

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ADMIRALTY AND VICE ADMIRALTY JURISDICTION

INTERIM APPLICATION NO.3291 OF 2022
IN
ADMIRALTY SUIT NO.03 OF 2007

Pacific Leathers Finishers

...Applicant/
Plaintiff

vs.

Allcargo Movers India Private Limited and Ors.

...Defendants

VISHAL
SUBHASH
PAREKAR

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VISHAL SUBHASH
PAREKAR

Date: 2022.10.27
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Mr. Ram Jaynarayan i/b. Mr. Ashwin Shanker, for the
Applicant/Plaintiff.

Mr. Rajesh Shah a/w. Ms. Sanidhaa Vedpathak i/b. Maneksha &
Sethna, for Defendant No. 1.

CORAM : N. J. JAMADAR, J.

DATE : OCTOBER 17, 2022

P.C.:

1. The applicant/plaintiff has preferred this application to recall Mr. M.T. Shibu (PW.2) for recording further examination in chief for the limited purpose of placing on record the original partnership deed of the plaintiff along with its translated version.

2. The applicant has instituted the suit to recover a sum of USD 77676.87 along with interest @ 12% p.a. from the date of institution of the suit till payment and/or realization. The plaintiff claims to be a registered partnership firm. Mr. M.T. Shibu (PW.2) filed an

affidavit in lieu of examination in chief on 29th May, 2015. While marking documents, by an order dated 30th October, 2018, this Court had, inter alia, marked the photostate copy of the certificate of registration as Exhibit X-1. The original instrument is in Hindi. It was required to be translated. In the meanwhile, the plaintiff has received the translated version of the certificate of registration (X-1) from the Chief Translator/Interpreter, High Court, Bombay. The said document is necessary for a just decision of the case. However, inadvertently, on 18th January, 2022 a statement was made on behalf of the plaintiff that the plaintiff's evidence is complete and may be closed. Serious prejudice would be caused to the plaintiff if the plaintiff is deprived of the opportunity to tender the original certificate of registration. Hence, it is necessary to recall Mr. M.T. Shibu (PW.2) for recording the evidence for the limited purpose of producing the original instrument along with its translated version.

3. An affidavit in reply is filed on behalf of the defendant No. 1. The substance of the resistance put forth by defendant No. 1 is that the plaintiff has already closed its evidence. At this stage the plaintiff cannot resort to fill the lacuna in the plaintiff's case. The defendant No. 1 has already led evidence. The defendant No. 2 has also filed affidavit in lieu of examination in chief of its first witness

and the documents. In view of the aforesaid developments, it may not be expedient to allow the plaintiff to re-examine its witness and re-open the entire case after the trial has reached an advanced stage.

4. I have heard Mr. Ram Jaynarayan, learned counsel for the Applicant/Plaintiff and Mr. Rajesh Shah, learned counsel for Defendant No. 1.

5. To begin with, it is necessary to note that the plaintiff has approached the Court with a case that the plaintiff is a registered partnership firm. Since the plaintiff has tendered a photostate copy of the certificate of registration (Exhibit DX-1), it came to be marked for identification. In the meanwhile, the plaintiff claims to have obtained a translated copy of the certificate of registration.

6. In the aforesaid backdrop, it does not appear that the defendants would be taken by surprise. All along it has been the case of the plaintiff that the plaintiff is a registered partnership firm. Initially, an effort was made to place a copy of the certificate of registration, and the original certificate of registration along with its translated version are now sought to be produced. In view of the

averments in the plaint and especially the nature of the controversy, the juridical status of the plaintiff assumes significance. I am, therefore, inclined to hold that the documents, the production of which is sought are necessary for a just decision of the case.

7. Mr. Shah, the learned counsel for defendant No. 1 would, however, urge that, at this length of time, the application to recall Mr. M.T. Shibu (PW.2) for further examination in chief cannot be said to be bonafide and is actuated by a desire to further delay the disposal of the suit. Therefore, the Court would not be justified in permitting the applicant/plaintiff to recall Mr. M.T. Shibu (PW.2) for further examination in chief.

8. Reliance was placed on the observations of the Supreme Court in the case of Gayatri vs. M. Girish¹ wherein it was observed that if the application to recall a witness is mischievous or frivolous, it is desirable to reject the application.

9. In opposition to this, the learned counsel for the plaintiff/applicant, submitted that the application is bonafide in as much as it has been the consistent claim of the plaintiff that the

1 (2016) 14 Supreme Court Cases 142

plaintiff is a registered partnership firm. Merely because the original certificate of registration could not be tendered and photostate copy of the registration certificate (X-1) came to be marked for the non production thereof, cannot be a ground to deprive the plaintiff/applicant of the opportunity to place the certificate of registration on record.

10. Inviting the attention of the Court to the decision of the Supreme Court in the case of K.K. Velusamy vs. N. Palanisamy² the learned counsel for the plaintiff/applicant submitted that the Court is vested with ample power to allow a party to recall a witness in exercise of its inherent jurisdiction. The observations in paragraphs 18 to 20 read as under:-

18] According to the appellant, the said evidence came into existence only on 27.10.2008 and 31.10.2008, and he prepared the applications and filed them at the earliest, that is on 11.11.2008. As defendant could not have produced this material earlier and if the said evidence, if found valid and admissible, would assist the court to consider the evidence in the correct perspective or to render justice, it was a fit case for exercising the discretion under section 151 of the Code. The courts below have not applied their minds to the question whether such evidence will be relevant and whether the ends of justice require permission to let in such evidence. Therefore the order calls for interference.

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

2 (2011) 11 Supreme Court Cases 275.

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 bonafide 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.

20] 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.

11. Evidently, certificate of registration, which purportedly evidences the fact that the plaintiff is a registered partnership firm, bears upon the question in controversy. It would assist the Court in arriving at a just decision of the case. In the circumstances of the case, it does not appear that the application is either malafide or frivolous. Not it can be said to be a case of filling up a lacuna as the

plaintiff/ applicant has positively asserted that it is a partnership firm. Viewed through the aforesaid prism, on the touchstone of the command of justice, in my view, the recall of Mr. M.T. Shibu (PW.2) is necessary to advance the cause of justice and also to prevent the abuse of the process of the Court. In the circumstances, the exercise of discretion in favour of plaintiff/applicant seems justifiable.

Hence, the following order.

ORDER

1. The application stands allowed in terms of prayer clause (a).
2. Needless to clarify that the defendants shall have effective opportunity to cross examine Mr. M.T. Shibu (PW.2) post further examination in chief.
3. Application stands disposed.

(N. J. JAMADAR, J.)