

IN THE COURT OF DISTRICT JUDGE-05,
CENTRAL DISTRICT, TIS HAZARI COURTS,
DELHI

Presided by:-

Sh. Abhishek Srivastava, DHJS

PC. 42424/2016

CNR No. DLCT01-000410-2006

Sh. Deepak Kumar Singh

.....Petitioner

Vs.

The State of NCT of Delhi & Ors.

.....Respondents

Order

1. This petition is listed today for passing of Order on an application of the petitioner filed under Order XVIII Rule 17 read with Section 151 of CPC, 1908, on 03.08.2023, *inter alia* seeking an opportunity to further/conclude the cross-examine of O2W1 Sh. Yogendra Pal Singh.

2. Reply to aforesaid application was filed on behalf of Respondent No. 2/ Objector No. 1 Sh. Yogendra Pal Singh, on 12.12.2023.

3. The backdrop in which this application was filed, is as follows:-

(a) Record shows that O2W1 was examined and partly cross-examined on 31.08.2022, and his

further cross-examination was deferred, subject to cost of Rs. 3000/- to be paid by the petitioner to respondent No. 2 for 03.12.2022.

(b) That on 03.12.2022, as the presiding officer (Ld. predecessor of this court) was on leave, matter was posted for purpose fixed for 25.02.2023.

(c) On 25.02.2023, a pass over was sought on behalf of the petitioner which was allowed subject to further cost of Rs. 2000/- to be paid by the petitioner to the witness. When the matter was called again, cost of Rs. 5000/- was paid by the petitioner to the Respondent No. 2, however, counsel for the petitioner was not present even then. This court accordingly adjourned the matter for further cross-examination of O2W1 for 22.04.2023 as last and final opportunity, subject to further cost of Rs. 5000/- to be paid by the petitioner to the Respondent No. 2.

(d) Since 22.04.2023 was declared a holiday, this file was taken up on 24.04.2023. On 24.04.2023, an adjournment was sought on behalf of petitioner stating that main counsel is not well. When this court directed the petitioner to pay the cost of Rs. 5000/- imposed on 25.02.2023 to respondent No. 2, it was submitted by the proxy counsel for the petitioner that main counsel is busy in Hon'ble Delhi High Court and five minutes time may be

given to him to seek instructions from the main counsel for payment of cost. Since the submission of the proxy counsel for petitioner was contrary to his earlier submission that the main counsel is unable to appear as he is not feeling well, this court while observing that the petitioner has failed to cross examine O2W1, who is aged 75 years, despite repeated opportunities and the intent of the petitioner appears to be to harass the witness, closed the right of the petitioner to further cross-examine O2W1, on account of non-compliance with the directions dated 25.02.2023 including non-payment of cost in terms of Section 35(B) CPC.

(e) Records show that thereafter O2W2 Sh. R.K. Singh was examined, cross-examined and discharged and Respondent's evidence was closed vide order dated 14.10.2023 and matter was posted for arguments on the aforesaid application.

4. Arguments were heard on behalf of the petitioner and the respondent No. 2 which were concluded on 16.05.20024. Respondent No. 2 also filed written submissions alongwith certain judgments.

5. During the hearing of arguments, the Ld. Counsel for the petitioner had submitted that the application should be allowed by this Court (a) because on 25.02.2023 the counsel for the petitioner was engaged in an argument before the Ld. District Judge, Rohini Courts and when after concluding the same,

reached to this court at about 1.10 PM, this court after imposing cost of Rs. 5000/- had already adjourned the matter for 22.04.2023; (b) because the matter was posted for 22.04.2023, however, the Hon'ble High Court vide a notification declared a holiday on the said date and accordingly the matter was listed for 24.04.2023 and it is a usual practice that in these circumstances, courts used to grant next date as per court diary; (c) because the counsel for the petitioner was suffering from GBS i.e. paralytic attack and on 24.04.2023 after appearing before the Hon'ble High Court, he was not feeling well; (d) because the witness is real Tauji of the petitioner and he has respect for him and he has no intention to harass the said witness; (e) because there is a registered Will in favour of the petitioner executed by his grand father, and the said witness O2W1 is appearing as an objector, as such there is no reason for the petitioner to delay his own case; and (f) because the petitioner seeks only one opportunity to cross-examine O2W1 which would be concluded within 30-45 minutes.

6. *Per Contra*, the Ld. Counsel for the Respondent No. 2/ Objector No. 1 had submitted that the application should be dismissed by this Court (a) because the basic purpose and object of Order XVIII Rule 17 CPC is to enable a court to clarify any doubt and can not be invoked at the behest of the petitioner for filling up or covering up act of omission or commission, and as such the application is not maintainable (relied on Vadiraj Naggappa Vernekar V/s Sharadchandra Prabhakar Gogate; (2009) 4 SCC 410; Gayathri V/s M. Girish, (2016) 14 SCC 14; P.

Mohan V/s M.K. Azhagiri & Ors, AIR 2014 Madras 18;
Jhanwarlal Patwa V/s Uday Narain Goswami & Anr., AIR 2006
Gauhati 184); (b) because repeated adjournments are sought by the Ld. counsel for the petitioner which is a misconduct (relied on N.G. Dastane V/s Shrikant S. Shivde & Anr.; AIR 2001 SC 2028); (c) because the contents of the application is based on whims and fancies of the petitioner and are false and contrary to records and the petitioner is trying to hoodwink this court (relied on Dalip Singh V/s State of Uttar Pradesh & Ors.; (2010) 2 SCC 114); and (d) because this court in terms of Section 35 (B) CPC is well within its right to close the right of the petitioner to further cross-examine the said witness (relied on Manohar Singh V/s D.S. Sharma & Anr., (2010) 1 SCC 53).

7. Heard. Record perused.

8. Order 18 of CPC deals with hearing of the suit and examination of witnesses. By an amendment introduced thereunder with effect from 01.02.1977, Rule 17A was introduced permitting production of evidence not previously known or which could not be produced despite due diligence. It appears, the amendment only caused unnecessary protraction of the litigation, and hence, the said provision was omitted by The Code of Civil Procedure (Amendment) Act, 1999 with effect from 01.07.2002. However, Rule 17 was retained which reads as follows:

“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.”

9. Hon’ble Supreme Court of India in Vadiraj Naggappa Vernekar (Dead) Through LRs. v. Sharadchandra Prabhakar Gogate; (2009) 4 SCC 410, has summarised the principle at paragraphs- 25, 28 and 29:-

“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.

xxx xxx xxx

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.

29. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, 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 his examination.”

10. Hon’ble Supreme Court of India in K.K. Velusamy v. N. Palanisamy; (2011) 11 SCC 275 followed the principles enunciated in Vadiraj (supra), and held;

“9. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate.)

10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling 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. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

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.”

(Underlined by me)

11. The settled legal position under Order 18 Rule 17 read with Section 151 of the CPC, being thus very clear, that the said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-

chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling 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.

12. 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 Hon'ble Supreme Court in K.K. Velusamy (supra) (Re-iterated by the Hon'ble Supreme Court in Ram Rati V/s Mange Ram (D) through LRs; Decided on 23.02.2016 in Civil Appeal No. 1684 of 2016).

13. Before coming to the application, let us also consider the provision of Section 35-B CPC. Hon'ble Himachal Pradesh High Court in Piara Devi V/s Anant Ram & Anr.; 2008 SCC OnLine HP 8 held that in case a suit is dismissed or defence is struck off in terms of Section 35-B, only on account of non-payment of costs, the aggrieved party can apply to the court under Section 151 CPC for recalling the orders, if it can show sufficient cause for non payment of the costs imposed. Every court has the power to recall or review its orders. In the absence of any express provision in this behalf, the power can also be derived from Section 151 CPC.

14. As already noted, the petitioner has filed his application under both the provisions i.e. under Order XVIII Rule 17 and under Section 151 of CPC, 1908.

15. This is not a case where the petitioner is seeking recall of the witnesses for further cross-examination for filing up some omissions in the evidence of the witness or putting some further question which the petitioner inadvertently failed to put when the witness was under cross-examination. As already noted the said witness O2W1 was examined and partly cross-examined on 31.08.2022 and his further cross-examination was deferred for 25.02.2023 and 24.04.2023, however since the petitioner failed to cross-examine the said witness, this court vide order dated 24.04.2023 closed the right of the petitioner to further cross-examine O2W1, on account of non-compliance with the directions dated 25.02.2023 including non-payment of cost in terms of Section 35(B) CPC. Petitioner accordingly filed the aforesaid application on 03.08.2023.

16. As such the further cross-examination is necessitated as this court closed the right of the petitioner to further cross-examination of O2W1. Ld. counsel for the petitioner during arguments had submitted that the petitioner is ready to make the cost of Rs. 5000/- imposed vide Order dated 25.02.2023 to the Respondent No. 2. Further, this court is conscious of the fact that the present petition is regarding grant of probate of Will dated 07.08.2000 executed by Late Sh. Basant Singh and as per Section 41 of the Evidence Act, 1872, the grant operates as rem. This court as such is of view that in the interest of justice and to

prevent the abuse of process of court, it is necessary to afford one last and final opportunity to the petitioner, subject to clearance of cost of Rs. 5000/- imposed vide Order dated 25.02.2023, to conclude the cross-examination of O2W1.

17. Considering the fact that the witness O2W1 is aged about 75 years, that petition pertains to the year 2006 and that the petitioner has been negligent in the prosecution of the petition, petitioner is burdened with the further cost of Rs. 10,000/- to be paid to the Respondent No. 2.

18. One last and final opportunity is accordingly granted to the petitioner to conclude the cross-examination of O2W1 Sh. Yogendra Pal Singh, subject to clearance of cost of Rs. 5000/- imposed vide Order dated 25.02.2023 and payment of further cost of Rs. 10,000/- to the Respondent No. 2.

19. Application of the petitioner filed under Order XVIII Rule 17 read with Section 151 of CPC, 1908, on 03.08.2023 is disposed of in above terms.

20. Ordered Accordingly.

*Announced in the open court on this 27th day of August, 2024.
This Order consists of eleven signed pages.*

(Abhishek Srivastava)
District Judge-05,
Central, THC, Delhi