

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO.8719 OF 2024**

1. Soli Sorabjee
(deleted since deceased)
2. Jehangir Soli Sorabjee
3. Ardeshir Modi (deleted)
4. Mrs. Molly Vakharia (deleted)

....Petitioner**V/s.**

1. M/s. Warden and Company (India)
Private Limited
2. Jimmy Vakharia
3. Ms Maki Hendry

....Respondents

Mr. Nikhil Sakhardande, Senior Advocate with Mr. Pralhad Paranjape, Ms Shubra Swami and Mr. Rupesh M. Geete i/b. M/s. Satyaki Law Associates for Petitioner.

Mr. Vineet Naik, Senior Advocate with Mr. Abhishek Adke i/b. M/s. Zunzarrao and Co. for Respondents.

CORAM : SANDEEP V. MARNE, J.**Dated : 24 June 2024.****JUDGMENT**

1. Rule. Rule is made returnable forthwith. With consent of the parties, Petition is taken up for hearing and final disposal.

2. Petitioners have filed this petition challenging order dated 3 April 2024 passed by the learned Judge of the Small Causes Court at Mumbai on

application at Exhibit-146 filed by Defendant, by which Defendant's witness (DW1) has been permitted to be recalled for re-examination, for clarification and for explanation.

3. R.A.E. Suit No.1966/6048 of 1986 is filed by Plaintiffs in Small Causes Court at Mumbai seeking recovery of possession of the suit premises being flat on second floor including garage in the compound of the building 'West Hill', situated at 27, Napean Sea Road, Mumbai-400 006. It appears that Plaintiffs have filed their evidence in December 2013 and cross-examination of Plaintiffs' witnesses was concluded on 29 January 2020. Respondent No.1, it is alleged, kept seeking adjournments for filing affidavit of evidence and 'no evidence order' came to be passed by the Small Causes Court on 25 July 2022. The application filed by Defendant was allowed and 'no evidence order' was recalled, subject to payment of cost on 8 August 2022. On 7 September 2022, the Defendant filed its affidavit of evidence. By 13 March 2023 cross examination of the witnesses of the Defendant was concluded. Petitioners allege that Defendant failed to file evidence closure *pursis* thereby delaying final arguments in the Suit. According to Petitioners, the suit was adjourned from time to time between 17 March 2023 till 31 October 2023 on various counts at the instance of the Defendants. It appears that there was change in the Advocate of Defendant on 31 October 2023. On 10 November 2023, Defendant filed application seeking recall of DW1 for re-examination. The application was opposed by Plaintiffs by filing reply. The learned Judge of the Small Causes Court has allowed the application at Exhibit-146 and has recalled DW1 for re-examination, for clarification and explanation with liberty to the Plaintiffs to cross examine DW1 on such

clarifications and explanations. Aggrieved by order dated 3 April 2024, Petitioners have filed the present petition.

4. Mr. Sakhardande, the learned senior advocate appearing for Petitioners would submit that the learned Judge of the Small Causes Court has committed gross error in allowing the application at Exhibit-146 filed by Defendant with the sole objective of somehow delaying decision of the Suit. That the Suit is pending since the year 1986 and the learned Judge ought to have considered long pendency of the Suit coupled with deliberate attempts made by the Defendant to delay in decision of the Suit. Taking me through the chronology of the events after conclusion of cross-examination of DW1, Mr. Sakhardande would submit that DW1 did not file evidence closure *pursis* for considerable time. That the impugned order has the effect of recalling witness, whose evidence was concluded one year ago on 13 March 2023. Mr. Sakhardande would submit that the learned Judge has erred in relying on judgment of this Court in ***Gurdial Singh vs. M/s. Arudatta Triotex Engineers Pvt. Ltd. 2011(5) Mh.L.J. 889*** in which case, the application for recalling of the witness was filed on immediate next date. That in the present case, the said application was filed after more than eight months of conclusion of evidence of DW1. He would take me through the application filed by Defendant at Exhibit 146 to demonstrate that the exact purpose for which recall of the witness is sought is not even disclosed in the said application. Mr. Sakhardande would rely upon judgment of the Apex Court in ***Vadiraj Naggappa Vernekar (dead) through LS. Vs. Sharadchandra Prabhakar Gogate***¹ in support of his contention that witness cannot be

1. 2009 4 SCC 410.

recalled under Order 18 Rule 17 under the Civil Procedure Code, 1908 for filling up lacunae in evidence or for withdrawal of admissions given in the cross examination and that the main purpose of the said provision is to enable the Court to clarify any doubts, which the Court may have with regard to evidence led by parties. That the Apex Court held that the provisions of Order 18 Rule 17 are to be sparingly exercised in appropriate cases and not as a general rule.

5. *Per contra* Mr. Naik, the learned senior advocate appearing for Defendant /Respondent No.1 would oppose the petition submitting that the petition is based on baseless presumption that recall of DW1 is sought to fill up any gap in the evidence. That the application clearly states that recall of the witness is sought for reconciling the discrepancies as well as to explain the statement made during the cross-examination and for removal of ambiguity in deposition of the witness. That the witness is yet to be examined upon recall and therefore it is too speculative to presume that the witness would fill up any gap in the evidence. Mr. Naik would submit that in the event of this Court coming to the conclusion that recall of DW1 would delay decision of Suit, this Court can fix a time bound schedule for completion of deposition of DW1, rather than setting aside order dated 3 April 2024.

6. I have considered the submissions canvassed by the learned counsel appearing for the parties and have gone through the application at Exhibit-146 as well as the impugned order passed by the Small Causes Court thereon.

7. Deposition of Mr. Sayalesh Mangesh Rane (DW1) examined on behalf of Defendant was concluded on 13 March 2023. The evidence recorded by the Small Causes Court on 13 March 2023 would indicate that after conclusion of cross-examination, re-examination of the witness was not sought at behest of Defendants. For about 8 long months after conclusion of recording of evidence of DW1, Defendant did not feel any need to seek any clarification from the witness. As a matter of fact, after recording cross examination of DW1, if there was any need to seek clarification from the witness, Defendant's Advocate ought to have conducted re-examination of the witness on the same day or could have asked for an adjournment for conducting such re-examination. Even if it is assumed that due to inadvertence on part of Defendant, re-examination was not conducted on 13 March 2023 or right was not reserved to conduct such re-examination, Defendant could have sought recall of the witness at least on the immediate next date assigned after 13 March 2023. It appears that Suit came up again on 17 March 2023 for filing of evidence closure *pursis* on behalf of Defendant. At least on 17 March 2023, an opportunity could have been availed by Defendant to seek recall of the witness. However, it appears that after 13 March 2023 the Suit was adjourned on 22 occasions before the application was filed by the Defendant seeking recall of DW1 on 10 November 2023. The application at Exhibit 146 was thus filed after a gap of 8 months and after 22 adjournments of the Suit.

8. Coming to the averments made in the application at Exhibit-146 it appears that the same was filed under provisions of Sections 137 and 138 of

the Indian Evidence Act 1872 read with Section 151 of the Code. After quoting provisions of Sections 137 and 138 of the Evidence Act, Defendant pleaded following reasons for seeking recall of the witness:

5. I say that it is pertinent to note that at the time of Cross Examination of D.W.1 there were many statements which was not clarified and it was not explained by D.W.1 and owing to these ambiguities which require the proper explanation, the right of Re-Examination of a witness as envisaged in section 137 R/W section 138 of the Evidence Act as portrayed above is applied to get clarity and to get a proper understanding with a proper explanation to assist the Hon'ble Court for a better conclusion. Hence, the purpose of Re-Examinations only to get clarifications of some doubts created in the cross examination which will clear the ambiguities and throw the light on the issue will give the better explanation to the matter.

6. The main objective for the Re-Examination of D.W.1 is that in the cross Examination of D.W.1 there were discrepancies /ambiguities and for these reason atleast an opportunity should be granted to reconcile the discrepancies, if any, between the statement in Examination-in-Chief and Cross-Examination or to explain any statement inadvertently made during the cross Examination or to remove any ambiguity in the deposition or suspicion so cast on the suspicion so cast on the Evidence by cross examination.

7. Re-Examination of D.W.1 is necessary for the purpose that it will clear the Obscurities and the facts can be brought to the stronger light by D.W.1 which will touch down the roots of the matter and give the clarity to it.

9. Thus, the recall of DW1 was sought by citing vague reasons such as (i) to reconcile the discrepancy, if any or (ii) to explain any statement inadvertently made during cross examination or (iii) to remove any ambiguity in the deposition or suspicion so transgressed on the evidence by cross examination. The exact alleged discrepancy, about which reconciliation was sought was not indicated. In fact, contents of paragraph 6 of the application indicates that the Defendant was not even sure as to whether any discrepancy existed since the words '*if any*' are used in the application. No particular statement in the cross examination was indicated about which

explanation is needed nor any ambiguity in the deposition is highlighted. In my view therefore, the application filed by Defendant at Exhibit -146 did not make out any specific ground for seeking recall of DW1. Reliance of Defendant on provisions of Sections 137 and 138 of the Evidence Act did not cut any ice either. Sections 137 and 138 of the Evidence Act read thus:-

137. Examination-in-chief.

The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination - The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination. - The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

138. Order of examinations- Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination - The re-examination shall be directed to the explanation of the matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

10. The above provisions merely describe what 're-examination' means and provide for order in which examination-in-chief, cross examination and re-examination is to be conducted. Section 138 provides for the purpose for which the re-examination is to be conducted.

11. In the present case, the debate is not about permissibility to conduct re-examination after conclusion of cross examination of DW1. Record

relating to deposition of DW1 by 13 March 2023 undoubtedly indicates that after cross examination was concluded, opportunity to conduct re-examination was offered to the Defendant and the said opportunity was not availed by it. The debate in the present case is about grant of opportunity to the Defendant to recall the witness whose evidence was concluded on 13 March 2023. The relevant provision enabling the Court to recall and examine the witness is to be found in Order 18 Rule 17 of the Code, which reads thus:-

Rule 17. Court may recall and examine witness- The Court may at any stage of a suit, recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

12. Thus, a power of recall of witness is essentially conferred on the Court where the Court feels it necessary to seek any clarification from the witness to clear its own doubts. The Apex Court dealt with scope of power of the Court under Order 18 Rule 17 of the Code in its judgment in *Vadiraj Naggappa Vernekar* (supra), in which an application was filed during the course of recording of evidence in the Suit for conduct of further examination-in-chief of a witness under provisions of Order 18 Rule 17 of the Code. The application was rejected by the Single Judge of this Court, which was confirmed by the Appeal Court. When the matter reached the Apex Court, it was contended on behalf of the Appellant therein that though the cross examination of the witness was complete, Defendant could always be permitted to re-examine the witness on the fresh evidence that would be adduced. The submission was opposed on behalf of the Respondent therein

on the ground that the application was made to fill up lacunae in evidence after cross-examination was complete. In the above background the Apex Court held in paragraphs 24, 25 and 28 as under:-

24. Having heard learned counsel for the respective parties, we are unable to agree with Mr. Narasimha that both the Single Judge and the Division Bench of the High Court had erred in rejecting the appellants' application under Order 18 Rule 17 CPC since, according to Mr. Narasimha, no prejudice would be caused to the respondent as he would be given a chance of cross-examination after re-examination-in-chief by the plaintiff.

25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. **The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.**

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28. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

(emphasis supplied)

13. Thus, as held by the Apex Court in *Vadiraj Naggappa Vernekar* provisions of Order 18 Rule 17 of the Code are to be sparingly used in appropriate case and not as a matter of general rule, since the provision is essentially to enable the Court to seek clarification of any doubt which the Court has with regard to evidence led by parties. The said provision is not intended to be used to fill up omissions in the evidence of a witness, who has already been examined.

14. In my view, the learned Judge of the Small Causes Court has erred in not considering the provisions of Order 18 Rule 17 of the Code while erroneously allowing the application by referring the provision of Sections 137 and 138 of the Evidence Act.

15. Reliance by the Small Causes Court on judgment of the Single Judge of this Court in ***Gurdial Sing*** (supra) appears to be misplaced. In case before this Court, the witness was cross examined on 18 June 2009 and on the immediate next date fixed i.e. 18 July 2009, an application was moved for conduct of re-examination of the witness. The issue before this Court in ***Gurdial Sing*** was also entirely different. The issue was the scope of re-examination and not exercise of power of recall of witness. This Court held that while conducting re-examination of a witness, Court can permit putting of any question where the party recalling the witness feels that an explanation is required for any matter in the cross examination. In my view therefore, the Trial Court has erred in relying on judgment of the Single Judge of this Court in ***Gurdial Sing*** (supra) while allowing the application at Exhibit-146.

16. The learned Judge of the Small Causes Court ought to have also considered pendency of the suit for unduly long time since 1986. It appears that Plaintiffs had filed their evidence 11 years ago in December 2013 and after 7 years thereafter, cross-examination of Plaintiffs' witnesses was concluded on 29 January 2020. Defendant took two and half years thereafter to file its evidence on 7 September 2022. Further delay of 8 months in seeking recall of witness ought to have been considered in the light of delay

already caused in recording of evidence by the learned Judge. It has been 38 long years that the Suit is pending, and its expeditious decision is the need of the hour. I am sure the Trial Court is aware of this position and has been fixing shorter dates for early decision of the Suit.

17. The impugned order is thus indefensible and is liable to be set aside. Writ petition accordingly succeeds. Order dated 3 April 2024 passed by the learned Judge of the Court of Small Causes at Mumbai, on application at Exhibit -146 is set aside. Considering the pendency of the Suit since the year 1986, the Small Causes Court shall accord due priority for its expeditious decision.

18. With the above directions, the writ petition is allowed. Rule is made absolute in above terms. There shall be no order as to costs.

[SANDEEP V. MARNE, J.]