



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 04.01.2024

Judgment pronounced on: 16.01.2024

+ C.M. (M) NO. 1320 OF 2018, CM Nos. 45225/2018, 4967/2019

DELHI METRO RAIL CORPORATION LTD. Petitioner

Through: Ms. Vibha Mahajan Seth and Ms.
Teena Srivastava, Adv.

versus

PARAS

.... Respondent

Through: Ms. Ankita Patnaik, Adv. (DHCLSC)
with respondent.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The petitioner herein is the defendant and respondent herein is the plaintiff in the civil suit bearing no. 38/2018 (1524/2016) pending adjudication before the learned Additional District Judge (Central)-10 (hereinafter referred to as "ADJ"), Tis Hazari Courts, New Delhi. The petitioner is aggrieved by the order dated 14.08.2018 passed by the learned ADJ on the application filed on behalf of the respondent herein seeking permission to cross-examine the petitioner's witnesses. The learned ADJ had allowed the application thereby permitting to recall the witnesses of the petitioner i.e. DW-1 and DW-4 for cross-examination.

2. The relevant facts extracted from the present petition are as under:-

3. On 25.01.2012, the respondent herein met with an accident while standing at Chandni Chowk Metro Station due to a sudden impact from behind. The respondent fell down on the railway track and came under the



metro train (TN-3505). The respondent was rescued, however, he sustained several back and spinal injuries due to the aforesaid accident. Consequently, he filed a suit against the petitioner i.e. Delhi Metro Rail Corporation (hereinafter referred to as “DMRC”) seeking damages of Rs. 19 lacs along with 24% interest per annum for the injuries caused to him on account of petitioner’s negligence.

4. Conversely, the petitioner filed its written statement before the learned Trial Court denying any such negligence and accorded weightage on the CCTV footage wherein it could be seen that the respondent reached Chandni Chowk Metro Station at 17:15 hours on 23.01.2012 and had intentionally jumped in front of Train no. 35 02 DT-28 due to which he sustained injuries on his person. Therefore, the injuries were suffered by the respondent due to his deliberate act and not as alleged by him on account of any negligence on the part of petitioner herein.

5. The petitioner herein has also pleaded that for such an irresponsible and reckless act, the respondent is liable to be prosecuted and penalized under the Delhi Metro Railway (Operation and Maintenance), Act, 2002.

6. It is part of the record that the respondent has no source of income. Thus, based on the Tehsildar’s report dated 21.08.2012, he was allowed to proceed with the case as an indigent person vide learned Trial Court’s order dated 08.10.2012.

7. The main focus of arguments led on behalf of the petitioner is that the civil suit was instituted in the year 2012 and the respondent closed his evidence on 13.02.2014. Thereafter, the petitioner herein opened its evidence in defence on 26.03.2014 and filed evidence affidavits of four witnesses i.e. DW-1 to DW-4. The petitioner’s evidence commenced by



examining DW-1, who was partly cross-examined after tendering his evidence affidavit in examination-in-chief, as the respondent failed to conduct cross-examination of DW-1, vide order dated 07.11.2014, the right of the respondent to further cross-examine DW-1 was closed. On 06.01.2014, DW-4 tendered his evidence affidavit, again due to non-presence of the counsel of the respondent, after granting an opportunity to him to cross-examine DW-4, the right was closed and the case was listed for final arguments as the counsel for the petitioner closed evidence in defence without further leading evidence of DW-2 and DW-3.

8. Learned counsel submitted that after seeking various adjournments on behalf of the respondent to advance final arguments, part arguments were heard on 27.04.2016, when it was observed by learned Trial Court as the CD, Ex. DW-1/1 was played, the same was not with respect to the video footage of the incident in question. Thus, on 04.10.2016, an application was moved by the petitioner for leading additional evidence of producing the video footage of the incident, which was allowed vide order dated 04.05.2017 and the case was listed for evidence of the defendant (petitioner herein). At that stage, the respondent herein also pressed for an application dated 16.02.2017 filed by him under Section 151 CPC for recalling of the witnesses of the petitioner i.e. DW-1 and DW-4. The said application came to be allowed vide order dated 14.08.2018 and DW-1 and DW-4 were recalled for cross-examination.

9. After narrating, the sequence of the facts leading to passing of the impugned order dated 14.08.2018, the learned counsel for the petitioner submitted that the respondent had been duly represented by counsels at each stage of the trial. Moreover, a legal aid counsel appeared for him even when



he had moved an application on 16.02.2017 under Section 151 CPC. He was afforded sufficient opportunities to cross-examine DW-1 and DW-4 but he failed to avail those opportunities.

10. It was submitted that the orders dated 07.11.2014 and 06.01.2015 closing his right to further cross-examine DW-1 and DW-4 remained unchallenged. Therefore, the application dated 16.02.2017 was filed only to fill the omission in the evidence of witnesses, who have already been cross-examined, which cannot be permitted under law.

11. The learned counsel took me through the judgments titled “**Ram Rait vs. Mange Ram (Dead) thru LRs & Ors.**” (2016) 11 SCC 296 [Para 12-13], “**ARB INC vs. United India Insurance Co. Ltd. & Ors.**” FAO (OS) No. 398/2015 [Para 3-14]” and “**Rajiv Mehta vs. Savita Mehta**” 253 (2018) DLT 156 (DB) [Para 6, 9-13] to dwell on his above contentions.

12. Proceedings to address further arguments. the learned counsel submitted that there is no provision in the Code of Civil Procedure for fresh cross-examination of already cross-examined witness except to recall a witness under Order XVIII Rule 17 CPC, which confers sparing powers on the Court to clarify any issue or doubt by recalling any witness either suo moto or at the request of any party. The same cannot be used in a routine manner merely for the asking or to enable a party to fill lacunas in the evidence.

13. The learned counsel submitted that the learned ADJ erred in allowing the application of the respondent seeking to recall the cross-examined witnesses of the petitioner for further cross-examination on the ground that the technicalities of law cannot sub-serve the ends of justice, ignoring the fact that respondent had been negligent in not availing the several



opportunities provided to him to cross-examine the petitioner's witnesses. Furthermore, the reversal of the time clock leading to opening of entire trial of the case is going to cause serious prejudice to the petitioner. It was thus submitted that the impugned order is patently illegal and deserves to be set aside.

14. Conversely, learned counsel for the respondent submitted that he had instituted a suit against the petitioner herein as an indigent person. Therefore, due to lack of funds to furnish the legal expenses and fees of his counsel at the relevant time, his erstwhile counsel stopped appearing for him and the suit remained unattended by any counsel for many days until an advocate was appointed by Delhi Legal Services Authority, Delhi to represent him in the civil suit. The said counsel examined the record and it was noticed that cross-examination of petitioner's witnesses was incomplete and had not concluded. Aggrieved by aforesaid position, the counsel for the respondent filed an application under Section 151 CPC seeking permission to cross-examine the petitioner's witnesses.

15. It was vehemently argued that the petitioner had moved an application to lead additional evidence on 04.10.2016 and the respondent filed his application under Section 151 CPC for recalling of the witnesses of the petitioner on 16.02.2017. The learned ADJ since had allowed the aforesaid application of the petitioner for leading additional evidence and thus to balance the equities, also granted permission to the respondent to further cross-examine DW-1 and DW-4 i.e. witnesses of the petitioner.

Reasons and conclusions

16. Having being established, the position of law is clear that the power to recall witness under Order XVIII Rule 17 of CPC can be exercised by the



Court on its own motion, however, it has also been interpreted to include applications filed by any of the parties to the suit for recall of witnesses. Such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of examination of the witness.

17. It was observed by the Hon'ble Supreme Court in the case of **Ram Rati v. Mange Ram** (2016) 11 Supreme Court cases 296 as follows:

“The rigour under Rule 17, however, does not affect the inherent powers of the court to pass the required orders for ends of justice to reopen the evidence for the purpose of further examination or cross-examination or even for production of fresh evidence. This power can also be exercised at any stage of the suit, even after closure of evidence. Thus, the inherent power is the only recourse, as held by this Court in K.K. Velusamy at para 11, which reads as follows: (SCC p. 282)

“11. There is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.”

18. The principles of law regarding recalling of witnesses was discussed in the case of **K.K. Velusmay vs N. Palanisamy** (2011) 11 SCC 275 and it was observed:



“16. We may add a word of caution. The power under section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. It so used, It will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bonafide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, It should ensure that the process does not become a protracting tactic. The court should the award appropriate costs to the other party a compensate for the delay Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. if the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.

19. It is manifest from the above judicial pronouncements that it cannot be disputed that a Court would have ample powers under Order XVIII Rule 17 CPC or Section 151 of the Code to recall any witness but ideally the power is discretionary to be invoked sparingly in appropriate cases for the purpose of rendering justice.

20. On perusal of the records, It is observed that the erstwhile counsel for the respondent had partly cross-examined the petitioner’s witness, DW1, Mr. Yogesh Kumar, on 27.05.2014, however, the cross-examination was deferred on account of lunch hour. Thereafter, the case was adjourned for further cross-examination of DW1 to 04.08.2014 which was again adjourned to 15.09.2014 since witnesses were not available, then adjourned to



07.11.2014 at the request of proxy counsel for the respondent since main counsel for the respondent was in a personal difficulty. Thus, the matter was again adjourned to 07.11.2014 when the counsel for respondent was yet not present and the father of the respondent sought an adjournment, even on the second call, the counsel for respondent remained absent and thus the Learned ADJ closed the opportunity of the respondent to cross-examine DW1. The matter was posted for defendant's evidence on 06.01.2015 whereon the petitioner conducted the examination-in-chief of its witness DW4, yet again the counsel for respondent was not present and the father of respondent sought a passover and again as earlier the counsel for respondent remained absent on the second call. The DW1 could not be cross-examined and the defence closed its evidence on the said date.

21. Subsequently thereto, petitioner filed an application for leading additional evidence, which was allowed and thereafter the application seeking permission to cross-examine of the defendant's witnesses was filed by the respondent before the Learned Trial Court which gives rise to passing of the impugned order.

22. Noting the peculiar circumstances and facts, the respondent cannot be held at complete fault for non-appearance of his counsel due to various reasons and given his indigency. A legal aid counsel was provided by the Delhi Legal Services Authority who has been appearing in the matter diligently. In such a case and in the interest of justice, the respondent cannot be permitted to suffer on account of negligence or inaction on the part of the counsel. The cross-examination is a stage of paramount significance for the purposes of unravelling the truth, since the same is in consonance with the principle of a fair trial, closing the right to cross-examine a witness in the



present peculiar facts of the case will cause injustice to the respondent. Moreso, the trial is at the stage of defendant's evidence as the recording of defendant's evidence was opened at the asking of petitioner herein. The facts when taken in totality leads this Court to conclude that there is no perversity with impugned order dated 14.08.2018 passed by learned ADJ. The judgment **ARB INC vs. United India Insurance Co. Ltd. & Ors.** (*supra*) and **Rajiv Mehta vs. Savita Mehta** (*supra*) have been decided on its own facts and which have no bearing on the facts of the present petition. Consequently, the petition along with pending applications is disposed of subject to following directions:-

- i. Respondent shall be granted a single opportunity to cross-examine DW-1 and DW-4 subject to the availability of the witnesses by the learned Trial Court within one week from today, subject to its convenience by fixing a short date for cross-examination of the witnesses, which shall be produced by the petitioner.
- ii. The respondent shall cross-examine both the witnesses on the same day and no adjournment on whatsoever ground shall be granted to the parties by the learned Trial Court deferring the cross-examination of DW-1 and DW-4.

SHALINDER KAUR, J.

JANUARY 16, 2024/ss