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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 1168/2022 &CM APPL. 46945/2022, CM APPL.
46946/2022, CM APPL. 46969/2022

SMT. SUNITA DEVI Petitioner
Through: Ms. Divya Kalra, Adv.

versus

SH. RAJ KUMAR SINGHAL Respondent
Through:

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T (O R A L)**
03.11.2022

1. The order dated 16th March, 2022, passed by the learned Additional District Judge (“the learned ADJ”), in CS DJ 579159-2016 (*Raj Kumar Singhal v. Sunita Devi*), which forms subject matter of challenge of challenge in the present petition instituted under Article 227 of the Constitution of India, rejects an application filed by the petitioner, as the defendant in the suit, under Order XVIII Rule 17 of the Code of Civil Procedure, 1908 (CPC).

2. Given the nature of the controversy in the present case, it is not necessary to advert to the dispute in the suit. Suffice it to state that, the learned ADJ deemed it appropriate to direct the defendant (the present petitioner) to lead evidence first. Accordingly, on 8th August 2018, affidavit in evidence was filed by the petitioner along with certain document, without, however, any accompanying application under Order VIII Rule 1A (3) of the CPC to take the said documents

on record. No such application was filed by the petitioner even before the next date of hearing which was 31st October 2018.

3. Accordingly, on 31st October 2018, on which date there was no appearance on behalf of the petitioner-defendant, the matter was passed over and taken up again at 12 Noon on the said date, by which time, too, no one appeared for the petitioner. A last opportunity was, therefore, granted to the petitioner, subject to costs of ₹ 3000/-, and the matter was adjourned to 23rd July 2019.

4. Again, on 23rd January 2019, there was no appearance on behalf of the petitioner. Accordingly, the evidence of the petitioner was closed under Order XVII of the CPC.

5. The petitioner, thereafter, moved an application under Order XVIII Rule 17 of the CPC, which stands dismissed by the learned ADJ by the order dated 16th March 2022 under challenge.

6. The reasoning of the learned ADJ, in dismissing the petitioner's application, is to be found in para 5 to 7 of the impugned order, which read thus:

“5. Perusal of the file would show that issues were framed in the present matter vide order dated 14.03.2018 and keeping in view the fact that signatures and thumb impression were admitted by the defendant, opportunity was given to the defendant to lead her evidence first. On 08.08.2018, affidavit alongwith photocopies and some documents was filed on behalf of defendant, however no application was attached for bringing said documents on record. It was stated on behalf of the Ld.Counsel for defendant that defendant was out of station hence affidavit of the defendant could not be prepared earlier and advance copy of the same was not supplied to the opposite party earlier. On 31.10.2018, Ld.Counsel for defendant had not appeared and defendant was advised to file written application and pass over was given for 12 PM, but at 12 PM, none had appeared on behalf of defendant. On that day, last opportunity was granted to the defendant subject to cost of Rs. 3,000/- and matter was adjourned for 23.01.2019. On 23.01.2019,

none had appeared on behalf of defendant for leading evidence and matter was proceeded under Order 17 of CPC and defendant evidence was closed.

6. Perusal of order dated 24.04.2019 would show that on that day, none had appeared on behalf of defendant and two witnesses of plaintiff were present and matter was proceeded under Order 17 CPC and both the witnesses were discharged and matter was adjourned for final arguments. On 10.07.2019, Ld.Counsels for both the parties were not available and application under Section 151 CPC for taking on record the documents and the present application under Order 18 Rule 17 CPC was moved on 27.08.2019. Ld.Counsel for defendant has withdrawn his application under section 151 CPC filed on 27.08.2019, which was dismissed as withdrawn vide recording of separate statement of Ld.Counsel for defendant.

7. Perusal of file would show that not a single document has been filed on behalf of defendant substantiating her reason of nonappearance for herself as well as for her Ld.Counsel. Sufficient opportunities had been given to the defendant for leading evidence as well as for cross-examination of the witnesses examined on behalf of plaintiff despite that no evidence was lead. Perusal of order sheets would reflect that defendant and not appear deliberately and intended to delay the matter. Thus, keeping in view the totality of the facts and circumstances of the present matter, the application is without any merit and stands dismissed accordingly.”

7. Aggrieved by the aforesaid order, the petitioner has approached this Court, invoking the jurisdiction vested in it by Article 227 of the Constitution of India.

8. I have heard Ms. Divya Kalra, on behalf of the petitioner. She has placed reliance on the judgment rendered by me in **Deepak v. Ramesh Sethi¹**, and has particularly emphasised the following passage from the said decision:

“13. The right to lead evidence is pivotal to a fair trial and partakes of the character of natural justice and fair play. No doubt, where a party is unconscionably indolent, the Court may put its foot down and close the right of the party to lead evidence; else, as adversarial litigations are meant to be tried after allowing the parties to an

adequate opportunity to place their respective stands on record, the Court should not be hyper-technical, in the matter of granting opportunity to lead evidence and the like.”

9. Having considered the material on record and the submissions advanced by Ms. Kalra, I regret my inability to be of any help to the petitioner in the present case.

10. In the first place, the invocation, by the petitioner, of Order XVIII Rule 17 of the CPC was obviously misconceived.

11. Order XVIII Rule 17 of the CPC reads thus:

“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.”

12. Plainly read, the scope and ambit of Order XVIII Rule 17 of the CPC is extremely narrow. A witness may be recalled, under the said provision, only where the Court desires to put any question to the witness. The peripheries of this provision have, however, been expanded by judicial decisions to include applications, by one party or the other, seeking to recall a witness. Even so, the decisions make it clear that the recall can only be for the purposes of clarifying any doubt which may remain with the Court, or for the Court to obtain clarity with respect to the exact contours of the controversy before it. One may refer, in this context, to the following passages from *Ram Rati v. Mange Ram*², *Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate*³ and *K.K. Velusamy v. N. Palanisamy*⁴, of which the last cited decision also examines a situation in which the application is moved not merely under Order XVIII Rule 17, but also

² (2016) 11 SCC 296

³ (2009) 4 SCC 410

invokes Section 151 of the CPC.

“Ram Rati”²

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.

***Vadiraj Naggappa Vernekar*³**

“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 that his recall and reexamination 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.”

K.K. Velusamy⁴

“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***³)

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.”

13. A holistic reading of the aforesaid passages from ***Ram Rati***² makes it clear that, classically, the recall of a witness under Order XVIII Rule 17 has to be for clarifying any doubts which may exist despite the evidence already recorded and that, in this context, the Court is entitled to co-opt the assistance of the parties and permit questioning, by the parties, of the recalled witness. Nonetheless, in exceptional cases, the parties may also be permitted to apply for recall of witnesses under Order XVIII Rule 17 for further examination or cross-examination. In such cases, however, the Court would be exercising jurisdiction under Order XVIII Rule 17 read with Section 151 of the CPC. The manner in which Section 151 of the CPC would

come in for application in such a case also stands identified by the Supreme Court in para 16 of *Ram Rati*², which reads thus:

“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*⁴ (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.”

14. The resultant legal position is that, whether under Order XVIII Rule 17 or Order XVIII Rule 17 read with Section 151 of the CPC, a party may be permitted to recall a witness for further examination or cross-examination if (i) there exists any doubt remaining after the recording of the evidence of the said witness that has already taken place which is required to be clarified, or (ii) after the evidence of the witness has been recorded, the party seeking recall has comes across evidence on which he could not lay his hands earlier, or (iii) evidence in regard to the conduct or action of the other party has come into existence.

15. I have also occasion to examine the contours of Order XVIII Rule 17 of the CPC in *Shashi Sehdev v. Narender Kumar Sharma*⁵

and *Harpreet Singh Batra v. Karmawali*⁶.

16. In the present case, the grounds on which the application of the petitioner under Order XVIII Rule 17 was moved, have no relation to the provision. The petitioner, instead, sought to explain her absence/non-representation on earlier dates of hearing and sought permission to cross-examine the witnesses of the plaintiff as, were she not to be allowed to do so, her defence would be seriously prejudiced.

17. As I have already observed in the passage from the judgment in *Deepak*¹, on which Ms. Kalra places reliance, ordinarily, a Court would allow a party every opportunity to lead evidence and to contest the evidence led by other side so that lead evidence and to contest the evidence laid by the other side, so that adequate opportunity of representation is ensured. That said, however, if a party is unconscionably indolent before the Court below, Article 227 cannot be used as an avenue to tide over such indolence. Else, it would result in a situation in which the learned Trial Courts would not be able to exercise their discretion in such manner as they deem appropriate, as every order that they pass is in danger of being set aside by the High Court. Article 227 is not intended to preserve any such purpose.

18. In the present case, the learned ADJ has noted that (i) on 8th August 2019, additional documents were placed by the petitioner on record without any accompanying application, (ii) on 31st October 2018 despite the matter having been called out twice, the petitioner was unrepresented, as a result of which the matter was adjourned for the last time subject to costs, (iii) on 23rd January 2019, again, the petitioner was unrepresented, resulting in closure of the right of the

plaintiff to lead defence evidence (iv) thereafter, recording of the respondent–plaintiff witnesses commenced, (v) on 24th April 2019, though two witnesses of the respondent–plaintiff were present, the defendant was again absent; accordingly, the learned ADJ proceeded under Order XVII of the CPC, to discharge the witnesses of the respondent and adjourned the matter for final arguments, and (vi) On 10th July 2019, both parties were unrepresented. Thereafter, on 27th August 2019, the respondent as a petitioner moved the application under Order XVIII Rule 17 of the CPC, which stands dismissed by the order dated 16th March 2022, under challenge in the present petition.

19. I find, therefore, no reason to differ with the finding, of the learned ADJ, that the petitioner has been unable to provide any satisfying reason for her being unrepresented on all the dates noted hereinabove. The learned ADJ has correctly observed that sufficient opportunity had been granted to the petitioner both to lead evidence as well as to cross-examine the evidence of the witnesses of the respondent.

20. In that view of the matter, I do not deem this to be an appropriate case to interfere with the impugned order in exercise of the jurisdiction vested in this Court by Article 227 of the Constitution of India.

21. The petition is accordingly dismissed *in limine*. Miscellaneous applications are also disposed of.

C. HARI SHANKAR, J

NOVEMBER 3, 2022

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