

ORDERS ON IA No.22 & 23

Since both these interim applications are arising out of the similar set of facts and circumstances and connected to each other, therefore taken together for disposal to avoid repetition of appreciation of facts.

IA No.22 is filed by the applicant/plaintiff under Order XVIII Rule 17 and Sec.151 of CPC and sought to recall defendant No.2 for further cross examination.

IA No. 23 is filed by the applicant/plaintiff under Sec.151 of CPC and sought to reopen the case.

2. The plaintiff has filed affidavits in support of the averments made in the application wherein it is contended that material question was not put to the 2nd defendant at the time of cross examination. Proving issue No.2 is on the shoulder of the plaintiff. The plaintiff has recently traced some documents and on the basis of those documents also further cross examination of the 2nd defendant is necessary. If the application is allowed no inconvenience or injustice would cause to the defendants. Hence the plaintiff/applicant sought to allow the application.

3. Both the applications have been resisted by the defendants/opponents on the ground that the case is posted for arguments. Several interim applications came to be filed. All the applications have been dismissed. Even after that with the oblique motive just to delay the process, the plaintiff is filing application one after another. After omission of Order 18 Rule 17 of CPC, Sec.151 of CPC cannot be invoked for the purpose of

recall the witnesses. Rest of the contentions have been denied. Hence they sought to dismiss the applications with costs.

4. Heard the arguments.
5. The points that would arise for my determination are:
 1. Whether the applicant/plaintiff has made out a case to recall 2nd defendant for further cross examination in view of the documents traced recently as alleged?
 2. What order?

6. The above point No.1 is answered in the negative and point No.2 for the following:

REASONS

7. **Point No.1:** Before advertng to the contentions urged by the both the parties, it is just and necessary to narrate in brief the facts which led to the filing of the said applications. The plaintiff has filed suit for specific performance of contract . After conclusion of the evidence of both the parties, case was posted for arguments on 4.09.2019. After posting of the case for arguments, the plaintiff/applicant has filed IA No.16 and 17 for the purpose of reopening of the case. Both the interim applications have been rejected. After that again case was posted for arguments. On 27.11.2019 again IA No.18 and 19 were filed

to recall and reopen the case. That application is also came to be dismissed on 7.12.2019. On 17.12.2019 one more application under IA No.20 was filed seeking amendment of the plaint and that was also came to be dismissed by this court on 29.01.2020. None of the orders have been sought to assail before Hon'ble High court of Karnataka. Thereafter again the instant interim applications have been filed to recall 2nd defendant for further cross examination .

8. In the background of the above, if the applications are considered, as rightly submitted by the learned counsel for the 2nd defendant/opponent, it is contended in the affidavit that the plaintiff had traced certain documents recently and to prove issue No.2 on the basis of the said documents cross examination is necessary. But it is worthwhile to note that if any documents traced during the pendency of the suit after conclusion of the evidence of both the parties, the plaintiff may recall himself and lead evidence in respect of the documents traced recently as averred by him. The plaintiff/applicant cannot be permitted to prove the documents through 2nd defendant /opponent . The Hon'ble High court of Karnataka in the cases of ***Vadiraj Naggappa Vernekar (deceased by LRs) Vs. Sharad Chand Prabhakar Gogte AIR 2009 Supreme Court 1604, M/s Bagai Construction Thr. Its Proprietor Lalit Bagai Vs. M/s***

Gupta Building Material Store AIR 2013 Supreme court 1849 has held that power conferred under Order 18 Rule 17 is to be sparingly exercised and in appropriate cases and not as a general rule. In civil suit recording of evidence ought to be continuous – followed by arguments and decision adjournments, reopening and recalling of witnesses - to be allowed only in compelling circumstances. Further in the case of ***Abdul Naveed Vs. Dr. Masbah Nazam 2012(2) Kar. L.J. 692*** our own Hon'ble High court has held that witnesses cannot be recalled to fill up lacuna.

9. If the facts of the present case is examined in the light of the judgments of the Apex court and our own Hon'ble High Court in the instant case, the averements made in the affidavit appears to be tainted with malafidiness for the reason that when the case is posted for arguments, not only several adjournments have taken but various interim applications which was filed and even though all the interim applications came to be dismissed. Being aggrieved, none of the interim applications have been sought to be challenged before the Hon'ble High Court of Karnataka. As held in the decisions referred above, after omission of Order 18 Rule 17 CPC while exercising discretion under Sec.151 of CPC court must be on the guard and not allow the application in a mechanical

manner in each and every case. Therefore the application is vague, unspecific about the documents. **Therefore I answer point No.1 in the negative and proceed to pass the following:**

ORDER

IA 22 filed by the applicant/plaintiff under Order XVIII Rule 17 and Sec.151 of CPC and IA 23 filed by the applicant/plaintiff under Sec.151 of CPC are hereby dismissed with no order as to costs.

Call on for arguments finally by
07.03.2020

(Vivekananda S. Pandit)
Prl. Senior Civil Judge & CJM, Udupi