

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. 2012 of 2022

Sri Tapan Kumar Mondal
Vs.
The Mahathirtham, Society registered under the
West Bengal Societies Registration Act, 1961

For the petitioners : Mr. Sanjoy Mukherjee,
Mr. Arghadip Das.
For the opposite parties : Subrata Bhattacharjee.

Hearing concluded on: 13.02.2024
Judgment on: 06.03.2024

Shampa Sarkar, J.:-

- 1.** The revisional application arises out of an order dated April 21, 2022 passed by the learned Civil Judge, Senior Division 4th Court, Alipore, in Title Suit No.410 of 2011.
- 2.** By the order impugned, the learned Court rejected an application dated March 24, 2022 filed by the petitioner in connection with Title Suit No.410 of 2011 under Order 18 Rule 17 of the Code of Civil Procedure. The petitioner is the plaintiff in the said suit.
- 3.** According to the learned Court, the application under Order 18 Rule 17 of the Code of Civil Procedure could not be allowed as the defendant's witnesses had already been examined and discharged in the said suit. The Court held that the suit was at the stage of arguments. After closure of evidence of both the parties, the application filed by the plaintiff seeking to tender the affidavit-in-chief prepared in connection with another suit, being

Title Suit No.972 of 2011, was liable to be rejected. The said evidence was not relevant for adjudication of the suits. The two suits were being tried analogously and the affidavit-in-chief need not be tendered in Title Suit No.410 of 2011. It would serve no purpose. The provisions of Order 18 Rule 17 of the Code of Civil Procedure could not be pressed into action in such a situation.

4. This Court has to decide as to whether the affidavit-in-chief filed in connection with Title Suit No.972 of 2011, should be permitted to be tendered in evidence, when admittedly both the suits filed by the respective parties against each other, were being tried analogously.

5. Mr. Sanjoy Mukherjee, learned Advocate appearing on behalf of the petitioner/plaintiff in Title Suit No.410 of 2011, submitted that when the suits were being tried analogously, the learned Court could not have rejected the application under Order 18 Rule 17 of the Code of Civil Procedure as the same would be material for the adjudication.

6. Mr. Mukherjee further contended that the affidavit-in-chief filed in connection with Title Suit No.972 of 2011 was already on record, but at the time of adducing evidence, due to oversight the said affidavit-in-chief was not formally tendered in Title Suit 972 of 2011. The opposite party was the defendant No.1 in Title Suit No.410 of 2011 and the plaintiff in the Title Suit No.972 of 2011. The opposite party prayed for cancellation of the deed of conveyance dated October 10, 2002, executed by Amiya Ghosh in favour of the petitioner and for permanent injunction. Title Suit No.410 of 2011 had been filed by the petitioner for a declaration that he was the absolute owner in respect of the suit property and for permanent injunction. Both the suits

were between the same parties in respect of the self-same property. The suits were being tried analogously. The examination-in-chief of the defendant No.2 in Title Suit No.972 of 2011 was essential for proper adjudication of the dispute between the parties. The defendant No.2 in Title Suit No.972 of 2011 had the right to prove his defence in the said suit even if the suits were being tried analogously and even if evidence in both the suits was closed. Analogous hearing of the two suits would not debar the parties from adducing evidence separately in the suits which were tried together. Certain relevant facts in Title Suit No.972 of 2011 were required to be proved by leading evidence. It was not as if the petitioner/defendant No.2 suddenly realised that he had not filed the affidavit-in-chief in Title Suit No.972 of 2011 and wanted to recall himself to tender such affidavit. The affidavit-in-chief had been filed long ago and was a part of the record, but formal tendering was missed out due to *bona fide* mistake of the learned Advocate.

7. Thus, for the ends of justice, the affidavit-in-chief filed in connection with Title Suit No.972 of 2011, which was already on record, must be allowed to be tendered.

8. Mr. Subrata Bhattacharjee, Learned Advocate for the opposite party submits that Order 18 rule 17 of the Code, should not be used as a matter of course. The Court had absolute discretion to reject the application for recall of witness. Moreover, only under very exceptional circumstances, could a witness be recalled either to clarify a doubt or to explain an ambiguity, but not to tender fresh evidence. The evidence in Title Suit No.410 of 2011, was closed. The evidence could not be reopened by allowing

the petitioner, who was the plaintiff in Title Suit No.410 of 2011 and defendant No.2 in Title Suit No.972 of 2011, to tender the evidence-in-chief afresh, and at the stage of arguments. If such application for recall was allowed, it would amount to abuse of the process of court.

9. Learned Advocate further submitted that evidence in one suit would be treated as evidence in the other suit and there was no further need to tender the said affidavit-in-chief. Power of recall could not be exercised for further examination-in-chief or cross-examination of a witness or for adducing additional evidence. Upon deletion of the provisions of Order 18 Rule 17A of the Code of Civil Procedure, the Court ceased to have the jurisdiction to recall. In the absence of any express provision in law allowing reopening of evidence or recalling for further examination or cross-examination, the learned Court rightly did not allow the application of the petitioner. The said application was rightly rejected.

10. Title Suit No.972 of 2011 was filed by the opposite party against the petitioner. The petitioner was the defendant No.2 in Title suit No.972 of 2011. The petitioner who was the plaintiff in Title Suit No.410 of 2011, filed an application for analogous hearing of the two suits. Such prayer was allowed by an order dated November 10, 2016. The petitioner filed his affidavit-in-chief in Title Suit No.410 of 2011. The petitioner was examined and cross-examined in connection with Title Suit No. 410 of 2011 on several dates and was discharged. The evidence in respect of Title Suit No.972 of 2011 was also complete. The DW-1 was examined and discharged. Affidavit-in-chief was filed by the petitioner in Title Suit No.972 of 2011 on April 20, 2018. On detecting that the same had not been tendered, the affidavit in

chief was sought to be filed upon recall. According to the opposite party, further tender of the affidavit-in-chief filed in connection with Title Suit No.410 of 2011, was not required.

11. In the said affidavit-in-chief, the petitioner raised objection with regard to the maintainability of the suit. According to the petitioner, Title Suit No. 972 of 2011 was barred under Section 34 of the Specific Relief Act. The suit was misconceived, harassive and frivolous and filed for wrongful gain. The statement that Dipak Kumar Mukherjee was a land grabber and the property was conveyed on the strength of the power of attorney executed by Dipak Kumar Mukherjee had been stated. Statements that the power of attorney holder executed the deed of conveyance in favour of the petitioner was elaborated. Statements with regard to a prior suit and how Dipak Kumar Mukherjee, had created several plot out of his purchased land to sell the same to different purchasers, was highlighted. Moreover, all allegations made in the plaint of the Title Suit No.972 of 2011 were denied. The statements with regard to the registration of the Deed of Lease dated March 17, 2005, duly executed by and between the opposite party and the petitioner in respect of Shop No.1 measuring about 1815 sq. ft. on the ground floor of premises no. 35 Park Street, statements that the Deed of Lease was for a period of 75 years, statements that around May 2005, the said Deed of Lease was presented for registration upon payment of stamp duty and registration fees but the registering authority kept the said Deed of Lease pending for want of assessment etc. were mentioned. The fact that the petitioner, on a number of occasions, approached the registering authority for completing the assessment of stamp duty and ultimately on or about 6th

January, 2018 the registration process was completed had been narrated. Steps taken before the police authorities with regard to the unlawful action of the opposite party to dispossess the petitioner was also mentioned. In the said affidavit-in-chief, the defence case of the defendant No.2 in Title Suit No.972 of 2011 was sought to be proved and the plaint case was sought to be demolished.

12. Thus, the petitioner wanted to tender the affidavit-in-chief in evidence as DW-2 which was already a part of the record. It was discovered later, that the same had not been formally tendered.

13. Although, the learned Advocate for the opposite party submits that the provisions of Order 18 rule 17 could not be used for further examination-in-chief or cross-examination of a witness who had been discharged, this Court is required to analyse whether the learned Court should have allowed the application in the facts and circumstances of the particular case, in order to prevent miscarriage of justice.

14. Irrespective of the nomenclature of an application, this Court finds that the petitioner prayed for exercise of inherent power of the court to recall himself so that the affidavit-in-chief which was filed sometime in April 2018 and was part of the records of the Title Suit 972 of 2011, could be tendered formally in evidence. It is not a case where the petitioner wanted to recall himself to file further evidence or for further cross-examination. Both the suits were being tried analogously. The learned Court was of the view that the affidavit-in-chief in Title Suit No.972 of 2011 could not be tendered in Title Suit No.410 of 2011, because those were separate suits.

15. Such finding, in my opinion, is erroneous as the evidence tendered in both the suits would be considered together at the stage of final hearing. Admittedly, the learned Court had allowed analogous hearing of the suits. It was only a formality, required to be completed as the evidence on record had not been tendered by the DW-2 in Title Suit No.972 of 2011. The affidavit-in-chief would be relevant for the disposal of the two suits. Both the parties have rival claims to the property in question. The defence of the petitioner in Title Suit No.972 of 2011, as stated in his written statement, is required to be proved in evidence. It was only a bona fide mistake, which was realized after completion of evidence, that the said affidavit-in-chief had not been formally tendered. The statements in the affidavit-in-chief are relevant for adjudication of the suits which were being tried analogously. It is not a situation that a third case was being made out in the affidavit-in-chief which was sought to be introduced in Title Suit No.410 of 2011 after closure of evidence. Both the suits are between the same parties and in respect of the same property and some of the reliefs are similar. Such affidavit-in-chief must be tendered in evidence for the ends of justice.

16. Moreover, even if Order 18 Rule 17A of the Code of Civil Procedure has been deleted and Order 18 Rule 17 of the Code is only permissible for recalling of witnesses either for the purpose of explanation or clarification, the inherent power of the Court under Section 151 of the Code of Civil Procedure can be exercised to recall a witness under exceptional circumstances. 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.”

17. In the decision of **S.C. Jain vs. Bindeshwari Devi**, reported in **1997 (42) DRJ**, the Delhi High Court held that if the parties and the issues in the two suits were common, though different reliefs may have been claimed, the analogous hearing of suits would result in the suits being treated as one capable of being disposed of by one judgment and decree. Thus, the learned Court had erred in holding that affidavit-in-chief filed in connection with Title Suit No.972 of 2011 could not be tendered in Title Suit No.410 of 2011, although the suits were fixed for arguments. Direction for analogous hearing gave rise to an admitted position that there was sufficient unity and similarity in the matters, and the suits would be heard together and disposed of by one single judgment and decree. The suits would remain two

in its number, but the evidence recorded in one case would be relevant in the other case too. Thus, if the two suits are disposed of by one judgment, in that event the evidence of DW-2 in Title Suit No.972 of 2011, becomes relevant, material and necessary for disposal of the suits.

18. Under such circumstances, out of necessity and for the ends of justice, the affidavit-in-chief is allowed to be tendered. A direction for analogous hearing of the suits requires the court to take up the two suits for hearing on the same date and together.

19. The petitioner is allowed to tender the said evidence-in-chief in the proceedings. The suits shall be heard together after such evidence on recall is completed.

20. The opposite party will have a right to cross-examine the petitioner.

21. The order impugned is set aside.

22. The revisional application is allowed.

23. However, there shall be no order as to costs.

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

(Shampa Sarkar, J.)