

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 15th November, 2021.**

+ **CM(M) 1017/2021**

DEEPAK KUMAR & ANR.

..... Petitioners

Through: Mr. Sachin Dutta, Senior
Advocate with Ms. Khusboo,
Advocate.

Versus

JITENDER JAIN

..... Respondent

Through: Mr. Sundeep Srivastava,
Advocate.

CORAM:

**HON'BLE MR. JUSTICE AMIT BANSAL
[VIA VIDEO CONFERENCING]**

AMIT BANSAL, J. (Oral)

CM No.40408/2021(for exemption)

1. Allowed subject to all just exceptions.
2. The application is disposed of.

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3. The present petition under Article 227 of the Constitution of India impugns the order dated 12th October, 2021 passed by the Court of Civil Judge, Tis Hazari Courts, New Delhi in CS No.597006/2016, whereby the application filed on behalf of the petitioners/plaintiffs under Order XVIII Rule 17 of the Code of Civil Procedure, 1908 (CPC) for seeking re-opening

and recalling/calling of the witnesses on behalf of the petitioners has been dismissed.

4. It is deemed apposite to give a brief *résumé* of facts preceding the filing of the present petition. The petitioners/plaintiffs in the present case had filed a suit for possession against the respondent/defendant before the Trial Court, in respect of property bearing No. 39/33, 100 Feet Road, Guru Nanak Gali, comprised in Mustatil No. 137, Kila No. 14/2, Village Burari, Delhi. Plaintiffs' evidence began on 3rd October, 2007 and continued for 10 years therefrom, during which time the Local Commissioner appointed in another suit between the parties herein, being Suit No. 340/2005, was examined and cross examined on 6th September, 2017. Thereafter, defence evidence was concluded on 4th October, 2018 and the application filed by the petitioners/plaintiffs for leading rebuttal evidence was dismissed by the Trial Court. On 1st October, 2021, the petitioners/plaintiffs engaged a new counsel. Subsequently, matter was taken up for final arguments on 6th October, 2021 and matter was adjourned to 7th October, 2021 for further arguments. On 7th October, 2021 itself, the petitioners/plaintiffs filed the application under Order XVIII Rule 17 of the CPC, which was dismissed vide the impugned order dated 12th October, 2021.

5. The Trial Court has, in the impugned order, observed that (i) the application under Order XVIII Rule 17 of the CPC has been filed on 7th October, 2021, at the stage of final arguments; (ii) the only ground taken for recalling/calling of the witnesses is that of inadvertence of the previous counsel of the plaintiff and not new facts coming to the knowledge of the plaintiff; (iii) the Local Commissioner sought to be recalled has been

examined and cross-examined and no reasons have been given for his recall in the application under Order XVIII Rule 17 of the CPC; (iv) the remaining witnesses named in the application, barring the plaintiff no.2, were mentioned in the list of witnesses filed by the plaintiff no.1 on 8th January, 2007 and yet, none of them were called for evidence, signifying that it was a conscious choice made by the party to not do so; (v) the plaintiff no.2 ought to have been examined first and can not be expected to give evidence at the stage of final arguments, on an application filed by the other plaintiff; (vi) even at the stage of rebuttal evidence, the plaintiff(s) did not make an attempt to reopen evidence and examine the witnesses listed in the application under Order XVIII Rule 17 of the CPC; and, (vii) the plaintiff was afforded sufficient time and opportunities to lead evidence.

6. Mr. Sachin Dutta, senior counsel appearing on behalf of the petitioners states that the application under Order XVIII Rule 17 of the CPC had to be filed on account of the inadvertence of the earlier counsels engaged by the petitioners. Four of the said witnesses were part of the list of witnesses submitted by the petitioners and yet, they were not examined by the previous counsels. He submits that these are vital witnesses whose evidence is required for fair adjudication of the case.

7. Mr. Sundeep Srivastava, counsel appearing on behalf of the respondent states that petitioners/plaintiffs' evidence in the present case started in 2006 and was concluded only in the year 2016. He states that on a previous occasion, the petitioners/plaintiffs had filed an application for leading rebuttal evidence, which was dismissed on 13th March, 2019 and the petitioners did not pursue any remedies against the said order. It is also

stated that the matter has been at the stage of final hearing since 2019. Written arguments have been filed both by the petitioners and the respondent as far back as in 2020. In fact, the petitioners/plaintiffs' final arguments are already over and even the respondent/defendant has addressed the Trial Court on few occasions and the matter was listed today for concluding remaining arguments of the parties. Therefore, it is submitted that the present petition has been filed at a very belated stage and this Court should not interfere with the present case in exercise of its jurisdiction under Article 227 of the Constitution of India. He further submits that twelve counsels have been changed by the petitioner and it is the thirteenth counsel who is now representing the petitioners.

8. I have heard the counsel for the parties and perused the impugned order dated 12th October, 2021.

9. There is merit in the submission of the counsel for the respondent that the present petition has been filed at an extremely belated stage. The plaintiffs' evidence continued for a period of 10 years from 3rd October, 2007 to 25th October, 2017 and thereafter, even the defendant's evidence had been concluded on 9th October, 2018. Subsequently, the application filed on behalf of the petitioners/plaintiffs for leading rebuttal evidence was dismissed on 13th March, 2019. Admittedly, petitioner did not pursue any remedies against the aforesaid order. Now, when the case is at the stage of final hearing and in fact substantial arguments have already been made by the counsels for the parties, the present petition has been filed.

10. Even on merits, one of the witnesses sought to be examined is the plaintiff no.2 himself. There is no reason why the said witness was not

examined at the first instance. Further, another witness sought to be examined is the Local Commissioner appointed in another suit between the same parties, who has been examined and cross-examined at length. The Trial Court has rightly held that no reasons are forthcoming in the application under Order XVIII Rule 17 of the CPC for recall of the said witness. In the present case, the case of the petitioners is only premised on inadvertence of the previous counsel(s). This Court in ***Tota Ram Vs. Asha Sharma*** 2014 SCC OnLine Del 6499 has held that engaging of a new counsel cannot be ground for reopening evidence and filling up of the lacunae in the case of the party so concerned.

11. The Supreme Court in the case of ***K.K. Velusamy Vs. N. Palanisamy*** (2011) 11 SCC 275 has observed as under:

“9. Order 18 Rule 17 of the Code 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 in regard to 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. (Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate [(2009) 4 SCC 410 : (2009) 2 SCC (Civ) 198].)

10. Order 18 Rule 17 of the Code 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 motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.”

12. Even if it is assumed that there is negligence on part of the counsels, parties would have to bear the consequences of such negligence and it is not open for the petitioners to approach the Court at any point of time to re-open the proceedings which are already concluded before the Trial Court and more particularly, without adducing valid and sufficient reasons in the application under Order XVIII Rule 17 of the CPC.

13. No grounds for interference are made out.

Dismissed.

AMIT BANSAL, J

NOVEMBER 15, 2021

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