

**IN THE HIGH COURT AT CALCUTTA  
CONSTITUTIONAL WRIT JURISDICTION  
ORIGINAL SIDE**

**BEFORE:  
HON'BLE JUSTICE RAJA BASU CHOWDHURY**

**IA NO.GA/2/2022  
RVWO/14/2019  
IA NO.1/2019**

**IN THE GOODS OF:  
SITA DEVI BAZAZ (DECEASED)**

**AND**

**ATUL BAZAZ**

**VERSUS**

**RANI GOENKA**

|                              |   |                                                                                  |
|------------------------------|---|----------------------------------------------------------------------------------|
| For the caveatrix/defendant  | : | Mr. Sarosij Dasgupta, Adv.<br>Ms. Afreen Begum, Adv.                             |
| For the respondent/plaintiff | : | Mr. Rupak Ghosh, Adv.<br>Mr. Ayan Dutta, Adv.<br>Mr. Pradip Sumar Sarawagi, Adv. |
| Heard on                     | : | 30.08.2024 & 03.09.2024.                                                         |
| <b>Judgment on</b>           | : | <b>3<sup>rd</sup> September, 2024.</b>                                           |

**RAJA BASU CHOWDHURY, J:**

1. The instant review petition has been filed, *inter alia*, praying for review of the order dated 6<sup>th</sup> February, 2018 passed by a Coordinate Bench of this Court. The review was accompanied by an application under Section 5 of the Limitation Act, 1963. The review was dismissed for default on 11<sup>th</sup> April, 2022, the application under Section 5 of the Limitation Act, 1963, accordingly, also stood dismissed. Since then, an application being IA No.

GA 2/2022 has been filed for recall of the order dated 11<sup>th</sup> April, 2022. This Court has taken up hearing of not only the application for recall of the order dated 11<sup>th</sup> April, 2022, but application under Section 5 of the Limitation Act, 1963 and the review has also been heard on merits.

2. To consider the aforesaid matter, it is necessary to briefly indicate the facts.
3. The present proceeding arose out of and in connection with an application for grant of probate of the last will and testament dated 8<sup>th</sup> December, 2005 executed by Sita Devi Bazaz, a Hindu inhabitant governed by Mitakhsara School of Hindu Law (hereinafter referred to as the “deceased”). At the time of death of the deceased, she had left behind and was survived by Raj Kumar Bazaz (son) and Rani Goenka (daughter). The review applicant is the daughter of the deceased, while the propounder is the grandson (son’s son) of the deceased.
4. Records reveal that the review applicant had not only filed a caveat but had also filed an affidavit in support thereof. By the order dated 2<sup>nd</sup> December, 2014, the probate proceeding was converted to a contentious cause and is being tried as a suit. The propounder/plaintiff had examined himself as the first witness. On 15<sup>th</sup> November, 2017, since, the review applicant/defendant was not represented, a Coordinate Bench of this Court after recording the deposition of the first witness namely Atul Bazaz stands concluded, had permitted the plaintiff to examine the second witness namely Archana Bazaz. On the said date itself, in absence of the defendant, the examination of the second witness namely Archana Bazaz was closed and the Coordinate Bench of this Court recorded that no one is

present to cross-examine the witness namely Archana Bazaz on behalf of the caveatrix/defendant and the evidence is closed and the matter was directed to appear for argument on 5<sup>th</sup> December, 2017.

5. Before the arguments could commence, the defendant had filed an application for recall of the order dated 15<sup>th</sup> November, 2017. The prayers made in the Notice of Motion taken out on behalf of the defendant on 12<sup>th</sup> January, 2018 are extracted hereinbelow: -

- a. Recalling the order dated 15.11.2017 passed by His Lordship The Hon'ble Justice Sahidullah Munshi of the Hon'ble High Court;*
- b. Allow the petitioner to cross-examine the plaintiff's witnesses;*
- c. Ad interim order in terms of prayer (a) above;*
- d. Such further and/or other order or orders be passed, direction or directions be given as Your Lordships may deem fit and proper.*

6. Records reveal that on 6<sup>th</sup> February, 2018, although, the plaintiff was not represented, the Coordinate Bench of this Court by accepting the explanation given by the defendant and by observing that the defendant was sufficiently compelled not to appear before the Court on 15<sup>th</sup> November, 2017, was pleased to recall the order dated 15<sup>th</sup> November, 2017 with a further direction on Archana Bazaz to appear on 9<sup>th</sup> March, 2018 at 11.30 a.m.
7. Archana Bazaz was thereafter cross-examined by the defendant's advocate. After closure of her cross-examination, the defendant having found that the first witness's cross-examination was not complete had filed an application being GA No.62 of 2019, *inter alia*, praying for modification of the order

dated 15<sup>th</sup> November, 2017. Such application was filed on 7<sup>th</sup> January, 2019. Subsequently on 26<sup>th</sup> February, 2019, the defendant obtained leave to withdraw the same with liberty to file an appropriate application on the self-same cause of action. According to the defendant, the aforesaid withdrawal was necessitated since, the defendant was in effect seeking review of the order dated 15<sup>th</sup> November, 2017, which was not permissible in an application for modification being GA No.62 of 2019.

8. Pursuant to the aforesaid liberty, the review had been filed accompanied by an application under Section 5 of the Limitation Act, 1963, being I.A No.G.A/1/2022. Incidentally though, an affidavit in opposition was filed, however, on 11<sup>th</sup> April, 2022 since the defendant was not represented in Court, the Coordinate Bench of this Court was, *inter alia*, pleased to dismiss the cause for default.
9. The defendant had thereafter, applied for recall of the above order by filing the recalling application being IA No G.A/2/2022. Since then, not only the review but the restoration application being IA NO.GA/2/2022 has come up for consideration. This Court has heard the matter extensively and having found the explanation given by the defendant as regards her non-appearance on 11<sup>th</sup> April, 2022 to be sufficient directs that the order dated 11<sup>th</sup> April, 2022 be recalled and consequentially directs the review along with the application under Section 5 of the Limitation Act, 1963 to be restored to their respective original file and number.
10. Mr. Dasgupta, learned advocate appearing on behalf of the defendant would submit that the order dated 15<sup>th</sup> November, 2017 was recalled by an order dated 6<sup>th</sup> February, 2018. According to him, once, the order dated

15<sup>th</sup> November, 2017 was recalled, it consequentially followed that the direction to close the deposition of the plaintiff's first witness was also recalled along with the order directing closure of evidence of the plaintiff's second witness. He submits that the Court by oversight had not included the name of the plaintiff's first witness in the order dated 6<sup>th</sup> February, 2018 and this is a mistake apparent on the face of the record. It is still further submitted that the defendant's advocate had duly cross-examined the plaintiff's second witness pursuant to the direction passed by the Coordinate Bench on 6<sup>th</sup> February, 2018 and on closure of the cross-examination of the plaintiff's second witness had taken out an application seeking modification of the earlier order dated 6<sup>th</sup> February, 2018. According to Mr. Dasgupta, since, the relief sought for by the defendant was not permissible by way of a modification application, such application was withdrawn with liberty to apply afresh on the self-same ground, and in terms of the liberty granted by the Coordinate Bench of this Court on 26<sup>th</sup> February, 2019, a review had been filed. According to him, since, the defendant had been *bona fide* proceeding with the modification application, there had been delay in filing the review. He prays that the delay in filing the review be condoned. In support of his contention that it was also open to the Court to permit recall of a witness, he has relied on the judgment delivered by the Hon'ble Supreme Court in the case of ***K.K. Velusamy v. N. Palanisamy.***, reported in **(2011) 11 SCC 275**.

11. It is submitted, in the facts noted hereinabove, this Court may be pleased to review its earlier order dated 6<sup>th</sup> February, 2018 and permit the defendant to cross-examine the plaintiff's first witness whose cross-

examination was incidentally also closed along with the plaintiff's second witness on 15<sup>th</sup> November, 2017.

12. *Per contra*, Mr. Ghosh, learned advocate representing the propounder/plaintiff would submit, that the defendant is only interested to delay the proceeding. By placing before this Court a compilation of relevant documents along with the list of dates, which is taken on record, he submits that although, the examination of Atul Bazaz had commenced on 18<sup>th</sup> August, 2017 and continued on 21<sup>st</sup> September, 2017, ultimately, the same was closed on 15<sup>th</sup> November, 2017, since, on repeated occasions the defendant's advocate chose not to appear. As such, on 15<sup>th</sup> November, 2017, when the defendant's advocate did not appear, the Coordinate Bench of this Court not only closed the deposition of Atul Bazaz but also permitted the examination in chief of Archana Bazaz to be proceeded with. After conclusion of examination in chief of Archana Bazaz, since none was present for cross-examining her, the witness action on behalf of the plaintiff was closed. He submits that although, the Coordinate Bench of this Court by an order dated 6<sup>th</sup> February, 2018 had recalled the order dated 15<sup>th</sup> November, 2017, the Court had specifically permitted the defendant to cross-examine the plaintiff's second witness and not the first witness. According to him, the defendant accepted the said order, had proceeded with the cross-examination of the plaintiff's second witness and, only upon conclusion of such cross-examination, the defendant filed the application for modification. By placing before this Court, the application for recall of the order dated 15<sup>th</sup> November, 2017 filed by the defendant being GA/149/2018, he submits that despite the fact that the defendant

had sought for recall of both the witnesses, the Coordinate Bench of this Court expressly permitted recall of only one witness, namely Archana Bazaz. He submits that in the facts noted hereinabove, the review should fail and the parties be permitted to proceed further, as the next date is fixed for arguments.

13. Having heard the learned advocates appearing for the respective parties, and considering the materials on record, as also the explanation given by the defendant for the delay in filing the review, I find the delay to be sufficiently explained, accordingly, the delay in filing the review is condoned. IA No GA 1/2022 (GA 1207 of 2019) is accordingly allowed and the review is considered on merit.

14. Although, elaborate arguments have been advanced in this matter, I find that the only point that requires consideration is, the closure of witness action of the plaintiff on 15<sup>th</sup> November, 2017 and the order recalling the direction dated 15<sup>th</sup> November, 2017. To morefully appreciate the above, the order dated 15<sup>th</sup> November, 2017 is extracted hereinbelow:

*“No one is present to cross-examine the witness namely, Archana Bazaz on behalf of the caveatrix. Evidence is closed.  
Let this matter appear for argument on 5<sup>th</sup> December, 2017.”*

15. From the aforesaid order, it would be apparent that on 15<sup>th</sup> November 2017, the evidence of the plaintiff's second witness Archana Bazaz was closed. I find that the evidence of the plaintiff's second witness was closed as none was present on behalf of the defendant to cross-examine the witness namely, Archana Bazaz. Although, on the aforesaid date the evidence of Atul Bazaz was also closed, such fact is, however, not recorded in the order. Be that as it may, the fact remains that on the said date the

evidence of both witnesses, Atul Bazaz and Archana Bazaz were closed. This Court notices that the defendant had filed an application for recall of the order dated 15<sup>th</sup> November, 2017. From the prayers of the notice of motion, which have been extracted hereinabove, it would transpire that the defendant had clearly sought for recall of both the witnesses of the plaintiff.

16. Incidentally, the said application filed on behalf of the defendant was allowed *ex parte* by an order dated 6<sup>th</sup> February, 2018. The consideration for allowing such application was the explanation given by the defendant in paragraph 6 of the said application. It appears that the Coordinate Bench on being satisfied with regard to such explanation and by accepting the same had recalled the order dated 15<sup>th</sup> November, 2017 to meet the ends of justice. Upto this stage, there is no dispute, but in the aforesaid order, since the Coordinate Bench had directed only one of the witnesses namely, Archana Bazaz to appear on 9<sup>th</sup> March, 2018 at 11.30 A.M., a difficulty has arisen and it is necessary to ascertain whether the order dated 6<sup>th</sup> February, 2018 was limited to recall of only one witness or both the witnesses and whether there is an error apparent on the face of the record, which had prompted the defendant to apply before this Court.

17. It must be noted that ordinarily, when an order is passed by a Court, the same is final unless, the Court considers the same is required to be recalled either to meet the ends of justice or for any other sufficient reason. In the instant case, it may be noted that on 15<sup>th</sup> November, 2017, the evidence of both the witnesses of the plaintiff were closed. Unfortunately, in the order dated 15<sup>th</sup> November, 2017 it had gone down as “*No one is present to cross-examine the witness, namely Archana Bazaz on behalf of the caveatrix.*”

*Evidence is closed.*” Perhaps it is for this reason that the Coordinate Bench was prompted while recalling the order dated 15<sup>th</sup> November, 2017, by its order dated 6<sup>th</sup> February, 2018 to direct the witness namely Archana Bazaz to appear on 9<sup>th</sup> March, 2018.

18. I may note here, as reiterated earlier, that the Court seldom interferes with an order which is final. However, if the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction in a particular manner but for the erroneous assumption which, in fact, did not exist and its perpetration shall result in miscarriage of justice, then it cannot on any principle be precluded from rectifying the error. Admittedly, on 15<sup>th</sup> November 2017, evidence of both the witnesses was closed. Once, the Court recalled the order dated 15<sup>th</sup> November, 2017, in my view, it obviously followed that the direction was not confined to only one witness. The direction only on Archana Bazaz to appear on 9<sup>th</sup> March, 2018 appears to be an error apparent on the face of the record. However, simply because there is an error, the same may not permit rectification/review. In this case, I may note that if the defendant is not permitted to cross-examine the plaintiff's first witness, the same would cause injustice because the foundation for recall of the first witness lies in the foundation for recall of the second witness. Although, I have been able to ascertain from the submissions made by the parties that the suit has advanced further and is at the stage of argument, however, taking note of the facts as narrated hereinabove, I am of the view that the order dated 6<sup>th</sup> February, 2018 requires to be reviewed. Accordingly, I direct the plaintiff's first witness to appear before the Court for cross-examination on 10<sup>th</sup> September, 2024,

subject to the convenience of the Learned Judge taking up hearing of the matter.

19. Before parting, I must record an undertaking given by Mr. Dasgupta on behalf of the defendant that the cross examination of the plaintiff's first witness would not be unnecessarily prolonged and attempt shall be made to conclude the cross examination on a particular day or immediately on the next date, or as may be permitted by the Court.
20. GA/1/2019 (Old GA/1207/2019) and IA NO.GA 2/2022 are allowed and RVWO/14/2019 is disposed of.

**(RAJA BASU CHOWDHURY, J.)**

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