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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 2nd December, 2019
+ **CM(M) 1714/2019**
RAVITA & ORS Petitioners
Through: Mr. R. K. Sonkiya, Advocate.
(M:9810124896)
versus
SURESH Respondent
Through: None.
CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(oral)

CM APPL.51749/2019 (for exemption)

1. Allowed, subject to all just exceptions. Application is disposed of.

CM(M) 1714/2019 & CM APPL. 51748/2019

2. The present petition under Article 227 challenges the impugned order dated 23rd October, 2019 by which the Id. Trial Court has permitted the reopening of the cross-examination of DW-2 – Ms. Manisha at the behest of the Plaintiff/Respondent. The case of the Petitioner/Defendant is that Ms. Manisha was cross-examined by the Plaintiff on 8th February, 2019 and the matter was thereafter listed for final arguments. At that stage, the Plaintiff moved an application relying upon various documents to argue that the statement made by Ms. Manisha that she signs in Hindi is not correct as she has also signed in English. Along with this application certain documents were also annexed. Considering that application, the impugned order has been passed by which the Trial court has permitted Ms. Manisha to be cross-examined again on 3rd December, 2019.

3. Ld. counsel for the Petitioner relies upon the judgment of the Supreme

Court in *M/s Bagai Construction Thr. Proprietor Lalit Bagai v. M/s Gupta Building Material Store*, 2013 (14) SCC 1, the judgment of the Orissa High Court in *Sarat Chandra Mohapatra v. Narasingha Mohapatra & Anr.*, II (2017) CLT 369 (Ori) as well as the Calcutta High Court judgment in *Sipra Chatterjee v. Samir Ranjan Mukherjee*, II (2018) CLT 101 (Cal.) to argue that Order XVIII Rule 17 CPC is only a provision which enables Court to clarify the doubts and is not meant to be used by the parties who wish to fill up lacunae in the evidence.

4. It is important to note that vide the amendment of the CPC in July, 2002, Order XVIII Rule 17(A) CPC has been repealed. Thus, under the CPC as it is prevalent currently, the power to recall and examine a witness is quite limited. As laid down in *M/s Bagai Construction (supra)*, the parties cannot be permitted to file applications under Section 151 to place on record documents after the witness has been discharged. Further, the same cannot be permitted to fill up lacunae and gaps in the cross-examination/evidence. The observations in the *M/s Bagai Construction (supra)* read as under:

9. In Vadiraj Nagappa Vernekar v. Sharadchandra Prabhakar Gogate [Vadiraj Nagappa Vernekar v. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410 : (2009) 2 SCC (Civ) 198] this Court had an occasion to consider similar claim, particularly, application filed under Order 18 Rule 17 and held as under: (SCC pp. 414-15, paras 25, 28-29 & 31)

“25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties.

The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

28. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

29. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.

31. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out."

10. If we apply the principles enunciated in the above case and the limitation as explained with regard to the application under Order 18 Rule 17, the applications filed by the plaintiff have to be rejected. However, the learned counsel for the respondent by placing heavy reliance on a subsequent decision, namely, *K.K. Velusamy v. N. Palanisamy* [*K.K. Velusamy v. N. Palanisamy*, (2011) 11 SCC 275 : (2011) 3 SCC (Civ) 665], submitted that with the aid of Section 151 CPC,

the plaintiff may be given an opportunity to put additional evidence and to recall PW 1 to prove those documents and if need arises other side may be compensated. According to him, since the High Court has adopted the said course, there is no need to interfere with the same.

...

12. *Further, it observed that the evidence should be permitted in exercise of its power under Section 151 of the Code. The following principles laid down in that case are relevant: (K.K. Velusamy case [K.K. Velusamy v. N. Palanisamy, (2011) 11 SCC 275: (2011) 3 SCC (Civ) 665], SCC p. 285, para 19)*

“19. We may add a word of caution. 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. But 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.”

13. *With these principles, let us consider the merits of*

the case in hand.

14. The perusal of the materials placed by the plaintiff which are intended to be marked as bills have already been mentioned by the plaintiff in its statement of account but the original bills have not been placed on record by the plaintiff till the date of filing of such application. It is further seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons known to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of the judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. As rightly observed by the trial court, there is no acceptable reason or cause which has been shown by the plaintiff as to why these documents were not placed on record by the plaintiff during the entire trial. Unfortunately, the High Court taking note of the words "at any stage" occurring in Order 18 Rule 17 casually set aside the order of the trial court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW 1 to prove those bills. Though power under Section 151 can be exercised if ends of justice so warrant and to prevent abuse of process of court and court can exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties, in the light of the information as shown in the order of the trial court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 CPC, the plaintiff cannot be permitted.

5. In the present case, in the impugned order the Id. ADJ has clearly

directed that the purpose for which the witness is being permitted to be cross-examined again would be to the extent of putting her signatures on the documents and nothing beyond. The impugned order reads as under:

“Arguments heard on application filed under Section 151 CPC.

It is submitted by Ld. Counsel for plaintiff that DW2 Manisha has stated in the Court that she signs in Hindi. It is submitted that the Sale Deed by way of which this property was transferred by all the defendants including Manisha and sold off to a third party, Manisha has signed in English. It is submitted that after the cross-examination of Manisha on 11.03.2019 wherein she specifically deposed that she signs in Hindi only, it became necessary to bring forth this fact that Manisha signs in English also. Hence, they seek one opportunity to recall DW2 Manisha in order to put the Sale Deed to her wherein she has signed in English.

It is the argument of Ld. Counsel for defendant and is also mentioned in reply that this document i.e. the Sale Deed which they seek to put to DW2 in cross-examination was in their possession since 2014 only. On the basis of this, they filed one Police complaint against Manisha and others which is admitted by plaintiff. Hence, they cannot be permitted to file any additional document on record at this stage. It is denied that the document contains signatures of Manisha. Further it is submitted that it is not obligatory for the witness to append same signatures everywhere, it is further submitted that DW2 nowhere stated that she signs only in Hindi.

Heard both the sides and gone through the record.

The relevant cross-examination of DW2 Manisha is dated 11.03.2019 wherein questions were asked from her regarding her signatures. In the said

cross-examination she stated that she signs in Hindi. While in the impugned documents being relied upon by plaintiff, it is claimed by plaintiff that DW2 Manisha has signed in English. Hence, pursuant to the cross-examination of DW2 Manisha on 11.03.2019 when she specifically denied her signatures and stated that she signs in Hindi, one opportunity should be granted to the plaintiff to assess the truth regarding, the signatures of defendant. It was on 11.03.2019 when DW2 stated that she signs in Hindi, that the occasion for plaintiff to search for additional documents wherein she might have: signed in English, arose. It is immaterial whether the sale deed was already in possession of plaintiff or not as the purpose of plaintiff is not to bring the sale deed on record but only to seek explanation regarding the signatures of this witness to prove the fact that she signs in English also as is claimed by plaintiff. Further the purpose of justice delivery system is to assess truth, hence in order to assess truth, when plaintiff has produced before the court one registered Sale Deed, one opportunity must be granted to plaintiff to prove his case.

In the circumstances, present application is allowed.

Evidence before LC is already completed,

Hence, cross-examination of DW2 Manisha shall take place on the next date of hearing before this court and the cross-examination shall only be limited to the extent of putting her signatures of these documents, to her and nothing beyond, as she has once been cross-examined in detail earlier. DW2 is directed to appear in court for her cross-examination on 03.12.2019.”

6. A perusal of the above order clearly shows that there is an attempt to reopen the evidence by also relying upon fresh documents. While there can be no doubt that as observed by the Id. ADJ, if the Court requires a

clarification as to whether the witness signs in English or in Hindi, the same can be obtained by recalling the witness. No further documents etc, can be put to the said witness at the stage of final arguments. The observations to the effect that the question as to whether documents were in possession of the Plaintiff and as to why such documents are chosen to be produced at this stage, is immaterial, is clearly an incorrect position in law. Unless there are extenuating circumstances shown for non-filing of documents earlier, after evidence is closed, documents ought not to be permitted to be taken on record especially at the stage of final arguments. While this Court does not interfere with the recalling of DW-2 for the mere purpose to clarify as to whether she signs in English or in Hindi, no further documents are being permitted to be put to the witness inasmuch as these documents would be reopening of the entire evidence. Such a procedure is not permissible. Accordingly, the present petition and all pending applications are disposed of with the direction that DW-2 – Ms. Manisha who has been recalled shall be only put questions by the Court, since the Court requires some clarifications and nothing more.

7. *Dasti* under signatures of the Court Master.

PRATHIBA M. SINGH
JUDGE

DECEMBER 02, 2019/dj