

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2106 OF 2018**

- | | | |
|---|---|----------------|
| 1. Shri. Navinchandra Khimchand Shah |) | |
| Age: 72 years, Occupation: Business |) | |
| 2. Mr. Manish Dharnidhar Shah |) | |
| Age: 49 years, Occupation: Business |) | |
| Both executors and trustees of last will and |) | |
| Testament of Shri Dharnidhar Khimchand |) | |
| Shah having their address at Mangrol |) | |
| Mansion Office Nos. 2 & 3, 1 st Floor, |) | |
| Gunbow Street, Mumbai - 400001 |) | ...Petitioners |

Versus

- | | | |
|--|---|-----------------|
| 1. M/s. PUTCO PVT LTD. A private limited |) | |
| Company, having its registered office at |) | |
| Rawat Manzil, 50, Shamaldas Gandhi Marg, |) | |
| Mumbai - 40002 and tenant of Godown |) | |
| No. 3, in the compunt of Ravji Sejpal, |) | |
| Golandaji Hill Road, Sewree, Mumbai-400015 |) | |
| 2. National Transport Company |) | |
| a firm having their office on 4 th Floor, Mustafa |) | |
| Building, Sir Phirozshah Mehta Road, |) | |
| Mumbai - 400001 |) | ... Respondents |

Mr. Vishal Kande, a/w. Rajesh Chainani, I/b M/s S. Pathak & Co. for the
Petitioners.

Abdul Waheed Champawalla for the Respondent No. 2.

**CORAM: DAMA SESHADRI NAIDU, J.
DATED: 25th July 2019**

ORAL JUDGMENT:

Facts:

The petitioners are the plaintiffs in Suit No. 560/972 of 2001. They sued two defendants for eviction. The principal allegation is that the first defendant, as the original tenant, sublet the property to the second defendant. Both the defendants filed their defence. Then, the Trial Court framed the issues.

2. After framing of the issues, the plaintiffs completed their evidence. When the second defendant was being examined as D.W. 1, he applied below Exhibit 73 to produce certain documents. It seems that the second defendant came up with that application because he had been confronted with questions in the cross-examination. And those questions relate to certain documents which he did not produce. The Trial Court has, however, rejected that application through its order, dated 13th July 2016.

3. Aggrieved, the second defendant filed Writ Petition No. 9965 of 2016. This Court, through its judgment dated 04th October 2016, refused to interfere. At any rate, of the two reliefs he has sought, this Court has felt that the Trial Court has not adequately dealt with the second question: the production of the rent receipts. So, this Court has remanded the matter to the Trial Court.

4. On remand, the Trial Court reconsidered the issue and passed an order on dated 26th October 2016, rejecting the second defendant's claim to produce further documents. Though the second defendant has continued with his evidence in cross-examination, he came up with two more applications: Application below Exhibit 83 and Application below Exhibit 86.

5. Both the counsel agree those two applications are substantially the same. Through those applications, the second defendant wanted to

produce additional documentary evidence to support his contentions. Along with those two applications, he has annexed “additional affidavits in lieu of examination-in-chief.” As the plaintiffs opposed those applications, the Trial Court allowed those applications through its order, dated 17th November 2017.

Odd-Practice, if it were:

6. At this stage, I queried whether two writ petitions were filed against the two orders in two separate applications. But I was informed that only one writ petition was filed. *Prima facie*, I felt that such a course of action is impermissible. At any rate, the counsel on either side has submitted that it is perhaps a technical omission and that need not affect the adjudication. According to them, this Court permits such practice, so I can consider the matter on merits. Skeptical as I am on such procedure, I proceed to decide on the merits.

Submissions:

Petitioner's:

7. In the above factual backdrop, Shri Vishal Kanade, the learned counsel for the petitioners, has submitted that this Court and, thereafter, the Trial Court has already rejected the respondent's Applications for additional documentary evidence. And that order has become final. Now, through these two applications, the respondent wanted to re-introduce what has

otherwise been prohibited through binding judicial directives. According to Shri Kanade, CPC permits no suitor to fill the lacunae in his case only because the rival has questioned them. In that context, he has taken me through the record, especially the applications and reasoning of the Trial Court for allowing those applications.

8. Shri Kanade has further submitted that besides seeking to place on record the additional sets of documents, the respondent has also filed “additional affidavit in lieu of examination-in-chief.” This practice of filing additional documents, despite their earlier rejection; and additional affidavit as if they were covering letters to those documents, according to Shri Kanade, is unknown to law and entirely impermissible.

Second Respondent’s:

9. In response, Shri Abdul Waheed Champawalla, the learned counsel for the respondents, has contended that the Courts have always tried to do substantial justice instead of letting the matter perish on the altar of technicalities. For this, he has drawn my attention to the Directive Principles in Chapter IV of the

Constitution of India, besides Section 151 of the Civil Procedure Code—a heady combination of legal justification, though.

10. To elaborate, Shri Champawalla has submitted that the second respondent has already pleaded his case in detail but could not produce a few documents on time. Plainly put, though he had duly instructed his counsel and handed over the documents to him, the counsel did not place them before the Court as expected. The petitioners' counsel stressed in the cross-examination about the lack of evidence on a particular plea of the second respondent. Then, the second respondent enquired with his previous counsel. Eventually, after receiving those documents along with a "written communication" from his previous counsel, Shri Champawalla explains, the second respondent filed these two applications. Thus, in these circumstances, the second respondent has been justified, asserts the counsel, in filing those applications. And that course of action does not amount to filling the lacunae, belatedly.

11. About the additional affidavit filed in lieu of examination-in-chief, Shri Champawalla contends that though Order 18 Rule 17(a) of CPC has been done away with, this Court has ample power

under Section 151 of the same Code to allow the additional evidence, either oral or documentary, so the Court could do substantive justice. To support his contentions, Shri Champawalla has relied on *K. K. Velusamy v. N. Palanisamy*^[1].

12. About this Court's previous orders in Writ Petition No. 9965 of 2016, Shri Champawalla has contended that the documents in those proceedings were the rent receipts issued by one N. Jivanlal & Company. The second respondent has nothing to do with them. In the later applications the Trial Court allowed, the documents were the rent receipts issued by the first respondent. In sum, the second respondent wanted to establish, as Shri Champawalla articulates, before the Trial Court that he was a sub-tenant by 1st February 1973. Only to prove this fact did he want to produce both oral and documentary evidence.

13. Heard Shri Vishal Kanade, the learned counsel for the petitioner, and Shri Abdul Waheed Champawalla, the learned counsel for the second respondent, besides perusing the record.

¹ [(2011) 11 SCC 275]

Discussion:**The First Round:**

14. Indeed, in the middle of his cross-examination, the second respondent wanted to introduce certain documentary evidence. That was in response to the questions in the cross-examination that he produced no evidence—say, rent receipts—despite his assertion that he had been a tenant for a long time. But the Trial Court rejected the second respondent's plea on that count. It refused to take those documents on file.

15. Though this Court substantively concurred with the Trial Court, through its order dated 4th October 2016, it remanded the matter. The remand was only on one issue: The Trial Court has not addressed the issue about the rent receipts allegedly issued by N. Jivanlal & Company. Then, on 26th October 2016, through a detailed order, the Trial Court rejected the second respondent's plea to producing further documentary evidence. The issue must have rested there, but it has not.

16. That is, one would expect the second respondent to proceed with the matter so his cross-examination could have been

completed. Instead, the second respondent has come up with two more applications: application below exhibit 85 and application below exhibit 86. Through two applications, again, the second respondent wanted to bring additional documentary evidence on record.

Second Round:

17. The justification the second respondent supplies is two-fold: First, the present set of documents was issued by the first respondent, the principal tenant. They had been entrusted to the previous counsel. He did not file them by oversight. They are vital for the second respondent to counter—nay, to answer—the petitioner’s questions in the cross-examination. Second, the set of documents the Trial Court earlier rejected were issued by a third party; thus, they remain unrelated to the issue in the suit. To be explicit, those rent receipts were issued by N. Jivanlal & Co., from which the second respondent has not been tracing his title or possession as a sub-tenant.

18. Plainly put, now the second respondent wanted to introduce documentary evidence of the rent receipts allegedly issued by the first respondent. For the second respondent wished to establish

that he had had the property by 1st February 1973. Of course, the respondent has elaborately pleaded that he had handed over the rent receipts to his previous counsel; he then changed the counsel; the present counsel before the Trial Court went through the case file and felt that the previous counsel “has not properly pleaded” the second respondent’s case, nor has he filed all the documents necessary in the case; so he contacted his previous counsel; secured the documents from him along with a letter, and, thus, eventually filed the additional evidence-in-chief.

The Blame Game:

19. But the question is, can a party to the litigation simply change his counsel, blame him for myriad reasons, and seek a course correction—much to the rival suitor’s prejudice? If it were so, all that a party should do to get out of a difficult situation in a case is to change his counsel. That simple.

(a) Vakalatnama:

20. In the common law context and in the legislative perspective, advocates are, first, officers of the court; their fealty compels them to assist the court, rather than remain mere mouthpieces to their clients. But from the client’s perspective, an

advocate is his special power of attorney agent—that is what vakalatnama is all about—to plead on his behalf. The advocate represents the client, and that representation binds the client. Period.

21. Vakalatnama is an Urdu term. Section 2 (m) of the Advocates Welfare Act, 2001, inclusively defines it as the memorandum of appearance or any other document by which an advocate is empowered to appear or plead before any court, tribunal, or other authority.” It is, according to Ramanatha Aiyar^[2], “a written authority empowering a legal practitioner to and plead on behalf of the litigant.”

(b) Advocate, Lawyer, Counsel, Pleader, Attorney: What lies in a Name?

22. An attorney, as the Black’s Law Dictionary defines, is a legal agent; a person who practices law; a lawyer. The same lexicon defines a lawyer as a person who is licensed to practice law. In the same breath, we may also note that an advocate is “a person who assists, defends, pleads, or prosecutes for another.” ^[3] Before exploring other semantic corners, we will see what or who a

² [1] Major Law Lexicon, Vol. 6, p.7050

³ [1] Black’s Law Dictionary, 9th Ed., p.64

pleader is. A pleader is a person entitled to appear and plead for another in court and includes an advocate, a vakil, and an attorney of High Court^[4].

23. A counsel, too, is a lawyer appointed or engaged to advise and represent in legal matters. So defines Section 138 (2) of the Army Act. “Counsel” has no plural form, though. We bandy about many expressions to describe the profession of advocacy. Are they fanciful or distinguishable” We can turn to who else than the master of lexical nuances of legal terms: Bryan A. Garner. In his celebrated *A Dictionary of Modern Legal Usage*^[5],

24. Garner deals with “attorney” and its “near-synonyms.” Lawyers, like those in other walks of life, have long sought to improve their descriptive titles. Boswell relates: “The Society of Procurators, or Attorneys, had obtained a royal charter, in which they had taken care to have their ancient designation Procurators changed into that of Solicitors, from a notion, as they supposed, that it was more genteel.”^[6]

⁴ [1] C. K. Thakker’s Code of Civil Procedure, Vol. 3, p.565 (e-book reader)

⁵ [1] Oxford, 3rd Ed., pp 93-93 (Though the title is Fowlerian, the content is seminal. Garner barely came out of college when he wrote this scholarly book. I wish every lawyer, as a wordsmith, would keep a book like this close by.)

⁶ [1] *Life of Johnson* 128 (1791), as quoted by Garner

25. The connotations of attorney and its near synonyms, according to Garner, have historically been quite different in British English and American English. Originally, attorney denoted a practitioner in common-law courts, solicitor one in equity courts, and proctor one in ecclesiastical courts; all instructed barristers to appear and argue. Attorney, it seems, soon developed an unpleasant smell about it: one commentator writes that the 18th-century efforts “to deodorize the word attorney [were] later abandoned, and in the nineteenth century it was supplanted in England by solicitor. There solicitor lacks the offensive American connotation, as in ‘No peddlers or solicitors.’ In England, attorney, for a lawyer, survives only as the attorney (the attorney general), while in America the chief respectable lawyer-solicitor is the solicitor-general.^[7]”

26. The two most common terms in American English, lawyer and attorney, are not generally distinguished even by members of the profession. In the U.S., attorney, attorney-at-law, and lawyer are generally viewed as synonyms. Today there seems to be a notion afoot, however, that attorney is a more formal (and less

⁷ [7] David Mellinkoff, *The Language of the Law* 198 (1963), as quoted by Garner

disparaging) term than lawyer^[8].

27. Technically, lawyer is the more general term, referring to one who practices law. Attorney literally means “one who is designated to transact business for another.” An attorney, technically and archaically (except in the phrase attorney in fact), may or may not be a lawyer. Thus, Samuel Johnson’s statement that attorney “was anciently used for those who did any business for another; now only in law.”^[9]

28. From the fact that an attorney is really an agent, Bernstein deduces that “a lawyer is an attorney only when he has a client. It may be that the desire of lawyers to appear to be making a go of their profession has accounted for their leaning toward the designation attorney.”^[10] Yet this distinction between lawyer and attorney is rarely, if ever, observed in practice. In the U.S., those licensed to practice law are admitted to practice as “attorneys and counselors.” This combination of names is unknown in English law, in which attorney = solicitor, and counsellor = barrister. Yet “in the United States, the term attorney has come to have a generic

⁸ [1] Garner’s A Dictionary of Modern Legal Usage

⁹ [1] A Dictionary of the English Language (1755), as quoted by Garner

¹⁰ [1] Theodore M. Bernstein, *The Careful Writer* 60 (1965), as quoted by Garner

significance that embraces all branches of legal practice.^[11]

29. In Great Britain, a solicitor or attorney does all sorts of legal work for clients but generally appears only in inferior courts; a barrister is a trial lawyer or litigator. In American English, counsel and counselor are both, in one sense, general terms meaning “one who gives (legal) advice,” the latter being the more formal term. Counsel may refer to but one lawyer or, as a plural, to more than one lawyer. The former means “one with power of attorney to act for another; legal agent.” The latter means “a licensed lawyer.”^[12]

30. *Brett M.R., Minister v. Lamb*^[13] describes the unenviable position of a counsel defending a cause: a counsel’s position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can without degrading himself, in order to maintain the preposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position, he were to be called upon during the heat of his document to consider whether what he says is true or

¹¹ [1] G.W. Warvelle, *Essays in Legal Ethics* 53 (1902), as quoted by Garner

¹² [1] Garner’s *A Dictionary of Modern Legal Usage*

¹³ [1] (1833) LRQB 603, as quoted in *Major Law Lexicon*, p.1578

false, whether it is relevant, he would have his mind so embarrassed that he could not do his duty which he is called upon to perform. For more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public.

The Relationship Between the Lawyer and the Litigant:

31. First, What's in a name? That whom we call an advocate by any other name would still remain his client's agent. Order III, Rule 1 permits a person to appear before the court either in person, by recognized agent, or by pleader. It is subject to statutory exceptions, though. Rule 4 of the same Order mandates that "no pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment." And an appearance of a pleader appointed by a party is, under Rule 1 of Order III, equivalent to the appurtenance of the party himself. The High Court of Rajasthan has held in *Mool Raj v. Narsinghdas*^[14] that "so long as the pleader has the authority to appear or to act for his

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[1] ILR (1953) Raj 1038

client, the appearance of the former would be deemed for the party. Ordinarily a pleader would be deemed to act for his client so long as the Vakalatnama filed in the case is not determined by another document in writing.” Therefore, the second respondent’s contention that his previous counsel erred in not filing the documents he had given does not rescue him.

How to Produce Additional Evidence?

32. The second is that the set of documents the Trial Court earlier rejected was unrelated. To check the legality of this assertion, we must examine a couple of provisions. To begin with, Order 13, Rule 1 mandates that the original documents must be produced at or before the settlement of issues. Sub-Rule (1) compels the parties or their pleader to produce all the documentary evidence in original, on or before the settlement of issues. As per sub-rule (2), the Court shall receive the documents so produced if they come with an accurate list of those documents. But nothing in sub-rule (1) shall apply to documents (a) produced for the cross-examination of the witnesses of the other party; or (b) handed over to a witness merely to refresh his memory.

33. Indeed, earlier Rule 2 of Order 13 elaborated on the effect of non-production of documents. It declared that if a document, capable of being produced, has not been produced as per Rule 1 of Order 13, it should not be received later. Of course, it could be received if the party concerned shows a “good cause [...] to the satisfaction of the Court.” But this Rule 2 was omitted by Act 46 of 1999, with effect from 01.07.2002.

34. Order 13, Rule 1 applies to both the plaintiff and the defendant. With the deletion of Rule 2, the belated production of documents seems to have been barred, or so one may think. The Code earlier had another specific provision in Order 18 Rule 17A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after that party’s evidence, if he satisfied the court that despite his due diligence, he could not secure the evidence or that the evidence was not within his knowledge. That provision was deleted with effect from 1.7.2002.

35. But this procedural leverage of producing evidence stands restored simultaneous to its deletion. Order 7, Rule 14 and Order 8, Rule 1A deal with the production of documents by the plaintiff and the defendant respectively. They are in *para Materia*.

The Defendant's Domain:

36. As the second respondent is the defendant, let us focus on Order 8, Rule 1A. It speaks of the defendant's duty to produce documents upon which he relies. A defendant must produce the documents along with the written statement if they are in his possession or if he can produce them. Sub-rule (3) provides for the exception. The defendant may produce the document with the court's leave. True, that leave depends on the defendant's showing sufficient cause for his inability to produce the document along with the written statement. Of course, as this Court has held in *The Upper India Couper Paper Mills Co., Ltd. v. Mangaldas*^[15], the defendant may not have already disclosed about a document he had been in possession. Still he can use it but only to confront the plaintiff's witness during the cross-examination. It is evident from Clause (4) of Rule 1-A.

¹⁵

[1] 2004 (6) Bom CR 18

37. Has the second defendant shown any good or sufficient reasons to the Trial Court for it taking on file those belatedly produced documents? None. Instead, he has blamed his previous counsel. If at all that counsel had been remiss in his duty—the duty of defending his client properly—the second respondent may have other remedies. His agent’s commissions and omissions, so to say, cannot prejudice the other party. Even to believe this blame game, he has produced no record that he expressed his concern to, if not complained against, his previous counsel. His present counsel’s spotting the weaknesses in the second respondent’s case, his desire—with hindsight—to falsify the petitioner’s questions in the cross-examination cannot be good grounds for the Trial Court to take those documents on file.

The Procedural Pandemonium:

38. Curiously, the second respondent has filed, it seems, no application under Order 8, Rule 1A of CPC. Instead, he has applied under Order 6, Rule 17 of CPC—amendment to the pleadings. He has filed two affidavits, supposed to be examinations-in-chief, under Order 18, Rule of CPC. True, it is not unusual for the witnesses to be recalled for further examination. Then, the provision that

governs it is Order 18, Rule 17 of CPC. The object of this rule is to afford an opportunity to a party to put such questions to a witness not put at an earlier occasion—because of inadvertence or could not be put despite due diligence. The Trial Court can recall the witness either on its own or at the party's request. The party himself may be the witness. This power, expansive as it is, must be sparingly exercised.

39. Here, the second respondent got himself examined as DW1. In the middle of the cross examination, he filed two additional examinations-in-chief along with a bunch of documents. We may divide his action into two: recalling himself as a witness; and producing additional documentary evidence. The former is governed by Order 18, Rule 17 of CPC; the latter by Order 8, Rule 1A. Neither was invoked. Instead, he calls this whole process compendiously “amendment.” So, Order 6, Rule 17 seems to have been invoked. Flexible is the civil procedure, but its mutilation should not be the result.

40. The High Court of Andhra Pradesh *Macha Gangadhar v. Macha Gangaram*^[16] dealt with an identical case. During his

¹⁶ [1] 2004 (5) ALD 402

cross-examination, DW1 filed an interlocutory application under Order 18, Rule 17 C.P.C. to recall himself for further chief-examination—to mark a document. The document, by then, was not on record. The respondent contended that he wanted to recall himself only to mark a document; the petitioner could cross examine him. No prejudice would be caused to the petitioner.

41. *Macha Gangadhar* has held that the “question of marking a document not received by the Court in the chief examination of a witness does not arise.” So, recalling of DW-1 for further chief examination, according to *Macha Gangadhar*, to mark a document not received in Court is erroneous. Then, it has suggested that the respondent must take steps to file a petition for production of that document as additional evidence, he should ensure that the court accepted it, and only after that could that party request the court to recall him for chief examination, to be followed by the cross examination, if any.

42. In the words of *Macha Gangadhar*:

[W]hen witness is being cross examined, question of the party calling him as a witness filing a petition to recall him for further chief examination does not arise. After cross-examination of the witness is completed, the party calling him as a witness wants to examine

him further in chief examination, he can seek permission of the court, which can grant him permission to further chief examine the witness, as laid down by Section 138 of Evidence Act. In the middle of the cross examination, a witness cannot be stopped for further chief examination. Therefore, the order under revision is set aside with a direction to follow the procedure prescribed in Section 138 of Evidence Act.”

43. As noted by *Macha Gangadhar*, Section 138 of the Indian Evidence Act mandates that 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.

44. And the last part of that provision relates to direction of re-examination. The re-examination shall be directed to the explanation of matters referred to in cross-examination. And if new matter is, with the court’s leave, introduced in re-examination, the adverse party may further cross-examine upon that matter.

The Precedential Prop:

45. Now, I may examine the case of *K. K. Velusamy*, the respondent’s talisman. The Respondent sued for specific

performance. The Appellant resisted the suit. After trial, when the arguments were in progress, the appellant filed two applications. One was under Section 151 of CPC for reopening the evidence; he wanted to further cross-examine the plaintiff-respondent and the attesting witness. The other was under Order 18 Rule 17 of CPC for recalling those two witnesses.

46. The appellant wanted to cross-examine the witnesses because of the admissions they allegedly made during some conversations, recorded on a compact disc. The conversation was recorded after the trial was concluded. The trial court dismissed the applications. Later, the High Court, too, dismissed the revision petitions.

47. The Supreme Court, per R. V. Raveendran J., has noted that Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined. 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.” Indeed, the observation is emphatic that the power “is not intended to be used to fill up omissions in the evidence of a witness who has already been

examined.” 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 a party’s request, so the court itself can put questions and elicit answers. Once a witness is recalled for such clarification, it may, of course, permit the parties to assist it by putting questions.

48. Then, *K. K. Velusamy* has further noted there is no specific provision in the Code enabling the parties to re-open the evidence for further examination-in-chief or cross-examination. So, Section 151 of the Code springs into action. It is a matter of the court’s inherent powers. About the deletion of Order 18, Rule 17A of the Code, *K. K. Velusamy* clarifies that the deletion does not mean that no evidence can be received at all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence.

49. *K. K. Velusamy*, then, puts the issue in perspective and holds that the court can allow a party to place on record any evidence unavailable during the trial or any evidence that “comes into existence” about the witness’s “conduct or action.” The material part reads:

“12. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for re-opening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, *and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence*, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.

(italics supplied)

50. Eventually, *K. K. Velusamy cautions*. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. In the same vein, it has observed:

“[B]ut where the application is found to be *bona fide* and where the 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, the court may exercise its discretion to recall the witnesses or permit the fresh evidence.* But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. *Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.*

(italics supplied)

51. Here, the mutilated procedure apart, the second respondent, I reckon, has known from the beginning about those documents which he now wanted to produce. He thought of bringing them on record only when he faced inconvenient questions in the cross-examination. Merely by blaming the previous counsel or by securing sane advice from the present counsel, the second respondent cannot gloss over his lapses. Much less can he change the course of litigation—leave alone affecting the rights accrued to the petitioner.

52. In these circumstances, I hold that the Trial Court has grievously erred in allowing the Application below Exhibit 83 and

application below Exhibit 86. As a result, orders both dated 17th November, 2017 are set aside. Both the applications failing, the parties can proceed with the trial as it stands now.

No order as to cost.

(DAMA SESHADRI NAIDU, J.)