IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE

APOT/411/2024
WITH
CS/264/2012
IA NO: GA/1/2024

NIRMAL KANODIA AND ORS
VS
UMADEVI AGARWALLA AND ORS

BEFORE:
The Hon'ble JUSTICE SOUMEN SEN
AND
The Hon'ble JUSTICE BISWAROOP CHOWDHURY
Date : 17th February, 2025

Appearance:
Mr. Sukrit Mukherjee, Adv.
Mr. Tanuj Kakrania, Adv.
Mr. Karanjeet Sharma, Adv.
... for the appellants.

Mr. Sabyasachi Chowdhury, Sr. Adv.
Ms. Urmila Chakraborty, Adv.
Mr. Amit Meharia, Adv.
Ms. Paramita Banerjee, Adv.
Mr. Sayan Dey, Adv.
... for the respondents.

1. Apart from good grounds shown for non-maintainability of the appeal, we are also of the view that the judgment passed by the learned Single Judge does not call for any interference having regard to the fact that the case sought to be made out by way of recalling of the witness was not the case made in the original written statement.

2. The respondents are the plaintiffs in CS no. 124 of 2011. The said plaintiffs filed this suit for a decree for Rs.6,61,50,520/- on account of loss and damage as stated in paragraph 23 for Rs.5.51 crores and interest of rupees 1.10 crores by reason of wrongful repudiation of the MOU on 20th September, 2010. The cross suit was filed by the

plaintiffs being CS no. 264 of 2012 claiming money decree for Rs.1,32,05,480/- . In the subsequent suit the present appellants were the plaintiffs in cross suit. It was alleged that the original Memorandum of Understanding was entered into between the plaintiff nos. 1, 2 and 3 as the purchasers and the original defendant nos. 1 and 2 as the vendors for sale of the majority shareholding of the original defendant nos. 1 and 2 and the proforma defendant no.3 to the plaintiff nos. 1, 2 and 3 on the terms and conditions.

3. In the written statement filed by the appellants they disputed the sale of the shares and contended that the shares were sold without notice and hence they are not liable. Both the suits proceed on the aforesaid pleadings, issues were framed. Now, it is after the conclusion of evidence and the arguments of the respondents in respect of both the suits that an application was filed for production of certain documents in order to show that the defendants continue to remain as shareholders and as such there was no sale of shares at all. However, this was never the plea taken in the original written statement or in the course of hearing of the suits. The application for recalling of the witness was filed almost after 5 months after the learned Advocate for the respondents concluded his submissions. The learned Counsel for the appellants have submitted that there are good reasons for allowing such prayer for effective adjudication of the disputes between the parties, the said evidence is essential is relevant. However, we are unable to accept the said submissions having regard to the fact that the said issues were never raised and

the defence of the present appellants was quite different from what is now sought to be canvassed. The appellants of the said cases want to make out a new case apart from the aforesaid decision of the Hon'ble Supreme Court in **Salem Advocate Bar Association, T.N. v. Union of India** reported in **2003(1) SCC 49** taking note of the deletion of Order XVIII Rule 17A by Amendment Act of 2002. It was held that Order XVIII Rule 17A did not create any right but only clarified the position that the party in spite of due diligence was unable to produce the evidence earlier and thereafter the said deletion would not disentitle production of evidence at a later stage on a party satisfying the court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence.

4. The learned Counsel has relied upon the judgment in **K.K. Velusamy v. N. Palanisamy** reported in **2011(11) SCC 275** to argue that it is a fit case for seeking clarification. In this regard we may refer to paragraph 9 and 10 of the said decision which has clearly stated that Order XVIII Rule 17A is an enabling provision for the court to clarify any issue or doubt by recalling any witness either suo motu or at the request of any party so that the Court itself can put questions and elicit answers. In the instant case there was no need for clarification having regard to the clear statement of the appellant that the entire procedure adopted by the plaintiff, who are the respondents of the appeal was without notice to them. They had never disputed the MOU but had questioned the manner in which the shares were sold. This

would be evident from the written statement produced in course of hearing. Moreover, the basic requirements of establishing due diligence in respect of the documents which are now intended to be produced has not been satisfied.

5. The Court cannot exercise the power under Order XVIII Rule 17A of the Code of Civil Procedure unless the Court is of the view that having regard to the nature of the dispute, the Court needs some clarification on the evidence already adduced. It is the requirement of the Court which can be exercised suo motu or on the basis of an application filed by a party. The application filed by the party at a much belated stage after the arguments in respect of both the suits insofar as the plaintiff is concerned was concluded, was an attempt to raise certain issues that was not originally pleaded.
6. The learned Single Judge was absolutely justified in rejecting the said application.
7. Accordingly, the appeal being APOT No.411 of 2024 and the connected application being IA No.GA/1/2024 stand dismissed.
8. However, there shall be no order as to costs.

(SOUMEN SEN, J.)

(BISWAROOP CHOWDHURY, J.)

S. Pal/mg