

March 5, 2024
Sl. No.7
Court No.19
s.biswas

CO 107 of 2023

Smt. Anita Mondal

vs.

Manash Hazra and another

Mr. Pinaki Ranjan Mitra

... for the petitioner

Mr. Animesh Paul

... for the opposite party no.1/plaintiff

1. This revisional application arises out of an order dated November 7, 2022 passed by the learned Civil Judge (Senior Division), 3rd Court, Howrah in Title Suit No.146 of 2017. The petitioner is the defendant No.2 in the suit.

2. By the order impugned, the learned court rejected the application under Order 18 Rule 17 of the Code of Civil Procedure read with Section 151 of the said code. The petitioner wanted to recall PW2 and question him on some points. It is specifically contended by Mr. Mitra, learned advocate for the petitioner, that the learned court proceeded on the basis that by deletion of the provision of Order 18 Rule 17A of the Code, the legislature intended to do away with the system of recalling a witness at the mere asking. According to Mr. Mitra, the right to recall a witness in exercise of inherent power under Section 151 of the Code, is always available.

3. Moreover, the learned court also misdirected itself in holding that when the questions were not

specifically mentioned in the recalling application, such application should not be allowed.

4. According to Mr. Mitra, the defendant No.2 was not required to frame the questions to be put in cross-examination when there were clear indications that only questions with regard to attestation and execution of two deeds of gift which were the subject matters in the suit, would be put to the witness who had deposed on behalf of the plaintiffs.

5. Mr. Paul, learned advocate appearing on behalf of the plaintiff, submits that in a suit for declaration, partition and permanent injunction, further cross-examination of the witness would not be necessary. The plaintiff claimed co-sharership on the basis of the deeds of gift. The PW2 was cross-examined and discharged. The provision of Order 18 Rule 17 of the Code would only be attracted to clear doubts and for clarifications and explanations on the statements of the witness. Further questions could not be put to a witness, upon recall. The provision of the Code had been deleted and the court should not allow recall of witness at any stage only because the petitioner had missed out some questions. Relying on the decision of the Hon'ble Apex Court in the matter of **Vidiraj Naggappa Vernekar (Dead) through LRS vs. Sharadchandra Prabhakar Gogate** reported in (2009) 4 SCC 410, Mr. Paul submits that even if

some vital questions were omitted such omission would not be enough to recall PW2. He further submits that recall of witness could not be allowed in order to fill up a lacunae in the evidence.

6. To counter such submission, Mr. Mitra has relied on the decision of **Raghu Nath Biswas vs. Rabi Ram Chandra Jalandhar and others** reported in (2008) 2 CHN 709. The High Court had held that the statute vested an absolute right upon a party to re-examine a witness.

7. Under the circumstances of this case, the re-examination/further cross-examination of PW2 should be allowed, for the ends of justice.

8. Having heard the learned advocates for the respective parties, this court finds that in the application for recall of PW2, the petitioner had indicated that the recall was only for the purpose of putting some questions with regard to the execution and attestation of the two deeds of gift. P.W.2 is a summoned witness.

9. The learned court held that as questions were not put in the application for recall, the application should not be allowed. I find that the application clarifies the nature of questions that would be put to the witness. Secondly, soon after the cross-examination was over, the mistake was detected and the application was filed for recall. The evidence of

DW had not started. The question of filling up a lacunae in the evidence would not arise in this case as the DW was yet to depose.

10. In the decision of **Vidiraj Naggappa Vernekar (Dead) through LRS** (supra), the Hon'ble Apex Court held that the court could not recall the witness to fill up the lacunae in the evidence. However, if the evidence on recall of a witness had a bearing on the ultimate decision of the suit, recall could be allowed. The introduction of a new case/third case, should not be the purpose for recall of a witness. In the case in hand, the deeds were sought to be proved by the PW2 as the attesting witness. Thus, prayer for recall was made to put some questions and suggestions on such attestation and execution. I do not find any reason not to allow such recall, only on questions with regard to the execution and attestation of the deeds which are the subject matters of the suit. The P.W.2 will be recalled. No questions outside the purview of the deeds will be allowed. Cross-examination must be completed within an hour on any working day to be fixed by the learned court, subject to payment of cost of Rs.5000/- to the plaintiff. The cost shall be paid within three weeks from date.

11. It has been settled by the Hon'ble Apex Court, that power under Section 151 of the Code of Civil

Procedure could be invoked by the learned court to recall witnesses, even if such provision has been deleted from the Code.

12. The Hon'ble Apex Court in the decision of **K.K. Velusamy vs. N. Palanisamy** reported in **(2011) 11 SCC 275**, held as follows:-

“**13.** The Code earlier had a specific provision in Order 18 Rule 17-A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. That provision was deleted with effect from 1-7-2002. The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence.

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.

15. The learned counsel for the respondent contended that once arguments are commenced, there could be no reopening of evidence or recalling of any witness. This contention is raised by extending the convention that once arguments are concluded and the case is reserved for judgment, the court will not entertain any interlocutory application for any kind of relief. The need for the court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extraordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognised with reference to exercise of power under Section 151 of the Code. Be that as it may. In this case, the applications were made before the conclusion of the arguments.

16. Neither the trial court nor the High Court considered the question whether it was a fit case for exercise of discretion under Section 151 or

Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings.”

13. Under such circumstances, the revisional application is allowed and disposed of with a direction that the cross-examination of P.W.2 will be completed within an hour on the date fixed by the learned court and the entire evidence in the suit shall be completed within three months from date, peremptorily. It appears that the suit has been dragging since 2017. It is at the stage of evidence. The suit shall be disposed of peremptorily within a period of six months from completion of the evidence.

14. All the parties are directed to act on the basis of the server copy of the order.

15. Urgent Photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)