

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:

Hon'ble Justice Shampa Sarkar

C.O.12 of 2024
Tirupati Vinimoy Private Limited
Vs.
Karnani Properties Limited

For the petitioner : Mr. Bhaskar Ghosh, Sr. Advocate,
Mr. Rwitendra Banerjee,
Mr. Usha Doshi

For the respondent : Mr. Aniruddha Chatterjee, Sr. Adv.
Mr. Tanmoy Mukherjee,
Mr. Neelesh Chowdhury,
Ms. Anuradha Poddar,

Hearing concluded on: 24.01.2025

Judgment on: 04.03.2025

Shampa Sarkar, J.:-

1. This is an application under Article 227 of the Constitution of India filed by the defendant in Title Suit No. 35486 of 2014. The order dated October 17, 2023, passed by the Judge, Vth Bench, City Civil Court at Calcutta, is under challenge.

2. By the order impugned, the learned judge rejected the application dated December 20, 2021, filed by the defendant under Section 151 of the Code of Civil Procedure. The application was filed by the petitioner, defendant in the suit, with a prayer for recall of the PW1. The reason for such prayer for recall was that, questions mentioned in the said application, which were germane for the purpose of deciding the real controversy between the parties and the issues involved in the suit, should be allowed to be put to the PW1, in further cross-examination. If such prayer was not

allowed, irreparable loss and injury would be caused to the defendant and vital questions pertaining to the registration of the deed of lease would be left out. If such questions were allowed to be put in cross-examination of the PW1, upon his recall, the fate of the suit would be in favour of the defendant.

3. The plaintiff/opposite party contested the application by filing a written objection. It was submitted on behalf of the opposite party before the learned trial judge that the factum of registration of the agreement dated March 17, 2005, was attempted to be brought on record by an amendment of the written statement. Such prayer was disallowed and the same was affirmed by the High Court and ultimately by the Hon'ble Apex Court. Moreover, the application for recalling of the plaintiff's witness for further cross-examination should not be entertained as no exceptional circumstances had been provided by the petitioner, which would necessitate such recall. By amendment to Code of Civil Procedure, the provisions of Order 18 Rule 17A of the Code of Civil Procedure had been deleted. An application under Section 151 of the Code of Civil Procedure should not be entertained, as it was not an alternative mechanism available under the Code, for recall of witness.

4. The learned trial judge was of the view that the Memorandum of Agreement was registered on January 8, 2018, though it was presented for registration earlier. The cross-examination of PW1 was held on June 20, 2018, after the registration of the Memorandum of Agreement. Therefore, if the questions set forth in the application was allowed to be put to the witness on recall, the same would amount to filling up the lacuna in the cross-examination done earlier. The law prohibited recall of witness for

filling up the lacuna. The questions could have been put at the appropriate stage. The registration of the document was completed before the cross-examination of the PW1 was over. The learned court held that the ingredients of Order 18 Rule 17 of the Code of Civil Procedure were not all not available in the application for recall.

5. Mr. Bhaskar Ghosh, learned Senior Advocate, submitted that, while preparing the evidence-on-affidavit of the defendant's witness, it was noted that few questions, which were required to be asked to the plaintiff's witness no.1, during the cross examination, had been left out. The questions were necessary to elicit answers which would have a direct bearing on the ultimate outcome of the suit. The factum of registration would impact the maintainability of the suit. Thus, those questions were relevant, pertinent and necessary.

6. The recall was justified in view of the strong and cogent reasons which were pleaded in the application. The exceptional case had been made out. Interest of justice required the trial court to allow the recall by exercising inherent power under Section 151 of the Code. The inherent power of court was not limited by the provision of Order 18 Rule 17 of the Code of Civil Procedure. This was not a situation where the application has been filed as a matter of routine. Ends of justice demanded that the witness should be recalled. The court should undo the wrong and do the right thing. The deed of lease dated March 17, 2005, which was duly executed between the parties in respect of shop number 1, measuring 1815 square feet on the ground floor of the premises at 35 Park Street, was never in dispute. The lease granted was for a period of 75 years. On May 2005, the said lease was presented for registration upon payment of stamp duty and registration fees

as per the declaration in the deed. The registering authority kept the deed of lease pending for want of assessment. The petitioner approached the registering authority on various occasions for completion of the assessment of stamp duty and ultimately on January 8, 2018, the registration process was completed upon the authority receiving deficit stamp duty and registration fees.

7. During the pendency of the registration, the suit was filed by the opposite party for recovery of possession against the petitioner, alleging that the petitioner was inducted in the suit property on the basis of an unregistered agreement of lease and a notice under Section 106 of the Transfer of Property Act, had been issued, treating the petitioner as a trespasser. The effect of registration related back to the date of execution. The effect of registration was that the suit would not be maintainable in its present form. Thus, questions on the factum and effect of registration were essential to be put, by way of cross examination of PW1.

8. The delay in the registration could not be attributable to the petitioner, inasmuch, as the authority was required to assess the stamp, inform the petitioner, and accordingly, the petitioner was then required to deposit the deficit stamp. As soon as the petitioner was informed about the assessment, the stamp duty was paid and registration was completed on January 8, 2018. During cross examination on June 20, 2018, the vital questions relating to the fact of a registration and effect of such registration on the suit etc., were inadvertently missed out.

9. It was also submitted that the questions had been categorically mentioned in the application under Section 151 of the Code of Civil Procedure. A mere perusal of those questions would justify the reason for

recall, but the learned judge failed to take into consideration such aspects. This was a fit case for recall. The trend of the questions would not indicate that the petitioner was not trying to fill up any lacuna in the cross examination. The questions were related to and connected with the questions which were put to the PW1 in the cross examination, and there was no reason for the court to doubt in any manner that, the intention of the defendant was only to fill up the lacuna in the cross examination.

10. It is further submitted that rejection of the application for amendment of the written statement which was filed to incorporate subsequent events, including the issue of registration of the deed of lease, could not be a valid ground for not allowing the recall.

11. Mr. Ghosh relied on the decision of **K.K. Vellusamy vs. N. Palaanisamy**, reported in **2011 AIR SCW 2296**.

12. Mr. Tanmay Mukherjee learned Advocate for the opposite party submitted that evidence could not be beyond pleadings. When the written statement did not contain the fact of registration, the questions relating to the subsequent registration of the deed of lease, could not be brought on record by further cross examination of the PW1. Mr. Mukherjee further submitted that two attempts of the petitioner to amend the written statement failed before the learned trial judge. Both the orders were carried in revision to the High Court. In both the revisional applications, the petitioner was unsuccessful in amending the written statement and one of such orders went up before the Hon'ble Apex Court, by a Special Leave Petition, and the same was rejected.

13. The law was well settled. Principles of *res judicata* not only applied to subsequent proceedings, but also at different stages of the same proceeding.

In a circuitous manner, again, the petitioner was trying to bring on record the issue of registration of the deed of lease, after two failed attempts at amending the written statement and/or filing an additional written statement.

14. Further, referring to the pleadings in the written statement, Mr. Mukherjee submitted that the clear case of the petitioner was that the tenancy was governed by the West Bengal Premises Tenancy Act 1997. Now, the petitioner was trying to introduce a new case that, subsequent registration of the deed must lead to dismissal of the suit. The suit could not continue as one under Section 106 of the Transfer of Property Act. The petitioner had tried to resile from its own stand and was trying to introduce a mutually destructive defence.

15. Mr. Mukherjee further contended that, the plaintiff filed the affidavit in chief on April 25, 2018. The cross-examination was held thereafter. The cross-examination was closed on June 26, 2018. The registration was completed on January 8, 2018. Thus, the questions which the petitioner wanted to put in the cross-examination upon recall, could have been put at the relevant time when the PW1 was already on the docks.

16. According to Mr. Mukherjee, the application for recall was not only filed in order to fill up the lacuna, but also to delay the proceeding and to deprive the opposite party/plaintiff of its legitimate right to evict the petitioner, who was nothing more than a trespasser in the property concerned.

17. Considered the rival submissions. Although, Mr. Ghosh vehemently urged that the subsequent event of the registration of the deed of lease should have been allowed to be brought on record by way of amendment

and or by filing additional written statement, this court finds that even if there was some force in Mr. Ghosh's submission in this regard, the issue is no more available for adjudication by this court in view of the fact that the attempts of the petitioner in amending the written statement, to bring on record the subsequent event of registration of the deed of lease and the effect of such registration in the suit in question, had already been rejected twice. Whether such registration would have any effect in the ultimate outcome of the suit is a matter of trial and it is left open for the learned trial judge to decide the matter at the time of final adjudication of the suit, independently.

18. The application under Section 151 of Code of Civil Procedure, was filed after the cross-examination of PW1 had been closed. The questions which have been elaborately mentioned in the said application are quoted below:

“Questions for Cross Examination

1. Whether the instant suit has been filed on the basis of a Memorandum of Agreement dated March 17, 2005?
2. Do you agree that the suit premises was let out to the defendant on the basis of Memorandum of Agreement dated March 17, 2005?
3. How did you come to know that the defendant was unwilling to pay stamp duty and registration charges for completing registration process of the Lease Agreement?
4. Is there any subsequent agreement between the plaintiff and the defendant? if yes, have you filed any document with respect to that?
5. I am putting to you that on the date of filing the instant suit the registration of the said lease agreement was pending before the Registering Authority?
6. On which date was the said Lease agreement presented for registration before the Registering authority?
7. The Plaintiff has pleaded in paragraph no.4 of the plaint that the rent of the suit premises was further increased. On what basis was the rent increased?
8. Is there any provision of reduction of rent in the alleged Memorandum of Agreement dated March 17, 2005?
9. I am putting to you that reduction of rent on the fact of Tata Teleservices Limited leaving from the suit premises was just and according to the Agreement dated March 17, 2005?

10. I am putting to you that your refusal to accept the reduced rate of rent was unjustified and not according to the Memorandum of Agreement, which you have referred to?

11. Do you agree that payment of rent at the reduced rate was a breach of Memorandum of Agreement as you say?

12. Do you agree that as per the Memorandum of Agreement dated March 17, 2005, as you have referred to, one month notice is required to be given to the defendant to remedy the breach, if any?

13. Have you served any notice calling upon the defendant to remedy the alleged breach?

14. Is it correct that the address of the defendant as provided in the Memorandum of Agreement is 56/1, Canning Street, Kolkata 700001?

15. Have you produced any communication addressing the defendant at 35, Park Street, Shop No.1, ground Floor, Kolkata 700016 and received by it before filing of the instant suit?

16. I suggest to you that there has been no communication between the plaintiff and defendant at 35, Park Street, Shop No.1, ground floor, Kolkata 700016?

17. I suggest to you that the defendant is still a lessee in respect of the suit premises?

18. I am putting to you that there has been no termination of leasehold right of the Defendant ?

19. I suggest to you that the Plaintiff has no cause of action for the suit?

19. In the decision of ***KK Vellustami vs. N. Palani swami***.(supra), it was held that, although, there were no specific provisions in the Civil Procedure Code enabling parties to reopen evidence, but in the absence of any provision for reopening of evidence on recall of witnesses, the inherent power under Section 151 of the Code of Civil Procedure, could be invoked. Such inherent power conferred upon the court was not restrictive in any way. Although, Order 18 Rule 17 of the Code of Civil Procedure permitted recall any witness to enable the court to put such question to elicit any clarification, there could always be exceptional situations when, in order to meet the ends of justice or to prevent abuse of process of court, witnesses could be recalled by the court upon invoking the power under Section 151 of the Code of Civil Procedure, for further examination.

20. It is true that in this case, the questions which were to be put to the petitioner related to the fact of registration of the deed of lease. The application was filed belatedly. The registration was completed before the cross-examination was over. The amended provision of the Code of Civil Procedure contemplates expeditious trial and expects the trial court to hear the arguments immediately after the completion of evidence and then, proceed to deliver judgment. The application was filed on December 20, 2021, whereas, the cross-examination of the petitioner was closed on June 26, 2018. Thus, the time gap in this case, between closure of the evidence of PW1 and the filing of the application for recall of the PW1 is substantial. There is no explanation as to why the petitioner waited for almost three years to file the said application. The deed of lease was registered earlier, much before the closure of evidence of the PW1 and the questions could have been put earlier.

21. Although, deletion of Order 18 Rule 17A of Code of Civil Procedure, does not mean that no evidence could be received upon recall of a witness, the inherent power under Section 151 of the Code of Civil Procedure could not be invoked at such a belated stage in a routine manner. It was entirely the discretion of the learned trial court. The powers under Section 151 or Order 18 Rule 17 of the Code are not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code, to expedite trials. Where the application is found to be bona fide 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 the non-production earlier

was for valid and for sufficient reason, the court may exercise its discretion to recall the witnesses or permit fresh evidence.

22. Thus, this court is of the view that such a belated application under Section 151 of the Code of Civil Procedure cannot be allowed. Moreover and most importantly, this court finds from the cross-examination of the PW1 that questions relating to the presentation of the document for registration, the person who was present before the registering authority for the purpose of registration and suggestions that the deed was subsequently registered, were put to the PW1. Suggestion that the deed was registered in the office of the Registrar of Assurances (II), Kolkata and entered in book No.1, volume No.1902-218, page 2567-2586, deed No.1902-00051 for the year 2018, was made. The PW1 answered in the negative.

23. A suggestion that the plaintiff did not have any cause of action against the defendant upon such registration, was also made to the PW1. The PW1 stated that "it is not a fact that the agreement dated March 17, 2005 is an unregistered document as stated by me is false". The relevant portion of the evidence is quoted below:-

"The agreement was presented before the registration authority but the defendant was not willing to give the stamp duty for which the agreement was not registered. I cannot recollect the date on which the agreement was presented before the registration authority. I cannot recollect whether the agreement was presented before the registration authority sometimes in the month of May 2005. One of the Directors of the plaintiff-company was present before the registration authority for the purpose of registering the agreement. One of the addresses of the defendant-company is 56/1 Canning Street, Calcutta. Previously there was communication between the plaintiff and the defendant and the address of the defendant in that case was the suit premises i.e. 35 Park Street, Kolkata-16. The notice dated 29.9.2004 itself goes to show that communication has been made with the defendant in the address 35 Park Street, Kolkata-16. Not a fact that the lease agreement dated 17.03.2005 between the plaintiff and the defendant was duly registered before the registering authority. Not a fact that the lease agreement dated 17.03.2005 has been registered in the Office of

Registrar of Assurances (II), Kolkata in Book No. I, Volume No. 1902-2018, page 2567-2586, being no. 190200051 for the year 2018. Not a fact that plaintiff has no cause of action against the defendant. Not a fact that no notice u/s 106 of the T.P. Act has been issued by the plaintiff or that has not-been received by the defendant. Not a fact that the agreement dated 17.03.2005 is an unregistered agreement as stated by me is false. The defendant did not pay rent since April 2014. Not a fact that the plaintiff is not entitled to get any relief as prayed for. Not a fact that my evidence is false.”

24. Under such circumstances, upon going through the questions which the petitioner wanted to put again to the PW1 on recall, this court is of the view that similar questions were already put to the PW1 in cross-examination directly as suggestions. The consequence and effect of the trend of such cross examination will follow. The evidence so far adduced by the PW1 in both his chief and cross will be weighed by the learned trial judge in the final hearing of the suit. Moreover, the witness action of the petitioner has not commenced. He may depose in the manner so desired by him, subject to the direction of the learned trial court.

25. Under such circumstances, the revisional application is disposed of without interference with the order of the learned trial judge and with the observations made hereinabove.

26. There shall be no order as to costs.

27. Parties are to act on the basis of the sever copy of this order.

(Shampa Sarkar, J.)