

S.Sivakumar. Vs. P.Venkatachalam

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Court : Chennai

Decided On : Jul-10-2012

Judge : V.Dhanapalan, J.

Acts : [Code of Civil Procedure,\(CPC\) 1908](#) - Section 151, 17-A , Order 18 Rule 17A; [Constitution of India](#) - Articles 227

Appeal No. : C.R.P.(PD) Nos.323 and 324 of 2012

Appellant : S.Sivakumar

Respondent : P.Venkatachalam

Advocate for Def. : Mr.S.Chandrasekaran, Adv.

Advocate for Pet/Ap. : Mr.N.Manokaran, Adv.

Judgement :

Civil Revision Petitions filed under Article 227 of the [Constitution of India](#) against the fair and decretal order dated 29.10.2011 made in I.A.Nos.871 and 872 of 2011 in O.S.No.346 of 2009 on the file of the First Additional Sub Court, Erode.

ORDER

1. These Civil Revision Petitions are filed against the fair and decretal orders dated 29.10.2011 made in I.A.Nos.871 and 872 of 2011 in O.S.No.346 of 2009 on

the file of the First Additional Sub Court, Erode, in and by which the trial Court dismissed the applications for reopening of plaintiff side evidence.

2. According to the learned counsel for the petitioner/plaintiff, some important facts were omitted to be explained during the chief-examination of P.W.1 and hence P.W.1 has to be recalled. The said fact is disputed by the learned counsel for the respondent/defendant, stating that already plaintiff's side witnesses were examined and cross-examined by the respondent and by filing the applications, the petitioner wants to fill up the lacuna which cannot be permitted.

3. In support of his contentions, learned counsel for the petitioner has relied on the following:

(i) a decision of this Court reported in 2002 (3) CTC 92 in the case of P.S.Pandian vs. Annai Velanganni Films, Chennai and another

"10. The phrase "good cause" employed under Order XIII, Rule 2, C.P.C., no doubt, requires adequate, sound and genuine reasons, but it depends upon the facts and circumstances of the individual case, as the good cause or sufficient case, as the case may be, is intended only to ensure the bona fide of the parties who approach the Court for production of the documents at a subsequent stage. Therefore, it is suffice for the Court to find out whether the claim of a person who approaches the Court for production of the documents at a subsequent stage, lacks bona fide or suffers from mala fide. In either case, the test to be adopted is whether the documents relied upon by the party are required to meet the ends of justice.

11. Therefore, I am of the considered opinion that the Court, while exercising the power conferred under Order XIII Rule 2, C.P.C., should exercise the same liberally, to meet the ends of justice. Similarly, the same yardstick is equally applicable while exercising the power conferred under Order XVIII Rule 17, C.P.C., because, the said Rule provides for examination of witness only to meet the ends of justice, by enabling the authorities to substantiate their claim. Hence, both the provisions cannot be interpreted rigidly."

(ii) a Supreme Court decision reported in 2003 (3) CTC 315 in the case of Baljeet Singh vs. Harliveleen

"5. Having regard to the peculiar facts and circumstances of the case and taking note of the fact that the proceedings are matrimonial proceedings pending since 2001, we are of the view that an opportunity is to be given to the appellant to cross-examine the respondent-wife, one witness the mother examined on her behalf. Since the respondent is made to come to this Court for no fault of her, she needs to be compensated in terms of money. Under these circumstances, we dispose of this appeal by the following order:

6. The impugned order is set aside. The appellant is given opportunity to cross-examine the respondent and her witness on the next day of hearing, subject to the appellant-husband paying a sum of Rs.3,000/- as costs to the respondent-wife. The appellant shall not take further adjournment in the proceedings and shall go on with the proceedings on the given date. We expect the Trial Court to dispose of the matrimonial case pending before it as expeditiously as possible."

(iii) yet another Supreme Court decision reported in (2011) 11 SCC 275 in the case of K.K.Velusamy vs. N.Palanisamy

"16. Neither the trial court nor the High Court considered the question whether it was a fit case for exercise of discretion under Section 151 or Order 18 Rule 17 of the Code. They have not considered whether the evidence sought to be produced would either assist in clarifying the evidence led on the issues or lead to a just and effective adjudication. Both the courts have mechanically dismissed the application only on the ground that the matter was already at the stage of final arguments and the application would have the effect of delaying the proceedings.

19. 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. If 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 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 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 firstly award appropriate costs to the other party to 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."

4. Learned counsel for the respondent, to substantiate his case, has relied on the following:

(i) a decision of the Supreme Court reported in AIR 2009 SC 1604 in the case of Vadiraj Naggappa Vernekar (deceased by L.Rs) vs. Sharad Chand Prabhakar Gogate

"13. In support of his submissions, Mr.Jadhav referred to a single Bench decision of the Allahabad High Court in Sunder Theatres v. Allahabad Bank, Jhansi (AIR 1999 All 14), where a similar question arose and the Court observed that the power of the Court under Order 18 Rule 17 CPC is discretionary and has to be exercised with the greatest care and only in exceptional circumstances. It was further observed that under the garb of this rule, the Court ought not to recall a witness at the instance of a party in order to fill up a lacuna in the evidence already led.

14. Mr.Jadhav, therefore, submitted that the application filed by the appellants under Order 18 Rule 17 CPC had been rightly rejected by the Courts below following the well-established principles as to invocation of power by a court under Order 18 Rule 17 CPC.

15. Having heard the learned counsel for the respective parties, we are unable to agree with Mr.Narasimha that both the single Judge and the Division Bench of the High Court had erred in rejecting the appellants' application under Order 18 Rule 17 CPC since, according to Mr.Narasimha, no prejudice would be caused to the respondent as he would be given a chance of cross-examination after re-

examination-in-chief by the plaintiff."

(ii) an unreported decision of this Court made in CRP (NPD) No.758 of 2010, dated 14.03.2011 in the case of P.K.Madeswaran vs. T.S.Sivakumar

"8. Learned counsel for the respondent has relied upon the decision rendered by P.Sathasivam, J (as he then was) in the case of Krishnaveni and others vs. Gopal Pandithar (reported in 2006 (5) CTC 394) wherein after the defendants' witness was cross-examined, the plaintiff filed the applications to reopen and recall the defendants' witness to enable him to further cross examine such witnesses, as the plaintiff has failed to put vital questions. Since such applications have not been allowed, the same were challenged in the revisions. While considering the revisions, it has also been held that such applications are to be allowed if they are bonafide and not filed after delay.

11. The learned Single Judge, in the decision reported in 2006 (5) CTC 394 (cited supra), has held that if the case is reopened and the witnesses are recalled and the defendant is allowed to cross examine, no prejudice will be caused to the plaintiff/petitioner herein. In the decision reported in 2009 (4) SCC 410 (cited supra), the Apex Court has categorically laid down that under Order XVIII Rule 17 of the Civil Procedure Code, the Court can exercise its discretion either on its own motion or on an application filed by any of the parties to the suit, but such power is to be invoked not to fill up the lacunae in the evidence of the witness, which had already been recorded but to clear any ambiguity that may have arisen during the course of his examination. Following the earlier decisions, the Apex Court clearly laid down that the power under the provisions of Order XVIII Rule 17 of the Civil Procedure Code 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. The Apex Court further held that that is not the scheme or intention of Order XVIII Rule 17 of the Civil Procedure Code. The reason recorded by the Court below is quite contrary to the aforesaid law laid down by the Apex Court and therefore, the same cannot be sustained."

(iii) yet another decision of this Court reported in (2012) 2 MLJ 19 in the case of R.Jayakanthan vs. B.Sritha

"9. However, in the present case on hand, the facts extracted above would indicate that P.W.1 and other witnesses have been cross-examined at length by the counsel appearing for the wife/respondent herein and thereafter, the wife has come up with a transfer petition for transferring the matter from the file of the learned Subordinate Judge at Pollachi to the file of any other competent Court at Coimbatore making certain allegations against the Presiding Officer stating that he has not recorded the evidence properly. This Court has found that the lengthy cross examination made by her counsel, which was recorded by the said Officer would prove that her statement is not correct and dismissed the transfer petition. Thereafter, the respondent wife was examined and cross-examined. ..."

5. I have heard the learned counsel for the parties and also gone through the records.

6. 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. It 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. It 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.

7. 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 power 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. 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. The scope of Section 151 has been explained by the Supreme Court in a catena of decisions, in the following manner :

(a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognises the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is right and undo what is wrong , that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code. (d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided

in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a *carte blanche* to grant any relief.

(f) The power under Section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

8. The Code, earlier, had a specific provision in Order 18 Rule 17-A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. By Act 46 of 1999, the amended provision under Section 17-A was omitted and it was given effect from 1-7-2002. 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. The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence.

9. The power under Section 151 of the Code is 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. But 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 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 firstly award appropriate costs to the other party to 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. The above is the law laid down by the Supreme Court in K.K.Velusamy's case, cited above.

10. Keeping the above guidelines and the ratio laid down by the Supreme Court in mind, if we look at the present case, it is clear that already, the petitioner had filed I.A.No.683 of 2011 for reopening of the case before the trial Court and the same was allowed, pursuant to which both the petitioner and defendant were examined in chief and cross and thereafter the evidence on either side was closed. Now, again, the petitioner has filed the present applications for the second time to reopen the plaintiff's side evidence, to fill up the lacuna, which cannot be permitted. It is also seen that the petitioner was given sufficient opportunities to put forth his case by way of examination in chief. From this, it is clear that the present attempt of the petitioner is only to drag on the proceedings in the suit, which is at the stage of arguments.

11. Moreover, when 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, and as, in the instant case, the need for clarification of any issue or doubt did not arise for the Court below to recall the witness, if the applications filed by the petitioner are allowed, it will amount to abuse of process of court and the very purpose of cross-examination will stand negated, thereby causing much prejudice to the respondent as well.

12. Therefore, finding no infirmity in the orders of the trial Court, these C.R.Ps. are dismissed. No costs. Consequently, the connected M.P.No.1 of 2012 is also

dismissed.

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