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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 446 OF 2021

PRAKASH HARISCHANDRA MASURKAR ... PETITIONER
VS
VASANTI VASANT BHAGAT AMONKAR
(DEC) THR. HER LEGAL HEIR, VISHNU
BHAGAT AMONKAR ... RESPONDENT

Mr. Jatin Ramaiya, Advocate *for the Petitioner.*

Mr. Ashwin D. Bhobe with Ms. Annelise Fernandes, Advocates
for the Respondent.

CORAM: MANISH PITALE, J.

DATED: 1st MARCH 2022

P.C.:

1. By this Writ Petition, the petitioner, who is the original defendant has challenged order dated 13.09.2019, passed by the Court of Civil Judge Junior Division, Panaji (hereinafter referred to as the Trial Court), whereby an Application (Exhibit D-77), filed on behalf of the petitioner for recalling witness of the respondent i.e. PW-1, has been dismissed.

2. In a suit filed by the respondent for eviction of the petitioner, he has filed a counterclaim.

3. The Trial Court was recording evidence of PW-1 i.e. the first witness of the respondent and the said witness was being cross examined on behalf of the petitioner. On 17.04.2019, at the end of recording of cross examination of PW-1, it was recorded by the Trial Court as follows:

“For want of time”

4. The Roznama for the aforesaid date i.e. 17.04.2019 recorded that cross examination of PW-1 was recorded and completed. On the next date of hearing i.e. on 07.06.2019, it was further recorded that the Counsel appearing for the defendant i.e. the petitioner herein, submitted that he had completed the cross examination of PW-1.

5. On 31.07.2019, an Application was moved on behalf of the petitioner for recalling PW-1. It was stated in this Application that although, the cross examination of PW-1 was completed, due to inadvertence on the part of the Advocate representing the petitioner, in haste, he did not question PW-1 on certain aspects of the matter and inadvertently, without going through the record he made a statement that cross examination of PW-1 was complete. This Application was opposed on behalf of the respondent.

6. By the impugned order, the Application was dismissed and the present Writ Petition was filed challenging the order, in which, notice was issued and the respondent appeared through Counsel.

7. Mr. Ramaiya, learned Counsel appearing for the petitioner submitted that a perusal of the cross examination of PW-1 on 17.04.2019, would show that the aforesaid endorsement i.e. “for want of time”, at the end clearly indicated that further cross examination was yet to be undertaken and it was deferred for want of time. It was submitted that though it was stated in Roznama dated 17.04.2019 that cross examination was completed, it demonstrates an inadvertent mistake on the part of the Advocate for the petitioner, due to which cross examination of PW-1 could not be completed. It was submitted that the litigant should not be made to suffer due to the mistake of the Counsel. It was further submitted that to get to the truth of the matter, the Court is expected to take such steps as would be necessary and, in the facts and circumstances of the present case, the Application filed on behalf of the petitioner should have been allowed. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of **K.K. Velusamy Vs. N. Palanisamy**, (2011) 11 SCC 275.

8. On the other hand, Mr. Bhobe, learned Counsel appearing for the respondent submitted that the facts of the present case would not justify application of law laid down by the Hon'ble Supreme Court in the case of **K.K. Velusamy Vs. N. Palanisamy** (supra). It was submitted that the Advocate for the petitioner, not only in one place, but, in two places in the Roznama emphatically stated that cross examination of PW-1 was completed. It was submitted that merely because as an afterthought, the Advocate for the petitioner was of the opinion that certain questions were not put to PW-1, it cannot be a ground for allowing further cross examination by recalling the witness. Attention of this Court was invited to the cross examination of PW-1 recorded on 17.04.2019, wherein suggestions were put to PW-1, thereby indicating that cross examination of PW-1 was indeed complete.

9. In this context, the learned Counsel for the petitioner submitted that there is a counterclaim filed before the Trial Court and that certain suggestions in that regard were not put to the witness and therefore, it could not be said that the process of cross examination was complete.

10. This Court has given thoughtful consideration to the rival contentions raised in the present Petition. There can be no doubt

about the fact that the duty of the Court is to take such steps as found necessary to get to the truth of the matter. The Court is expected to decide the *lis* between the parties on the basis of the relevant material on record, including oral and documentary material, so as to arrive at findings, which would further the cause justice and truthfulness. The Court is not expected to decide the cases on the basis of the contest between the parties and the Counsel, only on the touchstone of their competence. The Court can also take into consideration any mistake on the part of the Counsel, which has the effect of harming the case of the litigant. The mistake on the part of the Counsel ought not to be detrimental to the interest of the litigant.

11. At the same time, the Court has to be cautious about showing indulgence to either party, which may put the other side to inconvenience. In the case of **K.K. Velusamy Vs. N. Palanisamy** (supra), the Supreme Court held as follows:

“16. 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. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.

17. Ideally, the recording of evidence should be continuous, followed by arguments, without any gap. Courts should constantly endeavour to follow such a time schedule. The amended Code expects them to do so. If that is done, applications for adjournments, re-opening, recalling, or interim measures could be avoided. The more the period of

pendency, the more the number of interlocutory applications which in turn add to the period of pendency.”

12. A perusal of the record in the present case shows that there is an endorsement at the end of the proceeding sheet, before the Trial Court on 17.04.2019, when the cross examination of PW-1 was being conducted, as follows:

“For want of time”

13. Although the Roznama for the dates 17.04.2019 and 07.06.2019 does show that, even according to the Advocate representing the petitioner, the cross examination of PW-1 was completed, it can be said that the Advocate was either under a wrong impression or due to inadvertence, proceeded on the basis that the cross examination was completed. There is no dispute about the fact that there is a counterclaim filed on behalf of the petitioner and questions regarding the same can be put in cross examination to the concerned witness.

14. Despite vehement opposition on the part of the respondent, in the peculiar facts and circumstances of the present case, this Court is inclined to grant the prayer made on behalf of the petitioner, subject to costs to be paid by the petitioner to the respondent for the inconvenience that the respondent has suffered

as a consequence of the inadvertence and mistake on the part of the Advocate for the petitioner.

15. In view of the above, the Writ Petition is allowed. The impugned order dated 13.09.2019, is quashed and set aside. The Application (Exhibit D-77), filed for recall of the witness is allowed, subject to the petitioner paying costs of ₹10,000/- to the respondent, within a period of two weeks from today. It is further directed that the petitioner through his Advocate will be permitted to further cross examine PW-1 only on one date to be fixed by the Trial Court and that no further date or adjournment will be granted for the same. It is made clear that further cross examination of the witness (PW-1) shall not exceed a period of half an hour, before the Trial Court.

16. The Writ Petition is disposed of.

MANISH PITALE, J.