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14.07.2021
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CO No.1944 of 2019
IA No: CAN 1 of 2019
(Old No: CAN 9458 of 2019)

Amalendu Bhunia and another
Vs.
Sabita Sadhukhan and others

Mr. Arun Pahari,
Mr. Biswanath Samanta

.... for the petitioners

Mr. Krishna Das Poddar,
Mr. Ayan Mitra

.... for the opposite parties

Learned counsel for the petitioners challenges an order, whereby the defendants/petitioners' application under Order XVIII Rule 17 of the Code of Civil Procedure was rejected.

The short background of the case is that an eviction suit bearing Ejectment Suit No. 16 of 2012 was filed by the plaintiffs/opposite parties, in which initially a written statement had been filed. Thereafter, evidence had been led by both the parties and concluded. Subsequently, the suit was fixed for arguments. At this juncture, the

defendants/petitioners filed an application under Order VI Rule 17 of the Code of Civil Procedure for amendment of their written statement, which was allowed.

It is submitted by learned counsel for the petitioners that the subsequent recall of the plaintiffs' witnesses was essential in view of the amendment having been allowed.

That apart, by placing reliance on Section 138 of the Evidence Act, it is submitted that the court has ample power to permit recall of witness at any stage of the suit. Order XVIII Rule 17 of the Code of Civil Procedure, it is submitted, also confers such power on the court.

Learned counsel for the petitioners places reliance on a coordinate Bench judgment of this court, reported at 2000 Cri LJ 1039 [*State of West Bengal vs. Arunesh Pathak and others*], in support of the proposition that the party who calls a witness has the right to re-examine him on all matters arising out of the cross-examination for the purpose of reconciling any discrepancies that may exist between the evidence on the examination-in-chief and that which has been given in cross-examination; or for the purpose of removing or diminishing any suspicion that the cross-examination may have cast on the evidence-in-chief; or

to enable the witness to state the whole truth as to matters which have only been partially dealt with in cross-examination. The scope of recall of witness being wide and it being one of the rights of the litigants to elucidate previous evidence, it is contended that the Trial Judge in the present case ought to have allowed the application.

Learned counsel for the petitioners next relies on *K.K. Velusamy vs. N. Palanisamy*, reported at (2011) 11 SCC 275, where it was held by the Supreme Court, *inter alia*, that there is sufficient scope of production of evidence at a later stage of the suit despite the deletion of Order XVIII Rule 17-A of the Code of Civil Procedure. In the said case, the Supreme Court also considered the power under Order XVIII Rule 17, which was held to be only for clarification to enable the court to clarify any issue or doubt it may have in regard to evidence led by parties by recalling any witness so that the court itself can put questions to such witness and elicit answers.

Learned counsel appearing for the plaintiffs/opposite parties controverts the submissions of the petitioners and contends that the entire evidence of both sides had been concluded long back in the year 2019. Thereafter, only at the argument

stage, the application for recall of witness was filed to stall the proceedings.

That apart, it is argued by the learned advocate for the opposite parties that the amended written statement did not carry any new material to justify recall of witnesses.

Upon hearing learned counsel for both sides, it is perused, from the records and the copy of the original written statement handed over by learned counsel for the opposite parties, that the amendment of written statement sought by the petitioners, which was allowed at a belated stage of the suit, only introduced cosmetic changes to the original pleadings of the defendants and the premise of the original pleadings remained the same. Hence, mere filing of the amended written statement could not have created any difference in the scope of adducing evidence in the suit.

As far as the power to recall witnesses is concerned, Section 138 of the Evidence Act, as well as Order XVIII Rule 17 of the Code of Civil Procedure, leave no doubt that such permission can be granted by the court at any stage.

However, a composite reading of Section 138 of the Evidence Act and Order XVIII Rule 17 of the Code

indicates that re-examination will be a matter of right, only if the party calling the witness so desires.

In the present case, the plaintiffs' witnesses were called by the plaintiffs/opposite parties, who do not desire such re-examination. Hence, it cannot be said that the re-examination sought by the defendants is a matter of right for the defendants.

That apart, in *K.K. Velusamy* (supra), cited by the petitioners themselves, the Supreme Court was dealing with a different issue as regards the powers of production of additional evidence still vested in the court as a consequence of the deletion of Order XVIII Rule 17-A from the Code. The Supreme Court, rather, specifically observed in respect of Order XVIII Rule 17 that such power was not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

The co-ordinate Bench judgment cited by the petitioners has to be read in the context of Section 138 of the Evidence Act and the Supreme Court report, apart from Order XVIII Rule 17 of the Code.

Since the additional written statement did not make out any conspicuously new case, in view of the petitioners' admission in the application under Order XVIII Rule 17 of the Code filed by the petitioners that the previous learned advocate handling the matter had

not put certain pertinent questions to the P.Ws. in their cross-examination, the recall now sought for ought not to be permitted merely to give another opportunity to the defendants to fill up the lacunae and omissions in their initial evidence.

That apart, since the witness of the parties was closed as long back as in 2019 and argument in the suit commenced thereafter, there was no justification for the trial court to allow the belated prayer for recall, which is apparently intended to stall the eviction suit, which is pending for several years now.

As regards the previous application filed by the petitioners in the court below under the same provision, that is, Order XVIII Rule 17 of the Code having been not pressed, learned counsel appearing for the petitioners submits that the court below assured the petitioners that the reliefs sought therein would be taken care of. However, such assurance, if any, could not create a right in favour of the defendants/petitioners.

In any event, even without considering the effect of not pressing the previous application under Order XVIII Rule 17 of the Code without liberty to file afresh, the present application for recall of witness was rightly refused by the trial court in view of the other considerations discussed above..

Accordingly, the revisional application fails.

CO No.1944 of 2019 is dismissed on contest, without any order as to costs. The order impugned in the revisional application is affirmed.

IA No: CAN 1 of 2019 (Old No: CAN 9458 of 2019) is disposed of accordingly.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)