.1; and the said act of the respondent-plaintiff had caused the petitioner-defendant grave prejudice.

Sri V.Ravinder Rao, Learned Senior Counsel appearing on behalf of the petitioner, would further submit that the Court below had failed to appreciate that a witness can be recalled at any stage; since DW.2's evidence was completed only on 12.07.2018, the

present application, filed on 24.07.2018, cannot be said to be belated; the petitioner could not, in view of Order 7 Rule 14 CPC more particularly Order 7 Rule 14(4), have filed the present application, before cross-examination of DWs.1 and 2 was completed; and having permitted the respondent-plaintiff to file documents in Court on 08.01.2018, 8½ years after the order was passed in I.A.No.4286 of 2008 dated 27.07.2009, the Court below had erred in holding that the present application, filed around six months after the documents were filed in Court on 08.01.2018, was unduly belated. Learned Senior Counsel would rely on **Macha Gangadhar v. Macha Gangaram**².

On the other hand Sri Shyam S. Agrawal, Learned Counsel for the respondent-plaintiff, would submit that the Court below was justified in rejecting the petitioner's application on the ground that it was belated; nothing prevented the petitioner from filing the present application soon after the documents were filed in Court on 08.01.2018; the very fact that the petitioner had chosen to wait till the entire cross-examination was completed, justified the Court below in holding that the present application was unduly belated; in any event these documents were, admittedly, signed by DW.1; since both DW.1 and DW.2 had admitted that the signatures in the documents belonged to them, they cannot be said to have suffered prejudice as a result of the order under revision. Learned Counsel would rely on **K.K.Velusamy**¹.

The submission, that in view of Order 7 Rule 14 CPC, the petitioner could not file the I.A to recall PW.1 for further cross-examination till cross-examination of DW.2 was completed on 12.07.2018, is not tenable. Order 7 Rule 14 relates to production of

² AIR 2005 AP 178 = 2004 (6) ALT 593

documents on which the plaintiff sues or relies and, under sub-rule (1) thereof, where the plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him and shall, at the same time, deliver the document and a copy thereof to be filed with the plaint. Sub-rule (2) stipulates that, where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is. Sub-rule (3) stipulates that a document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. Sub-rule (4) stipulates that nothing in this rule shall apply to a document produced for the cross-examination of the plaintiff's witness, or handed over to a witness merely to refresh his memory.

While the obligation placed on the plaintiff, under sub-rule (1) of Order 7 Rule 14, is to enter such documents in a list, and produce it in Court when the plaint is presented, sub-rule (3) enables the plaintiff, with the leave of the Court, to produce it as evidence later. Further sub-rule (4) makes sub-rules (1) to (3) inapplicable to documents produced for cross-examination of the plaintiff's witnesses, or handed over to a witness merely to refresh his mind. In the present case the documents were marked during cross-examination of DWs-1 and 2, and not when the plaintiff's witness was being cross-examined. Order 7 Rule 14 has, therefore, no application.

Reliance placed by Sri V.Ravinder Rao, Learned Senior Counsel appearing on behalf of the petitioner, on **Macha Gangadhar**² is also

misplaced. In **Macha Gangadhar**², DW-1 was being cross-examined when the respondent filed an I.A. under Order 18 Rule 17 CPC to recall DW-1 for further chief-examination to mark a document; and the said I.A was allowed. Aggrieved thereby the petitioner carried the matter in revision to this Court. It was contended on behalf of the petitioner that, since cross-examination of the witness was not completed, the question of his being recalled for further chief-examination did not arise; and the trial Court, without keeping in view the fact that the documents sought to be introduced in evidence through DW-1 in chief-examination, was not even received into Court, was in error in allowing the petition to recall DW-1 for the purpose of marking the said document. It was contended, on behalf of the respondent, that, since the respondent had sought to recall DW-1 only to mark a document, and since the petitioner could cross-examine the witness, no prejudice can be said to have been caused to the revision petitioner.

It is in this context that this Court observed that the document, intended to be marked through DW-1 by recalling him, was not even filed into Court by the stipulated time; the question of marking a document, not received by the Court, in the chief-examination of a witness did not arise; recalling DW-1, for further chief-examination to mark a document not received in Court, was erroneous; the respondent had to take steps to file the document, he intended to rely, into Court and the same should be received by the Court for its being put to the witness in evidence in chief-examination; when the witness was being cross-examined, the question of the party calling him as a witness, by filing a petition to recall him for further chief-examination did not arise; after cross-examination of the witness was completed, if the party calling him as a witness wanted to examine

him for further chief-examination, he could seek permission of the Court; the Court could grant permission to further chief-examine the witness as laid down in Section 138 of the Evidence Act; and, in the middle of cross-examination, a witness cannot be stopped for further chief-examination. The Court below was directed to follow the procedure laid down in Section 138 of the Evidence Act.

Since Order 18 Rule 17 CPC and Section 138 of the Indian Evidence Act were referred to in **Macha Gangadhar**², it is useful to take note what these provisions lay down. Order 18 Rule 17 CPC enables the Court, at any stage of a Suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness, under Order 18 Rule 17, can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary, and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have regarding the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (**Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate**³; **K.K. Velusamy**¹).

Order 18 Rule 17 CPC is not a provision 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 could not be produced when the evidence was being recorded. Order 18 Rule 17 is, primarily, a provision enabling the Court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the Court itself can put

³ (2009) 4 SCC 410

questions and elicit answers. Once a witness is recalled for the purpose of clarification, it may, of course, permit the parties to assist it by putting some questions. (**K.K. Velusamy**¹).

Section 138 of the Indian Evidence Act prescribes the order of examination and, in terms thereof, witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

The power to recall a witness, under Order 18 Rule 17 CPC, is exercised by the Court to clarify any doubts it may have regarding the evidence adduced by the parties. As noted in the order under revision, the Court below was of the view that there was no need to seek any clarification. All that Section 138 of the Indian Evidence Act stipulates is the order in which witnesses should be examined, and it does not deal with recall of the plaintiff's witness, after the evidence on behalf of the defendant is concluded. The judgment, in **Macha Gangadhar**², lays down that documents not filed into Court within the stipulated time cannot be marked in chief-examination; and during cross-examination of DW-1, the defendants could not, before completion of cross-examination, recall DW-1 for further chief-examination to mark a document not received in Court. In the present case these documents were all filed into Court on 08.01.2018 before DWs-1 and 2 were confronted with these documents during

cross-examination. It is not the petitioner-defendant which intends to mark documents through its witness, but desires to cross-examine PW-1 with respect to the documents with which both DWs-1 and 2 were confronted. The judgment in **Macha Gangadhar**² has, therefore, no application to the present case.

Sri V.Ravinder Rao, Learned Senior Counsel appearing on behalf of the petitioner, would fault the conduct of the respondent-plaintiff, and contend that they had deliberately avoided filing Exs.A24 to A37 till before commencement of cross-examination of DWs.1 and 2, and that too on the directions of the Court below. It is useful, in this context, to note that the petitioner-defendant filed I.A.No.4286 of 2008 seeking a direction to the respondent-plaintiff to produce the receipts, and other documents, purported to have been signed by the petitioner. I.A.No.4286 of 2008 was allowed by order dated 27.07.2009 and, in terms thereof, the respondent-plaintiff was required to produce the said documents. The respondent-plaintiff, however, failed to do so and it is only on the Court below directing them, by order dated 07.12.2017, to produce the documents, and in holding that they could not cross-examine the petitioner-defendant as DW.1 for non-production of those documents, did the respondent-plaintiff, thereafter, file the documents in Court on 08.01.2018. Exs.A25 to A36 were marked during cross-examination of DW.1 on 21.02.2018 and Ex.A37 was marked during cross-examination of DW.2 on 12.07.2008. The present application, seeking recall of PW.1 for further cross-examination, was filed 12 days thereafter on 24.07.2018.

While it is no doubt true that the application, to recall PW.1 for further cross-examination, was filed on 24.07.2018 six months after the documents were filed by the respondent-plaintiff in Court on

08.01.2018, this delay of six months should be weighed with the delay on the part of the respondent-plaintiff, in filing the said documents in Court, of around 8½ years. As noted hereinabove, I.A.No.4286 of 2008, filed by the petitioner-defendant, to direct the respondent-plaintiff to produce the documents was allowed by the Court below by its order dated 27.07.2009, and it is only after the Court below had, by its order dated 07.12.2017, refused to allow the respondent-plaintiff to cross-examine DWs.1 and 2 till production of the documents, were these documents filed in Court on 08.01.2018.

It is no doubt true that there is no specific provision in the Civil Procedure 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 the 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 clarification. **(K.K. Velusamy¹).**

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. 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. (**K.K. Velusamy**¹; **Padam Sen v. State of UP**⁴; **Manoharlal Chopra v. Seth Hiralali**⁵; **Arjun Singh v. Mohindra Kumar**⁶; **Ram Chand and Sons Sugar Mills (P) Ltd. v. Kanhay Lal**⁷; **Nain Singh v. Koonwarjee**⁸; **The Newabganj Sugar Mills Co. Ltd. v. Union of India**⁹; **Jaipur Mineral Development Syndicate v. Commissioner of Income Tax, New Delhi**¹⁰; **National Institute of Mental Health and Neuro Sciences v. C Parameshwara**¹¹; and **Vinod Seth v. Devinder Bajaj**¹²).

Section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. (**K.K. Velusamy**¹). A Court has no power to do that which is prohibited by law or the Code, by the 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

⁴ AIR 1961 SC 218

⁵ AIR 1962 SC 527

⁶ AIR 1964 SC 993

⁷ AIR 1966 SC 1899

⁸ (1970) 1 SCC 732

⁹ AIR 1976 SC 1152

¹⁰ AIR 1977 SC 1348

¹¹ (2005) 2 SCC 256

¹² (2010) 8 SCC 1

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. 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. (**K.K. Velusamy**¹; **Padam Sen**⁴; **Manoharlal Chopra**⁵; **Arjun Singh**⁶; **Ram Chand and Sons Sugar Mills (P) Ltd.**⁷; **Nain Singh**⁸; **The Newabganj Sugar Mills Co. Ltd.**⁹; **Jaipur Mineral Development Syndicate**¹⁰; **C Parameshwara**¹¹; and **Vinod Seth**¹²). No provision in the Code of Civil Procedure which prohibits recall of PW.1, for further cross-examination with respect to Exs.A24 to A37 which were marked only during cross-examination of DW.1 and DW.2, has been pointed out by Sri Shyam S. Agarwal, Learned Counsel for the respondent-plaintiff. In the absence of any prohibition, recourse to Section 151 CPC is permissible.

It must, however, be borne in mind, that, 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. The power under Section 151 shall 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. (**K.K. Velusamy**¹; **Padam Sen**⁴; **Manoharlal Chopra**⁵; **Arjun Singh**⁶; **Ram Chand and Sons Sugar Mills (P) Ltd.**⁷; **Nain Singh**⁸; **The Newabganj Sugar Mills Co. Ltd.**⁹; **Jaipur Mineral Development Syndicate**¹⁰; **C Parameshwara**¹¹; and **Vinod Seth**¹²).

Weighed with the delay of 8½ years on the part of the respondent-plaintiff in filing the documents in Court, (i.e from 27.07.2009 when an order was passed in I.A.No.4286 of 2009 till the documents were filed in Court on 08.01.2018), the delay of around seven months, on the part of the petitioner-defendant, in filing the application to recall PW.1 for further cross-examination (i.e from 08.01.2018 to 24.07.2018) cannot be said to be so unduly belated as to necessitate rejection of her request, more so as the petitioner-defendant did not have an opportunity to examine the plaintiff's witness regarding these documents.

While I am satisfied that the petitioner-defendant should be given an opportunity to further cross-examine PW.1, it must also be borne in mind that the Suit is of the year 2008, and has been pending adjudication before the Court below for the past ten years. I consider it appropriate, in such circumstances, to set aside the order under revision and direct the Court below to recall PW.1 for further cross-examination, by the petitioner-defendant, only to the limited extent such cross-examination is confined to Exs.A24 to A37 (i.e the documents marked during cross-examination of DWs.1 and 2). The petitioner-defendant shall avail the said opportunity to further cross-examine PW.1, with respect to these documents, on the date fixed by the Court below. It is made clear that, in case the petitioner-

defendant fails to avail the opportunity to further cross-examine PW.1 on the date so fixed, the Court below may, without granting any opportunity to the petitioner-defendant thereafter, proceed to hear arguments on behalf of the respondent-plaintiff and the petitioner-defendant, and pronounce judgment in accordance with law.

The Civil Revision Petition is, accordingly, disposed of. The miscellaneous petitions, if any pending, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

Date: .10.2018.
Mrkr/cs

