

RAM RATI

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v.

MANGE RAM (D) THROUGH LRS. AND ORS.

(Civil Appeal No. 1684 of 2016)

FEBRUARY 23, 2016

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[KURIAN JOSEPH AND ROHINTON FALI NARIMAN, JJ.]

Code of Civil Procedure, 1908 – Order 18 r. 17 – Application under – Scope of – Power of the court u/r 17 is though discretionary, has to be used sparingly – The power cannot be invoked to fill up the omission in the evidence already led by a witness, or for the purpose of filling up a lacuna in the evidence – ‘No prejudice is caused to either party’ also cannot be a ground to be invoked u/r. 17 – If the court invokes the power u/r. 17, it has to see that trial is not unnecessarily protracted on that ground – However, the rigour of r. 17 does not affect the inherent powers of the court – In the present case, the application u/r. 17 for further elaboration on the left out points is impermissible in law.

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Allowing the appeal, the Court

HELD: 1. The basic purpose of Rule 17 of Order 18 C.P.C. is to enable the court to clarify any position or doubt, and the court may, either *suo motu* or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. ‘No prejudice is caused to either party’ is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground. [Para 11] [14-A-C]

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A 2. 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
 B suit, even after closure of evidence. Thus, the inherent power is
 the only recourse. [Para 14] [15-G]

3. Thus, in view of the legal position under Order 18 Rule
 17 read with Section 151 of the CPC, the impugned orders
 passed by the trial court as affirmed by the High Court to recall a
 witness at the instance of the respondent “for further elaboration
 C on the left out points”, is wholly impermissible in law. [Para 18]
 [18-D]

*Vadiraj Naggappa Vernekar (Dead) Through Lrs. v.
 Sharadchandra Prabhakar Gogate (2009) 4 SCC 410;
 2009 (2) SCR 1071; K.K. Velusamy v. N. Palanisamy
 D (2011) 11 SCC 275; 2011 (4) SCR 31; Bagai
 Construction Through its Proprietor Lalit Bagai v.
 Gupta Building Material store (2013) 14 SCC 1; 2013
 (2) SCR 116 – relied on.*

Case Law Reference

E	2009 (2) SCR 1071	relied on.	Para 12
	2011 (4) SCR 31	relied on.	Para 13
	2013 (2) SCR 116	relied on.	Para 17

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1684
 of 2016

F From the Judgment and Order dated 09.04.2013 in Civil
 Miscellaneous (Main) No. 507 of 2011 passed by the High Court of
 Delhi at New Delhi.

Pritesh Kapur, Om Prakash, A. Abhinav, (For Vivek Narayan
 G Sharma), Advs. for the Appellant.

Praveen Jain, Sidharth Jain, Ajay Kumar Jain, Advs. for the
 Respondents.

The Judgment of the Court was delivered by

KURIAN, J.: 1. Leave granted.

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2. Whether a witness can be recalled under Order 18 Rule 17 of The Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') for further elaboration of aspects left out in evidence already closed, is the issue for consideration in this case. A

3. There are two suits filed by the respective parties and pending before the Tis Hazari Courts at Delhi. Civil Suit No. 43 of 2009 was filed by the respondents herein for declaration and injunction in respect of the B
plaint schedule property. In respect of very same property, the appellant herein also filed a suit seeking permanent injunction and that suit has been numbered as Civil Suit No. 44 of 2009. The suits were consolidated for common trial, on joint request, by order dated 08.12.2007. Suit No. C
43 of 2009, with the consent of the parties, was ordered to be tried in the court where Suit No. 44 of 2009 was pending by order dated 26.09.2005 of the District Judge, Delhi. Much before that, evidence in Civil Suit No. 44 of 2009 had commenced and the appellant herein had been examined as PW-1 and the respondents herein had cross-examined PW-1 as well. That evidence was closed on 16.04.2005. After the consolidation D
of the two suits, the respondents herein filed an application on 13.04.2010. We shall extract the averments made in the said application as under:

“APPLICATION ON BEHALF OF DEFENDANT FOR DISCHARGING THE STATEMENT OF PW-1 AND EXAMINATION OF WITNESS I.E. PW-1 AFRESH UNDER ORDER 18 RULE 17 C.P.C. READ WITH SECTION 151 C.P.C. E
Sir,

The applicant most respectfully submits as under:-

1. That the plaintiff examined PW-1, Sh. Chottu Ram as PW1- on 6.12.2004. His cross examination was concluded on 16.4.2005. F
2. That this Hon'ble Court consolidated the present suit with another suit titled as Mange Ram Vs. Chander Kanta etc. vide its order dated 8.12.2007.
3. That while passing the order of consolidation dated 8.12.2007, this Hon'ble Court ordered as under:- G

“It has been so urged on behalf of both contesting sides that trial in two cases be conducted commonly and evidence led in either case be read in both these cases.”

4. The directions or observations of this Hon'ble Court as reproduced above operates prospectively and not retrospectively. H

A 5. That when the Hon`ble Court ordered that evidence in one case may be read in evidence in another case, then plaintiff in Mange Ram Vs. Chander Kanta & Ors. would be deprived of the opportunity of cross examination of PW-1 which was concluded on 16.4.2005, much prior to the date of order of consolidation.

B 6. That as per settled position of law on this point and as per terms of order of this Hon`ble Court dated 08.12.2007, either the PW-1 be examined afresh or opportunity to cross examine the PW-1 may be granted to the applicant/plaintiff in Mange Ram Vs. Chander Kanta & Ors.

C It is, therefore, prayed that PW-1 may kindly be examined afresh or opportunity to cross examine the PW-1 in Ram Rati Vs. Mange Ram etc. may kindly be granted to the applicant.”

D 4. By order dated 15.04.2008 of the Additional District Judge, Delhi in Civil Suit No. 43 of 2009 filed by the respondents, the suit as against Defendant Nos. 5 and 6 was rejected and it was held that the plaintiff did not disclose any cause of action against them. Defendant No. 5 was the plaintiff in Suit No. 44 of 2009 and Defendant No. 6 is her husband. That Defendant No. 5 is the applicant before this Court.

E 5. Thus, the only ground taken up in the application filed under Order 18 Rule 17 of the CPC is that after consolidation of the suits, the plaintiff in Civil Suit No. 43 of 2009 should get an opportunity to cross-examine the PW-1 (Defendant No. 5 in Civil suit No. 43 of 2009).

F 6. It is interesting to note that in the order dated 24.02.2010 passed by the Additional District Judge in Civil Suit No. 44 of 2009, it has been observed by the Court that the plaintiff in Civil Suit No. 44 of 2009 is no more a party to Civil Suit No. 43 of 2009 and the earlier order of consolidation of suits dated 08.12.2007 was maintained, further clarifying that the past evidence of plaintiff in Civil Suit No. 44 of 2009, which has already been recorded, to be treated as the main suit.

G 7. We shall extract the order dated 24.02.2010, which reads as follows:

“Since the facts in this suit and suit No. 43/09 are intertwined even though Plaintiff is no more a party to suit No. 43/09, her claim for declaration to suit property therein may have reflection on the entitlement of Plaintiff, therefore, with the consent of both

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sides, the consolidation order dated 8.12.2007 is being maintained and suit No. 44/09 where past evidence of Plaintiff Ram Rati has been recorded is treated as main suit.” A

8. But it has to be noted that the Suit No. 43 of 2009 stands rejected against that PW-1 (Defendant No.5). Not only that, being a defendant in Suit No. 44 of 2009, PW-1 had been cross-examined also by the respondent herein. What is lost, if at all it can be termed so, is the opportunity to cross-examine in the capacity as plaintiff in O.S. No. 43 of 2009. But that suit, as noted above, had already been rejected as against PW-1 (Defendant No. 5), appellant herein. Unfortunately, both the courts have taken the view that the examination of PW-1 in Suit No. 44 of 2009 having taken place prior to consolidation, the plaintiff in Suit No. 43 of 2009 did not get an opportunity to cross-examine him. B C

9. The trial court, by order dated 18.12.2010, allowed the application filed by the respondent ... “for further elaboration on the left out points by the parties...”. The High Court, in the impugned order, endorsed the view taken by the trial court, holding that ... “reading the impugned order shows that the witness has been recalled, if available for further elaboration on the left out points to both the parties”. Since, the High Court and trial court have taken a wholly wrong approach in the matter and against the settled principles of law, it has become necessary for us to restate the law as well. D E

10. 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: F

“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.” G

11. The respondent filed the application under Rule 17 read with Section 151 of the CPC invoking the inherent powers of the court to make orders for the ends of justice or to prevent abuse of the process of H

- A the court. The basic purpose of Rule 17 is to enable the court to clarify any position or doubt, and the court may, either *suo motu* or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness
- B for the purpose of clarification required or permitted by the court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. ‘No prejudice is caused to either party’ is also not a
- C permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground.

- D 12. In Vadiraj Naggappa Vernekar (Dead) Through LRs. v. Sharadchandra Prabhakar Gogate¹, this principle has been summarized at paragraphs- 25, 28 and 29:

- E “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.

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- F 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.
- G 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

H ¹(2009) 4 SCC 410

which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.” A

13. In K.K. Velusamy v. N. Palanisamy², the principles enunciated in Vadiraj (supra) have been followed, holding at paragraphs-9 and 10:

“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.*) B
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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.” E
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14. 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 this Court in K.K. Velusamy (supra) at paragraph-11, which reads as follows: G

² (2011) 11 SCC 275

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. A
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(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. C

(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. D
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(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.” F

16. Some good guidance on invocation of Section 151 of the CPC to reopen an evidence or production of fresh evidence is also available in K.K. Velusamy (supra). To quote paragraph-14: G

“14. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then proceed to judgment. Therefore, it was unnecessary to have an express provision for reopening the evidence to examine a fresh witness or for recalling any witness H

- A for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands on earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose.”
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- C 17. Vadiraj (supra) and K.K. Velusamy (supra) have also found affirmation by this Court in Bagai Construction Through its Proprietor Lalit Bagai v. Gupta Building Material Store³.

- D 18. The settled legal position under Order 18 Rule 17 read with Section 151 of the CPC, being thus very clear, the impugned orders passed by the trial court as affirmed by the High Court to recall a witness at the instance of the respondent “for further elaboration on the left out points”, is wholly impermissible in law.

19. In the above circumstances, the impugned order is set aside and the appeal is allowed.

- E 20. We are informed that during the pendency of the appeal, the evidence has been closed and what remains is only the final arguments. In view of the above, we direct the trial court to dispose of the suits expeditiously and preferably within one month from the date of receipt of a copy of this order.

21. There shall be no order as to costs.

F Kalpana K. Tripathy

Appeal allowed.

³ (2013) 14 SCC 1