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

+ CM(M) 1133/2021 and CM 44415/2021 (stay)

HARPREET SINGH BATRA

..... Petitioner

Through: Mr. Kunal Sinha & Mr.
SarthaK Sharma, Advs

versus

KARMAWALI (DECEASED) & ORS. Respondents

Through: Mr. Abhay Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

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13.07.2022

1. The impugned order dated 5th October 2021, passed by the learned Additional District Judge (“the learned ADJ”) in CS 7298/2016 (*Karmawali & Anr. v. Harpreet Singh Batra & Ors.*) allows an application preferred by the respondents (the plaintiffs before the learned ADJ) for reopening of the evidence of DW-3, specifically for the purpose of enabling the respondents to further cross-examine DW-3.

2. Given the nature of the controversy, it is not necessary to refer to the factual matrix in which the disputes between the parties arose. One may start the recital of facts, therefore, with 23rd May 2007, when issues were framed in CS 7298/2016, in which the petitioner was the defendant and the respondents were the plaintiffs.

3. Thereafter, recording of evidence commenced. Four witnesses



(PWs) were cited by the respondent, three of whom expired. The fourth was examined and cross-examined and recording of his evidence was concluded on 29th August 2017.

4. Thereafter, recording of the evidence of the petitioner's witnesses (DWs) commenced. The petitioner cited five DWs. Of the five, DW-1 expired and DW-2 was dropped by the petitioner.

5. DW-3, DW-4 and DW-5 were cross-examined, after they filed their respective affidavits in evidence and affirmed the affidavits in evidence in examination-in-chief.

6. DW-3 filed his affidavit in evidence on 6th October 2017. He was cross-examined by the respondents on 6th February 2018, 15th October 2018, 19th October 2018, 22nd January 2019, 29th January 2019, 13th February 2019 and 18th April 2019. The matter was listed for further cross-examination of DW-3, by the respondents, on 15th July 2019.

7. In the interregnum, on 19th November 2018 and 12th December 2018, the recording of evidence of DW-4 was concluded.

8. On 15th July 2019, the following order came to be passed by the learned ADJ.

“CS NO. 7298/16

**KARMAWALI AND ANR Vs. HARPREET SINGH
BATRA ORS.**



15.07.2019

Present: Sh. Rakesh Kumar Sharma, counsel for plaintiff.

Sh. Kunal Sinha, counsel for defendant no. 1 to 11 with DW -3.

None for defendant no. 13/DDA.

None for other defendants.

DW-3 is present for further cross examination.

Counsel for plaintiff has filed fresh V/N and also filed the application for Inspection of court file and seeks some time for cross examination of witness on the ground of recent engagement. This case falls in the category of more than ten years old matters. Perused the curlier order-sheets. Last cross examination was conducted on 18.04.2019. Cross examination of DW-3 has been carried out extensively over a period of time and on a number of dates. Counsel for plaintiff submits that in view of recent engagement and without inspection of the court file, he is unable to cross examine the witness. There was no reason for delay in engagement or change of counsel if so desired by the plaintiff. Counsel for defendant no. 1 to 11 submits that there is no other witness to be examined on behalf of defendant no. 1 to 11. One opportunity is granted to the plaintiff for next date of hearing subject to cost of Rs. 10,000/- to be paid to defendant no. 1 to 11.

Some contempt petition is stated to be pending before Hon'ble High Court. Let the clarification be provided on next date of hearing for the same also. Put up on 01.08.2019.

Parties are directed to appear at 11.00 am for cross examination of DW-3.”

9. On the next date of hearing, i.e. 1st August 2019, the learned



ADJ noted that the costs of ₹ 10,000/-, as directed on 15th July 2019, were yet to be paid. Time was granted till the afternoon of the said day to pay the costs, failing which it was noted that the right of cross-examination would be closed. Costs were not paid, as a result of which, by order passed at 12 noon on 1st August 2019, the learned ADJ closed the right of further cross-examination of DW-3 and directed the matter to be listed for further defence evidence on 6th September 2019. The order passed on 29th November 2019, read as under:

**“CS NO. 7298/16
KARMAWALI AND ANR Vs. HARPREET SINGH
BATRA ORS.**

01.08.2019

Present: Counsel for plaintiff.

Counsel for defendant.

DW-3 is present for cross examination. One week more time is sought as complete set has not yet been received. Perused the last date order-sheet. Cost remains unpaid.

Put up at 12.00 pm for payment of cost failing which right of the cross examination shall be closed.

At 12.00 pm.

Present: Counsel for plaintiff.

Counsel for defendant.

An application u/s **151** CPC is filed for waiving of cost. Copy given. Perused the application. Heard. No ground is made out for



waiver of the cost. Application stands dismissed. In view of the same, right of further cross examination of the witness is closed.

To come up for remaining DE by way of affidavit with advance copy to counsel for plaintiff at least one week before next date. Put up on 06.09.2019.

Date is given at the convenience of both parties.”

10. The aforesaid order dated 1st August 2019 was never assailed by the respondents. Rather, the respondents proceeded, on 28th November 2019 and 29th November 2019, to cross-examine DW-5, who had tendered his evidence by way of affidavit prior thereto. With the conclusion of cross-examination of DW-5, the exercise of recording of evidence came to an end.

11. On 29th November 2019, therefore, the following order came to be passed.

“CS NQ. 7298/16

**KARMAWALI AND ANR Vs. HARPREET SINGH
BATRA ORS.**

29.11.2019

Present: Sh. Abhay Kumar, counsel for plaintiff no. 2 (ii)
Sunil Kumar with plaintiff no.2(ii).

Sh. Kunal Sinha, counsel for defendant no. I to 11.

Sh. Mukul Dhawan, counsel for defendant no. 12.

Sh. Manish Kumar, counsel for defendant
no.14/ROC.



None for other defendants

DW-5 is present for further cross examination. He is cross examined and discharged. There is no other witness to be examined by defendant no.2. His evidence stands closed. There is no other defendant appearing in this case for several consecutive dates. They are accordingly proceeded ex-parte. Their evidence also stands closed.

Counsel appearing for plaintiff submits that there has been no cross examination in this case of sole witness examined on behalf of defendant no. 1 to 11 as DW-3 and he will be filing the application for permission to cross examine the said witness and pursuant to the application being allowed and cross examination of the said witness, he may be permitted to put the some other question to DW-5 for cross examination.

No such permission in anticipation of such filing and such outcome can be granted in advance. It will be taken note of as and when such occasion arises.

Now to come up for final argument on 29.01.2020 at 12.30 pm”

12. Thereafter, on 10th January 2020, the respondents filed an application under Section 151 of the Code of Civil Procedure, 1908 (CPC), seeking to reopen the evidence of DW-3 by recalling him in the witness box for further cross-examination. The only ground urged in the application, for the said prayer, was that DW-3 was the main witness in the case and that, if he was not cross-examined thoroughly, “material facts which he has concealed cannot be brought before the Hon’ble Court”.

13. The impugned order dated 5th October 2021 allows the aforesaid application.



14. The observations and findings of the learned ADJ, in the impugned order, may be extracted *in extenso*, thus:

“Heard. I have perused the record of the case which is an old matter pertaining to the year 2004. Order 18 Rule 17 of CPC gives discretion to the court which can be exercised either on its own motion or on an application filed by any of the parties to the suit. However, the existence of the provision under Order 18 Rule 17 of CPC does not preclude a party from approaching this court u/s 151 of CPC which deals with inherent power of this court to make any such orders as may be necessary for the ends of the justice or to prevent the abuse of process of the court. In the absence of any provision providing for re-opening of evidence or recall any witness for further examination or cross examination for purposes other than securing clarification required by the court, the inherent power u/s 151 of CPC subject to its limitation can be invoked in appropriate cases to re-open the evidence and to recall the witness for further examination. In the case titled **Ram Rati**¹ (*supra*) also it has been held that "this inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such questions to elicit any clarification". Thus, it has been held in **Ram Rati**¹ (*supra*) itself that the inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

Now coming to the facts of the case in hand, it is clear that the matter is more than 15 years old and the witness ought to be recalled for cross examination has already been cross examined at length. However, it has been vehemently argued by the counsel for plaintiff that one more opportunity be again granted to him to cross examine DW3 in the interest of justice. Undoubtedly, sufficient delay has been caused due

¹ Ram Rati v. Mange Ram (2016) 11 SCC 296



to laches by the plaintiff. However, this lack of diligence can be compensated in terms of money and accordingly, the application of the plaintiff u/s 151 of CPC is allowed in the interest of justice subject to cost of Rs.35,000/- in total to paid to defendant no. 1 to 11.

DW3 is directed to be present in person for cross examination on the next date of hearing.

List for cross examination of DW3 on **14.12.2021.**”

15. A bare reading of the afore-extracted passages from the impugned order dated 5th October 2021 reveals that the learned ADJ has adduced no reason whatsoever for allowing the application of the respondents for recalling DW-3 into the witness box. The impugned order waxes eloquent on the amplitude of the power available with the Court to recall a witness, stressing the fact that the said power is required to be exercised *ex debito justitiae*. Thereafter, the learned ADJ has “coming to the facts of the case in hand”, noted the fact that (i) the matter was of over 15 years vintage, (ii) DW-3 had already been cross examined at length and (iii) considerable delay had been caused owing to laches by the respondents. Despite these inhibiting factors, the learned ADJ has proceeded to allow the request of the respondents for permission to recall DW-2 solely on the ground that the respondents “lack of diligence can be compensated in terms of money”. Following this somewhat peculiar reasoning, the learned ADJ has allowed the respondent’s application subject to costs of ₹ 35,000/-.

16. In my considered opinion, the impugned order is completely unsustainable in law.



17. On the jurisdiction of a Court to recall a witness, the recording of whose evidence is complete, the Supreme Court has this to say, in paras 10 to 18 of ***Ram Rati***¹, which read thus:

“10. Order 18 of CPC deals with hearing of the suit and examination of witnesses. By an amendment introduced thereunder with effect from 01.02.1977, Rule 17A was introduced permitting production of evidence not previously known or which could not be produced despite due diligence. It appears, the amendment only caused unnecessary protraction of the litigation, and hence, the said provision was omitted by The Code of Civil Procedure (Amendment) Act, 1999 with effect from 01.07.2002. However, Rule 17 was retained which reads as follows:

“17. Court may recall and examine witness.- The court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the court thinks fit.”

11. The respondent filed the application under Rule 17 read with Section 151 of the CPC invoking the inherent powers of the court to make orders for the ends of justice or to prevent abuse of the process of the court. The basic purpose of Rule 17 is to enable the court to clarify any position or doubt, and the court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. ‘No prejudice is caused to either party’ is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the court



decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground.

12. In *Vadiraj Naggappa Vernekar (Dead) Through LRs. v. Sharadchandra Prabhakar Gogate*², this principle has been summarized at paragraphs- 25, 28 and 29:

“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 1 (2009) 4 SCC 410 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.”

13. In *K.K. Velusamy v. N. Palanisamy*³, the principles enunciated in *Vadiraj*² have been followed, holding at paragraphs- 9 and 10:

² (2009) 4 SCC 110

³ (2011) 11 SCC 275



“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 Vadiraj²)

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 2 (2011) 11 SCC 275 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.”

14. The rigour under Rule 17, however, does not affect the inherent powers of the court to pass the required orders for ends of justice to reopen the evidence for the purpose of further examination or cross-examination or even for production of fresh evidence. This power can also be exercised at any stage of the suit, even after closure of evidence. Thus, the inherent power is the only recourse, as held by this Court in *K.K. Velusamy*³ (*supra*) at paragraph-11, which reads as follows:

“11. There is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that



nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.”

15. After surveying the various principles stated by this Court on Section 151 from 1961, in *K.K. Velusamy*³ (*supra*), they have been succinctly summarized as follows under paragraph-12:

“(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognises the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is “right” and undo what is “wrong”, that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such



provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.”

16. Some good guidance on invocation of Section 151 of the CPC to reopen an evidence or production of fresh evidence is also available in *K.K. Velusamy*³ (*supra*). To quote paragraph-14:

“14. The amended provisions of the



Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for reopening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands on earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.”

17. *Vadiraj*² (*supra*) and *K.K. Velusamy*³ (*supra*) have also found affirmation by this Court in *Bagai Construction Through its Proprietor Lalit Bagai v. Gupta Building Material Store*⁴.

18. The settled legal position under Order 18 Rule 17 read with Section 151 of the CPC, being thus very clear, the impugned orders passed by the trial court as affirmed by the High Court to recall a witness at the instance of the respondent “for further elaboration on the left out points”, is wholly impermissible in law.”

18. The power to recall the witness is, therefore, traceable to Order XVIII Rule 17 of the CPC. Though Order XVIII Rule 17 of the CPC, as plainly read, empowers the Court to recall a witness in order to pose questions to the witness and clarify any doubt that may survive, the Supreme Court has extended the ambit of the said provision to include a power to recall a witness at the instance of one of the parties to the proceedings, and allow the party to further examine or cross-examine him. For this purpose, the Court, along with Order XVIII Rule 17 of

⁴ (2013) 14 SCC 1



the CPC, also invoked Section 151 of the CPC.

19. That said, however, the judgment makes it clear that the power to recall a witness under Order XVIII Rule 17 of the CPC at the asking of the Court is not to be exercised in a cavalier fashion, but is only to be exercised where it is found necessary to recall a witness to clarify any issue that may still need clarity.

20. The ground urged by the respondents, in its application under Section 151 of the CPC, seeking recall of DW-3 into the witness box, does not come within any of the exigencies envisaged by the Supreme Court in *Ram Rati*¹, in which a witness could be recalled for further examination or cross-examination. All that is said is that DW-3 was the main and a very crucial witness in the case. Thereafter, a bald averment, sans any particulars whatsoever, is made, in the application, that, if DW-3 were not to be permitted to be further cross-examined, material facts which he had concealed could not be brought before the Court. The application is silent as to why, despite the fact that DW-3 was examined or cross-examined on as many as seven occasions, the material facts allegedly concealed by DW-3 could not be brought before the Court.

21. That apart, the evidence of DW-3 was closed on 1st August 2019. That order was never challenged by the respondents either by way of appeal or by any other manner known to law. Rather, the respondents proceeded to cross-examine DW-5 on 28th November 2019 and 29th November 2019. Even then, no request was made, by



the respondents, to the learned ADJ for permission to recall DW-3 in the witness box. It was nearly a month and a half after the recording of evidence was closed on 29th November 2019, and the matter was directed to be listed for final arguments, that, on 10th January 2020, the respondents suddenly decided to revitalize the proceedings and seek recall of DW-3. It is obvious that the prayer was a mere afterthought, for reasons which, for the present, have necessarily to remain *recondite*.

22. A third, and probably the most significant, reason why the impugned order cannot sustain, is that it is totally bereft of reasons. As already noted hereinabove, having entered detailed observations regarding the amplitude of the power available with the Court to recall a witness into the witness box. after the evidence of the witness stood concluded and having referred, in the process to *Ram Rati*¹, the learned ADJ does not proceed to apply the said decision or provide any reasons why, according to her, the recall of DW-3 in the witness box was advisable or necessary. She has merely imposed costs of ₹ 35,000/- on the respondents, as a condition for allowing the application. Costs are no substitute for reasons. An order which is bereft of reasons is, even on that sole ground, liable to be quashed and set aside⁵.

23. What, then, should the Court do?

24. No reasonable purpose would be served by remanding the

⁵ State of Uttarakhand v. Mayan Pal Singh Verma, 2022 SCC OnLine SC 469



respondent's application for recalling DW-3 in the witness box for a fresh decision by the learned ADJ for more than one reason. In the first place, the recording of evidence of DW-3 stood closed on 1st August 2019, and that order was never assailed by the respondents at any point of time. Secondly, in any event, the application of the respondents contains no reasonable justification for recall of DW-3 in the witness box. Even as it stands, therefore, the application of the respondents to recall DW-3 in the witness box, so that he could be further cross-examined by the respondents, was devoid of substance and was liable to be dismissed.

25. For the aforesaid reasons, the impugned order dated 5th October 2021, of the learned ADJ in CS 7298/2016 is quashed and set aside. Resultantly, the application preferred by the respondents under Section 151 of the CPC, seeking recall of DW-3 in the witness box is dismissed.

26. This petition stands allowed accordingly with no order as to costs. Miscellaneous application also stands disposed of.

C. HARI SHANKAR, J.

JULY 13, 2022

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