

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. 3553 of 2023

Sri Arindam Bose
Vs.
Sri Sarvadeva Paul Majumdar & Ors.

For the petitioner : Mr. Ayan Poddar
Mr. Soham Dutta

For the opposite party No.1 : Mr. Probal Kr. Mukherjee, Sr. Advocate
/plaintiff Ms. Shebatee Datta

Hearing concluded on: 14.03.2024
Judgment on: 19.04.2024

Shampa Sarkar, J.:-

1. The revisional application arises out of an order dated July 1, 2023 passed by the learned Additional District Judge, 14th Court at Alipore in original suit No.6 of 2008. An application under Section 151 of the Code of Civil Procedure, filed by the opposite party No.1, praying for his recall and re-examination was allowed. The opposite party No.1 is the propounder of his father's Will and plaintiff in the suit. He was examined as PW2 in the suit. His evidence stretched over from August 2010 to October 2011. His evidence was closed and he was discharged.

2. The petitioner is a contesting defendant in O.S. No. 11 of 1995, now renumbered as O.S. No.6 of 2008. The suit is for grant of probate of the last Will and Testament of late Sailesh Paul Majumdar, executed

on October 7, 1991. The proceeding became contentious. The petitioner is the heir and legal representative of the original defendant No.2 late Sima Bose, having been duly substituted after her demise. The petitioner's father late Sukalyan Bose, also expired.

3. The learned court allowed the application filed by the opposite party No.1 on the ground that a similar application was allowed by an order dated April 13, 2018 which permitted re-examination of Biswanath Santra, PW 3 (since deceased). The opposite party No.1 wanted to prove a document by tendering the same to PW3, which was a handwritten instruction given to PW3 by the testator with regard to the manner in which the testator wanted to settle the property. As Biswanath Santra, PW 3 passed away, the learned court was of the view that the opposite party No.1 should be recalled to prove the document in place of the learned Advocate who had been handed over the document by the testator. The court held that no prejudice would be caused to the defendants in the suit. Thus, there was no impediment on the part of the learned court to allow such an application.

4. Learned advocate for the petitioner has challenged the said order on various grounds. According to Mr. Poddar, Order 18 Rule 17 of the Code of Civil Procedure permitted recalling of a witness to clarify, elucidate or elaborate the evidence already on record. Re-examination of a witness should be either clarificatory or explanatory and the said provision should not be used casually, to fill up any lacunae in the evidence already on record.

5. The learned court failed to consider such provision of law. The learned Court, mechanically allowed the application. The opposite party No.1 had ample opportunity to prove the document when the evidence was going. The document was not disclosed at the first instance. One of the attesting witnesses, while proving the Will and the learned Advocate who had drafted the Will, mentioned the same in their evidence. The document was produced by way of a firsti later on after their evidence had commenced. Even assuming that Section 151 of the Code of Civil Procedure permitted the court to exercise inherent power to recall a witness, such power should be exercised sparingly and only under exceptional circumstances, for the ends of justice.

6. After eight years from the commencement of the evidence, the document was sought to be tendered. The learned advocate further contended that the deletion of Order 18 Rule 17A of the Code of Civil Procedure indicated that the legislative intent was to do away with the provision of recalling a witness at any stage of the suit in order to prevent abuse of the process of court by introduction of fresh evidence or by deposing further after the evidence was closed. Section 151 of the Code could not be used to introduce further evidence which was already available to the parties. The legislative intent should be strictly construed. The only exception to introduction of new documents in evidence was when a party could not produce the document despite due diligence. This was not a case of such nature. Rather, the opposite party No.1 had admitted that he had no knowledge either of the Will or of the said document. The same were handed over to him by his

pishi/aunt after his father's demise. Thus, even if late Bishwanth Santra, the learned Advocate, who had prepared the Will had mentioned the written instruction in his deposition, the opposite party No.1 could not be recalled to prove the same. Moreover, the relevance of the document was not considered by the learned court. In the probate suit, one of attesting witnesses deposed that the written instruction which was handed over to the learned advocate was not accepted by him. The learned Advocate informed the testator that the same was not in proper form. She further deposed that the learned advocate assured the testator that he would draft the Will in the proper form. Mr. Poddar urged this court to set aside the order impugned. Mr. Poddar relied on the following decisions:-

- (a) ***Bagai Construction (Through its proprietor Lalit Bagai) vs Gupta Building Material Store*** reported in **(2013) 14 SCC 1**,
- (b) ***Vadiraj Naggappa Vernekar (Dead) Through LRS, vs Sharadchandra Prabhakar Gogate*** reported in **(2009) 4 SCC 410**,
- (c) ***Ram Rati vs Mange Ram (Dead) Through LRS and Ors.*** reported in **(2016) 11 SCC 296**, and
- (d) ***Md. Manik Molla vs. Kohinoor Begum and Ors.*** reported in **2018 SCC Online Cal 7139**.

7. Mr. Probal Kumar Mukherjee, learned senior Advocate, appeared on behalf of opposite party/plaintiff and submitted that a probate case does not proceed like a normal suit. The court must clear its conscious that the Will was genuine. A will is proved in terms of Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act.

The statutory format in which a probate application has to be filed was also different. Thus, there was no scope to refer to the document in the petition for grant of probate. In this case, there were three attesting witnesses and the only surviving attesting witness had proved the Will. The propounder also deposed that the Will was handed over to him by his aunt. The learned advocate who prepared the Will had deposed in support of its execution and had narrated the entire process. Thus, the Will was already proved as per law. The contention of the petitioner that the written instruction/note was sought to be tendered in order to fill up the lacunae in the evidence, was thus, incorrect. The attesting witness mentioned in her examination-in-chief about the existence of the document. The execution of the Will, the manner in which the Will was prepared in presence of the witnesses in the learned advocate's chamber, the manner in which the Will was read out aloud to the testator, the manner in which the testator signed the document in presence of the witnesses and how the witnesses, one by one, signed the same in the presence of the testator and in each other's presence, were all part of such deposition.

8. The earlier order of the Court by which the recall of PW3 was allowed for the purpose of proving the hand written note, was placed. As there was no challenge to such order, Mr. Mukherjee submitted that instead of PW3, the PW2 would now prove the document. The defendants had waived their right to challenge the order impugned, when a similar order had not been assailed by them before any higher forum. The only difference was that the PW2 would now depose and

tender the document. The document was already on record and had been mentioned by all PWs in their deposition. The order was passed by the court to clear its conscience that the Will was genuinely executed on the basis of the instructions of the testator. Questions on such written instruction were also put in the cross-examination. The facts and justice demanded that the prayer for recall be allowed.

9. The recall of the PW2 could not prejudice the defendants. The trend of cross-examination of the PW2 would not reflect that the defendants had managed to put the propounder of the Will in any difficulty with regard to the genuineness of the Will by asking such questions which the opposite party No.1 (PW2) could not answer or hesitated to answer. Thus, the allegation of abuse of the process of court and filling up the lacunae were unfounded.

10. Mr Mukherjee relied on the following decisions in support of his contention that in special cases and for the cause of justice, a witness could be recalled by a court, upon invoking inherent power under Section 151 of the Code of Civil Procedure.

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

(b) *Godrej Consumer Products Ltd. Vs P.C. Chandra Gems Pvt. Ltd. & Anr.* reported in 2017 SCC Online Cal 745.

11. Considered the rival contentions of the parties. This Court has to examine whether the situation under which the learned trial judge had allowed the recall of PW2 was either extraordinary or exceptional. Whether there were unique circumstances which required such recall,

not only to meet the ends of justice, but also to prevent miscarriage of justice. Whether the document was necessary to be tendered as evidence.

12. The powers under Section 151 or Order 18 Rule 17 of the Code cannot be invoked in a routine manner, on a party's mere asking. The very purpose behind the amendment to the Code of Civil Procedure would be defeated in such a case. Omission of Order 18 rule 17A of the Code by an amendment, was intended not only to expedite trials, but also to prevent procrastination of suits by misuse of the provisions of law. Whether the application was filed bona fide and whether the additional evidence would assist the Court to clarify the position or to adjudicate the dispute effectively, are relevant considerations. The purpose for recall of a witness to prove the document long after his evidence was closed, would also be a significant factor for consideration by the court. The document sought to be tendered should be of such importance that without such evidence on record, a party would be subjected to grave injustice.

13. Under what circumstances and for what reasons could the court exercise inherent power to recall the witness and permit fresh evidence, is the moot point. The court was to ensure that the application was filed to bring on record such clinching evidence, without which the opposite party No.1 would be put at a serious disadvantage. Ideally, recording of evidence should be continuous, followed by arguments, without any gap. The Court should constantly endeavour to follow such a time schedule. The amended code expects

the Court to do so. If that is done, applications for recalling, re-opening of evidence etc., should be avoided. More the period of pendency, more would be the number of interlocutory applications, which would in turn add to far longer pendency of a particular litigation. Whether it was at all necessary to recall the PW2/opposite party No.1 to adduce evidence in order to prove the handwritten note after many years from closure of evidence of PW2 ought to have been considered by the learned trial judge in the light of the settled principles of law. The learned judge ought to have recorded his satisfaction that the application was filed to subserve the ends of justice, or to assist the court in rendering justice. It was not a case where a party wanted to tender a newly found or newly discovered document, which was extremely relevant for adjudication of the suit.

14. By the order impugned, the learned court allowed the application on the ground that a similar application to prove the same document had been allowed in 2018 by recalling late Biswanath Santra (PW3). The other ground for allowing such application was that tendering of the same would not prejudice the parties and there was no impediment to permit such recall. Both the grounds on which the order was passed, do not appear to be justiciable.

15. The Will has to be proved in terms of Sections 63 of the Indian Succession Act and section 68 of the Indian Evidence Act. In the case in hand, the pishi/aunt (PW1), Smt. Smriti Ghosh, the sole surviving attesting witness already deposed and the Will was marked as an exhibit in accordance with law. From her deposition, it is available that

the Will was drafted by the learned advocate PW3 on the instructions of the testator, in front of the witnesses, in the learned advocate's chamber. The testator had also handed over a handwritten note and the learned advocate informed the testator, that he would prepare the Will as per the required format. The PW1 also deposed that the Will was signed by the testator in the presence of the witnesses and the witnesses signed the same in presence of the testator and in each other's presence. Thus, the foundation of the Will was laid in accordance with law. The handwritten note was mentioned by the witnesses. The opposite party No.1 categorically mentioned in the deposition that he was neither aware of the Will nor of the handwritten instruction. Both were handed over to him by his aunt after his father's demise. The said document was in his possession since then, and the deposition of the parties continued for a long time. The instruction was with the records, which was not tendered by any of the parties. The same had been filed by way of a firsti sometime in December 2010. Sometime in 2018, the opposite party No.1 filed an application for recalling PW3 to prove the hand written document. The learned trial judge allowed such prayer. However, before the evidence could be tendered, the PW3, late Biswanath Santra, expired. He is no longer available to identify the said note

16. After a long gap of four years from the order passed earlier, another application was filed by the opposite party No.1, under Section 151 of Code of Civil Procedure for his recall so that he could prove the handwritten instruction of the testator, which was handed over to the

PW3. The surviving attesting witness has proved the Will, which has been marked as an exhibit. The genuineness of the Will shall be decided in the trial upon consideration of the evidence on record. The corroborative value of the depositions and the evidence will be decided by the learned judge at the trial. The opposite party No.1 is not the author of the alleged document. He did not have direct knowledge of the document as admitted in his deposition. Thus, this court does not find the document relevant for adjudication of the suit. There is no justification in allowing the said witness to recall himself to prove the document. The document is not relevant for consideration of the dispute with regard to genuineness of the Will. The same will not aid the court in deciding the matter. Once the Will had been exhibited, relevance of the said instruction loses its significance. It is neither a relevant fact nor a fact in issue. Moreover, the power of recall under Section 151 has to be exercised under very exceptional circumstances. In this case, the party seeking recall did not satisfy such requirement. After more than 11 years from closure of evidence, recall of PW2 to prove the said document is not in accordance with law. Secondly, the learned court has not recorded any reasons as to why the court deemed it fit to recall the said witness after closure of evidence. On July 16, 2011, the evidence of PW2 was recorded in the following manner:-

“On 21 May 1993 my father expired. No funeral rites was observed from our end in the premises 17, N.K.Ghosal Road despite our effort. There had and have been tenants all through in the said premises Not a fact that Ld. Advocate Sankar Mohan Bose was our family lawyer. Biswanath Sarkar, C.E.S.C lawyer resides at

Sakherbazar, Behala. I have no knowledge whether had Biswanath Santra, Ld. Advocate had conducted any litigation-matter against the tenants for the aforesaid premises no. 17 and 18. Till date I have not decided whether Mr. Santra will be produced here to give evidence on our behalf. Initially I had no knowledge about the purported WILL but latter (sic later) on I came to know about the same from the sister of my father. There is no written document to show. I have no document to show whether she (Smriti Ghosh) had been any possession of the said WILL. I have no paper to show in respect of the fact that she handed over the same to me. I had no knowledge whether my father decided to allot certain portion of property in favour of my sister Sima Bose. Not a fact that after death of my father I managed to have this WILL, manufactured with the help of a designed person selected by me intending to deprive of the lawful claim of my sister. Not a fact that I am not entitled to get probate in respect of this purported WILL.”

17. The order allowing recall of PW3 was passed in April 13th 2018. After a gap of four years, the application under Section 151 of the Code of Civil Procedure was filed by the opposite party No.1 to recall himself as a witness to prove the written instruction drafted by his late father. The justification given by the learned trial Judge was that no prejudice would be caused to the parties if the opposite party No.1 was allowed to recall himself as a witness to tender evidence and mark the written instruction of his father as an exhibit. This could not be a just and proper ground for allowing the application at such a belated stage. This is neither an exceptional case nor a rarest of rare case where, the learned Court was required to allow the witness to be recalled to prove the document. The power under Section 151 has to be exercised in a manner that non exercise of such power would either lead to abuse of process of court or the party who is being denied of such order would face genuine injustice in the hands of the court. Moreover, the court is also required to ascertain whether the marking of the said document

as an exhibit will assist the court in rendering complete justice. In the matter of ***Bagai Construction vs. Gupta Building Material Store***, reported in **(2013) 14 SCC 1**, the Hon'ble Apex Court held as follows:-

“14. The perusal of the materials placed by the plaintiff which are intended to be marked as bills have already been mentioned by the plaintiff in its statement of account but the original bills have not been placed on record by the plaintiff till the date of filing of such application. It is further seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons known to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of the judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. As rightly observed by the trial court, there is no acceptable reason or cause which has been shown by the plaintiff as to why these documents were not placed on record by the plaintiff during the entire trial. Unfortunately, the High Court taking note of the words “at any stage” occurring in Order 18 Rule 17 casually set aside the order of the trial court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW 1 to prove those bills. Though power under Section 151 can be exercised if ends of justice so warrant and to prevent abuse of process of court and court can exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties, in the light of the information as shown in the order of the trial court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 CPC, the plaintiff cannot be permitted.

15. After change of various provisions by way of amendment in CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial court in order to overcome the lacunae in the pleadings and evidence. It is not the case of the plaintiff that it was

not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still the plaintiff has not placed those bills on record. It further shows that final arguments were heard on a number of times and the judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.”

18. Under such circumstances, the order impugned suffers from material irregularity. The same is unreasoned and passed without considering whether the relevant factors for recall of PW2 existed, as discussed herein above.

19. The order impugned is set aside.

20. The Learned Court is directed to continue with the arguments of the parties and dispose of the suit in accordance with law, expeditiously.

21. The revisional application is accordingly disposed of.

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

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

(Shampa Sarkar, J.)