

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. 1004 of 2024

Ajit Kumar Das
Vs.
Dilip Kumar Ghosh & Another

For the petitioner : Ms. Shamolima Sarkar,
Ms. Chanchala Chatterjee

For the opposite parties : Mr. Prabal Mukherjee,
Mr. Aniruddha Chatterjee,
Mr. Sanjay Mukherjee,
Mr. Balarko Sen,
Mr. Suvradal Choudhury

Hearing concluded on: 24.04.2024

Judgment on: 17.05.2024

Shampa Sarkar, J.:-

1. The order dated March 1, 2024, passed by the learned Civil Judge (Senior Division) 4th Court at Alipore, District 24 Parganas (south) in Title Suit No.2487 of 2016, is under challenge in this revisional application.

2. By the order impugned, the learned court rejected an application under Section 151 of the Code of Civil Procedure. After closure of evidence, the petitioner wanted to recall himself, in order to adduce further evidence and prove some documents. It was contended that the petitioner could lay his hand on those documents at a later stage. The learned court was of the view that the application could not be allowed. The recall was not permissible for the purpose of admitting documents in evidence, when the

basis or the foundation of those documents were not available from the written statement. According to the learned court, what was not pleaded, could not be suddenly adduced in evidence. No party could be put at a disadvantage. It would not be proper for the Court to allow evidence beyond pleadings. In the absence of pleadings and also in the absence of any explanation as to why the said documents had neither been produced earlier nor mentioned in the written statement, the prayer for recall was rejected.

3. Ms. Shamolima Sarkar, learned Advocate for the petitioner submitted that the provisions of Section 151 of the Code of Civil Procedure could always be invoked for recall of a witness, even if, Order 18 Rule 17 of the Code of Civil Procedure had been deleted. Earlier, the Code had a specific provision under Order 18 Rule 17, for recall of witness at any stage. However, the deletion of the said provision would not take away the inherent power of the court to permit production of such evidence, which were relevant and necessary. Ends of justice demanded that the petitioner should be permitted to recall himself.

4. It was submitted that the learned trial judge ought to have exercised his discretion and invoked the inherent power, upon being satisfied that reopening of the evidence would be necessary in this case. Vital documents, could not be produced earlier in the suit. Referring to the cross-examination, Miss Sarkar submitted that the petitioner had already stated in his cross-examination on May 16, 2023, that he had papers in connection with his proprietorship business and transfer of the tenancy and he could produce such documents on the following day. Although, the documents could not be produced on the following day, those were subsequently traced

out and an opportunity should have been given to the petitioner to recall himself as DW and tender those documents. The documents should be admitted in evidence and marked as exhibits as they were vital evidence. The suit had been filed against the petitioner for eviction and recovery of khas possession, treating the petitioner to be a trespasser. The documents would indicate that the petitioner was a tenant in respect of the property.

5. According to the learned Advocate, although the tenancy was in the name of Ganesh Store, it had been well settled by various judgments that the proprietor of a proprietorship business was the tenant. Even if, the rent receipts were issued in the name of the proprietorship business and the tenancy was in the name of the proprietorship business, the proprietor was the real tenant.

6. Learned Advocate submitted that the prayer was bona fide and the documents would assist the court to decide and render judgment on the issues involved. Already, applications under Section 7(1) and 7(2) of the West Bengal Premises Tenancy Act, 1997, had been filed by the petitioner. The learned trial Judge had framed an issue with regard to the relationship of landlord and tenant between the parties. In order to aid the court in deciding such issue properly and effectively, the documents were required to be admitted in evidence, upon recall of the petitioner. One of such documents, was the deed of partnership dated September 30, 1999, between Nepal Chandra Pal, the erstwhile tenant and Sri Ajit Kumar Das.

7. It was submitted that such deed was operative from 1999. The fact that Ajit Kumar Das, the petitioner, was one of the partners of Ganesh Store, would be relevant to prove that the petitioner was a tenant along with

Nepal since 1999. The other document was the certificate of enlistment issued by the Kolkata Municipal Corporation in favour of Ganesh Store, in the names of Nepal Chandra Pal and Ajit Kumar Das. These two documents would indicate that the partners of Ganesh Store were the tenants and after demise of Nepal, Ajit became the sole proprietor of the business and the sole tenant.

8. It was also urged that the documents, if brought on record, would only be a further explanation or a clarification to the claim of tenancy made by the petitioner and the same would not cause any disadvantage to the plaintiffs, as the stand of Ajit Das had always been that he was a tenant in respect of the premises in question and not a trespasser.

9. Miss Sarkar relied on the following decisions :

(a) *K.K. Velusamy vs. N.Palanisamy* reported in (2011) 11 SCC 275

(b) *West Bengal Infrastructure Development Finance Corporation Ltd. vs UCO Bank* reported in 2023 SCC Online Cal 3326

(c) *Tapan Kumar Mondal vs Mahathirtham, Society registered under the West Bengal Societies Registration Act, 1961* reported in 2024 SCC Online Cal 2310

10. Mr. Prabal Kumar Mukherjee, learned Senior Advocate appeared on behalf of the opposite party and submitted that recall of a witness could not be allowed in a routine manner. There were no pleadings in the written statement either with regard to the deed of partnership dated September 30, 1999, or the enlistment certificate granted in favour of the store with Nepal and Ajit as partners. These facts were beyond the scope of the pleadings. Evidence beyond pleadings could not be admitted.

11. Mr. Mukherjee further submitted that although in the cross-examination held on May 16, 2023, the petitioner had deposed that he had papers in respect of the proprietorship business and transfer of the tenancy in his name, the document was not produced when the cross-examination continued on August 21, 2023. Questions were also put to him as to whether he had brought those documents or whether he could produce those documents. The petitioner answered that he had not brought the documents which he had mentioned on the previous date in his deposition.

12. After closure of evidence on August 21, 2023 and after lapse of a couple of months, an application was filed under Section 151 of the Code of Civil Procedure for recall on February 9, 2024. The Court rightly rejected the application.

13. The issue before this Court is whether in the facts of the case and the law as enunciated by a catena of decisions with regard to recall of witness, the petitioner should be allowed to be recalled in order to prove the documents, which had not been mentioned in the written statement.

14. The plaintiffs filed a suit for recovery of khas possession, mesne profits and damages, against the petitioner. The plaintiffs contended that the suit premises was on the footpath lane and reasonably required as a garage for parking the cars of the plaintiff No.2 and his son, who were busy doctors.

15. It was further contended that the said shop could be converted into a garage with the permission from the Kolkata Municipal Corporation. As the doctors had to work late hours and were on-call as well, it was difficult for them to use rented garages, far away from their residence. They had to hire

garage space in order to park their cars, although, the shop room could be converted easily into a garage. Thus, the petitioner, who was a trespasser in respect of the premises in question, should be evicted. The trespasser did not have any right to remain in the property in question.

16. According to the plaint case, Ganesh Store was inducted as a tenant, with Nepal Chandra Pal and Sanad Kumar Pal, as proprietors. Both of them died. During their lifetime, a suit for eviction under the West Bengal Premises Tenancy Act, 1997, being Title Suit No. 78 of 2013, renumbered from Title Suit No.285 of 1989, had been filed. The suit was subsequently withdrawn, as technical defects had been detected. As both the proprietors of Ganesh Store died, the present suit was filed against the petitioner.

17. The petitioner filed his written statement. The petitioner contended that he was also substituted upon the death of the original tenant Nepal Chandra Pal in the earlier eviction suit. The petitioner had been treated as a tenant by the plaintiffs in the earlier suit. It was also averred that there were other joint tenants in respect of the property, who were heirs of the original proprietors. The suit had in any event abated because the other heirs had not been substituted. Thus, finding no other alternative and knowing fully well that the suit would fail on various grounds, including non-joinder of parties, the suit was withdrawn without any liberty to file afresh.

18. Thus, according to the petitioner, the present suit was not maintainable in law. Further, the ground of reasonable requirement was also denied and it was stated that another tenant had already vacated the premises. The space was converted into a waiting area for patients, instead of being converted into a garage. Further contention of the petitioner was

that the ground for recovery of the property for being used as a garage space, was imaginary. The plaintiffs had admitted in the plaint, that the shop room was on the footpath of Rasbehari Avenue and the same could never be converted into a garage. Any attempt to do so, would be violation of the law and if the corporation permitted such conversion, it would be in collusion with the plaintiffs and not sanctioned by law. The fact that the petitioner was running the business and he had a trade license and electricity connection from the corporation, had been mentioned. The petitioner contended that he was not a trespasser, but a tenant in respect of the suit property. The allegation of default was denied and the petitioner admitted to have deposited the rent with the rent controller.

19. From the averments in the written statement, it is evident that the partnership deed dated September 30, 1999 and the certificate of enlistment dated June 24, 2022, had not been mentioned. The written statement is silent in this regard.

20. From the affidavit-in-chief of the PW-1, it is available that Ganesh Store was inducted as a tenant and the prior suit was withdrawn for some technical defect. There is a statement in the affidavit-in-chief, that the defendant and other persons were substituted in the suit, which was a mistake. It was also stated that the suit property was situated on the footpath lane and could be converted into a garage with permission from the Kolkata Municipal Corporation, into a garage. In his cross-examination, PW1 had deposed that Ganesh store was inducted as a tenant by the grandmother. Nepal and Sanad were the proprietors. Both passed away. Ganesh Store was a proprietorship business, but the PW-1 did not know the

name of the present proprietor. That the description of the shop room was available in the cause title of the plaint. PW-1 deposed that he had seen Ajit Kumar Das in the suit property. The PW1 also deposed that due to some technical fault in adding Ajit Das in the previous suit, his learned Advocate had advised withdrawal of the suit and Title Suit No.78 of 2013 was withdrawn, without any liberty.

21. On the other hand, the petitioner submitted in his cross-examination that he had documents with regard to his proprietorship business and transfer of the tenancy. He could not produce the same during the course of his cross-examination. He had lost his opportunity. The other contention of the petitioner is that if those documents were tendered and admitted in evidence upon his recall, his claim of tenancy would be stronger and easily proved. Such submission does not impress this Court. In the written statement, the documents have not been mentioned. There are no foundational basis for such documents which were sought to be tendered in evidence. Merely by mentioning that in spite of best efforts, the said documents could not be traced out, recall of the witness after closure of evidence, cannot be allowed. There are no pleadings with regard to the contents of the documents.

22. Moreover, Section 151 of the Code of Civil Procedure can be invoked to recall a witness provided the same does not amount to abuse of the process of court. The opponent cannot be put at a disadvantage. Recall cannot be permitted to fill up a lacuna. That is exactly, what the petitioner was attempting to do.

23. In the cross-examination on May 16, 2023, the petitioner deposed that he had papers and documents in respect of his proprietorship business and the transfer of the tenancy in his name and he could produce the same on the following day. On the following day, questions were put to the petitioner as to whether he had brought those documents. The petitioner had expressed his inability to do so. Thus, the petitioner had lost the chance to produce the documents during his cross-examination. Although, he had an opportunity to bring the same on record upon praying for amendment of the written statement at the appropriate time, the same was not done. Till date, the written statement had not been amended. Thus, the learned court rightly disallowed the application on the ground that evidence beyond pleadings, could not be allowed.

24. The petitioner had claimed to be a tenant. The plaintiffs have to prove that the petitioner is a trespasser. The petitioner can take advantage of deposition of the PW1 which have been discussed earlier. The petitioner has filed the electricity bill, the rent deposit challans and also the enlistment certificate issued in the name of Ganesh Store with his name as the proprietor.

25. The arguments advanced by Miss. Sarkar, that the tenancy in the name of the store amounted to tenancy of the proprietor, may be proved on the basis of other documents which have been exhibited. The learned Court has already framed an issue with regard to the relationship of landlord and tenant between the parties. Thus, in my opinion, the petitioner will not suffer serious prejudice or injustice if those documents are not brought on record. The petitioner had lost his right to produce the same on an earlier

occasion. Now, by bringing those documents on record, the petitioner cannot fill up the lacuna in his evidence.

26. In ***K.K. Velusamy (supra)***, the Hon'ble Apex Court in paragraph 20 had explained that if the party had an opportunity to produce the evidence earlier, but did not do so, or if the object of the application for recall of witness was only to protract the proceedings, the court should reject the said application. The court could not allow the application for recall which was filed at the belated stage to cover up negligence or lacuna. Rather, such application should be rejected with heavy cost.

27. The decision of this court in ***Tapan Kumar Mondal (supra)***, is not applicable in this case. The facts were different. In the said case, the deposition was already on record. Two suits were being heard analogously. Affidavit in chief was already on record. It was just required to be tendered formally.

28. In the decision in ***West Bengal Infrastructure Development (supra)***, the learned judge allowed the recall, upon coming to a specific conclusion that the documents were not in the possession of the plaintiff, at the time when the suit was filed and even during the deposition.

29. In the decision of ***Vadiraj Naggappa Vernekar (Dead) vs Sharadchandra Prabhakar Gogate*** reported in ***(2009) 4 SCC 410***, the Hon'ble Apex Court held that the main purpose of Order 18 Rule 17 of the Code of Civil Procedure, was to enable the court trying a suit, to clarify any doubts which it may have with regard to evidence led by the parties. The said provision was not intended to be used to fill up omissions in the evidence of a witness who had already been examined. In the present case,

such observation of the Hon'ble Apex Court is relevant as the petitioner had lost his chance to produce the said documents, when his evidence was going on.

30. In ***Ram Rati vs. Mange Ram (Dead) Through Legal Representatives and Ors.***, reported in **(2016) SCC 296**, the Hon'ble Apex Court held that recall could not be a matter of right and no prejudice should be caused to any of the parties. Recall could not be a mechanism to fill up any omission or lacuna in the evidence. Evidence could not be reopened for the purpose of further cross-examination or even for production of fresh evidence. Paragraph 15 of the judgment is quoted below :-

“15. After surveying the various principles stated by this Court on Section 151 from 1961, in K.K. Velusamy [K.K. Velusamy v. N. Palanisamy, (2011) 11 SCC 275 : (2011) 3 SCC (Civ) 665] , they have been succinctly summarised as follows under para 12 : (SCC pp. 282-83)

‘(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.”

31. In the decision of ***Sk. Rejabul Haque vs. Sk. Serajuddin***, reported in ***2012 SCC Online Cal 1361***, a coordinate bench held that:-

“13. It is a cardinal principle of law that the evidence beyond the pleading can neither be permitted to be adduced nor can such evidence be taken into consideration.”

32. Powers under Article 227 of the Constitution of India must be exercised sparingly and in appropriate cases. The learned trial Judge, upon considering the pleadings in the written statement and the nature of documents, arrived at the specific finding that such documents were not mentioned in the written statement. There were no pleadings even remotely connected to the documents sought to be adduced as evidence upon recall of a witness.

33. The exercise of power under Article 227 of the Constitution of India was limited to ensuring that the subordinate courts and tribunals acted

within the limits of their jurisdiction and authority. In this case, I do not find that the learned court had actually committed any error of law or fact, while rejecting the application under Section 151 of the Code of Civil Procedure. Even if, the reasons for rejection of the application were cryptic, the reasons have been supplied by this court. The learned court had passed a correct order and this court is not required to interfere with the same under Article 227 of the Constitution of India.

34. The revisional application is dismissed.

35. There shall be no order as to costs.

36. Parties are to act on the basis of the server copy of this judgment.

(Shampa Sarkar, J.)