(2017) 09 SHI CK 0019

High Court of Himachal Pradesh

Case No: 56 of 2017

Desh Raj, & Anr.	APPELLANT
Vs	
Keshav Ram, & Ors.	RESPONDENT

Date of Decision: Sept. 15, 2017

Acts Referred:

- Constitution of India, Article 227 - Power of superintendence over all courts by the High Court
- Code of Civil Procedure, 1908, Section 151, Order 18Rule 17 - Saving of Inherent powers of Court

Hon'ble Judges: Sandeep Sharma

Bench: Single Bench

Advocate: B.S. Attri, Anup Rattan

Final Decision: Dismissed

Judgement

1. By way of instant petition filed under Article 227 of the Constitution of India, challenge has been laid to the order dated 16.12.2016, passed by learned Civil Judge (Junior Division) Manali, District Kullu, Himachal Pradesh in Civil Suit No. 33/2012, whereby application filed under Section 151 CPC on behalf of the petitioners-defendants (herein after, ''defendants'') for leading additional evidence has been dismissed.

2. Briefly stated the fact as emerge from the record are that the respondents-plaintiffs (hereinafter, ''plaintiffs'') filed a suit for declaration and prohibitory injunction, alleging therein that Will dated 20.11.2007, is illegal, null and void and not binding upon the plaintiffs. By way of aforesaid suit, plaintiffs also prayed that the defendants be restrained from interfering in the ownership and possession of plaintiffs over the suit land, on the basis of Will, allegedly executed in

their favour as well as mutation attested by Assistant Collector 2nd Grade, Manali, District Kullu, bearing No. 142 dated 17.11.2011. Defendants, while refuting the claim as set up by the plaintiffs in the plaint, filed written statement and controverted the allegations as contained in the plaint. Defendants specifically denied that property in suit was inherited by the plaintiffs including proforma defendant. Defendants rather claimed that the suit land was bequeathed by deceased Ridku in favour of defendants No.1 and 2 sons of late Mangal Chand, by way of Will, which was executed on 19.11.2007 and registered on 20.11.2007, in the office of Sub Registrar, Manali. As per defendants, testator namely Ridku, by way of aforesaid Will, bequeathed land measuring 4 Biswa in favour of Mangal Chand (predecessor-ininterest of the defendants), on 15.3.2008, i.e. much prior to the death of testator, Ridku. Defendants further claimed that the mutation was attested on 17.1.2011, in their favour and at that relevant time, no objections, whatsoever, were raised by the plaintiffs and, accordingly, authorities attested and sanctioned mutation in favour of the defendants. Learned Court below, on the basis of pleadings adduced on record by the respective parties, framed as many as seven issues including issue No. 2 i.e. "Whether Will dated 20.11.2007, is null and void? OPP" Onus, if any, to prove the Will i.e. Ext. PW-1/D is/was upon the plaintiffs. It emerges from record that defendants after examination of plaintiff''s witnesses got their statements recorded, but since defendants failed to produce witnesses with regard to execution of aforesaid Will, they moved an application under Section 151 CPC before the court below, annexure P-3, seeking therein permission to lead additional evidence. Defendants, in the application referred to above, contended that inadvertently, they could not examine and produce scribe, marginal witnesses of Will dated 19.11.2007 and Registration Clerk of the office of Sub Registrar, Manali, while leading defendants'' evidence, as such, they may be allowed to examine following persons:

"(i) Sh. Vivek Bodh Advocate Manali, the Scribe of the Will dated 19-11-2007.

(ii) Sh. Luder Chand-Chowkidar, Gram Panchayat Nasogi, R/o Village Siyal, Tehsil Manali District Kullu HP.

(iii) Sh. Bhag Chand S/o late Sh. Mehar Chand R/o Koshla P.O. Vashisht, Tehsil Maanli, District Kullu, HP.

(iv) Sh. Atma Ram Numberdar s/o late Sh. Haru Ram R/o Village nasogi P.O. Chhiyal, Tehsil Manali District Kullu, HP.

(v) Registration Clerk office of Sub- Registrar Manali with the record of Will Dated 19-11-2007 Registered on 20-11-2007 vide serial No.35 Executed by late Sh. Ridku Ram S/o late Sh. Dilu R/o Village Gadherni Phati Shaleen Kothi and Tehsil Manali, District Kullu, HP."

3. Defendants submitted before the Court below that afore mentioned witnesses are material witnesses and their examination is quite necessary for just decision of the case at hand and in case, application is allowed no prejudice whatsoever, shall be caused to the opposite party.

4. Plaintiffs, by way of reply to the application, opposed aforesaid prayer having been made by applicants-defendants. Plaintiffs stated in the reply that since defendants were having knowledge about existence of Will dated 19.11.2007, as such, they could have examined such witnesses earlier. Plaintiffs further averred before the Court below that present application had been only filed to fill up lacuna and laches and in any case, witnesses proposed to be examined are not at all important to be examined at this stage.

5. Learned Court below, taking note of the aforesaid averments contained in the application and reply thereto, passed order dated 16.12.2016, thereby dismissing the application having been preferred by the defendants. In the aforesaid background, defendants approached this Court in the instant proceedings, seeking permission to lead additional evidence after setting aside impugned order dated 16.12.2016, passed by learned Civil Judge (Junior Division), Manali, in Civil Suit No. 33/2012.

6. Mr. B.S. Attri, learned counsel representing the defendants, while inviting attention of this Court to the impugned order, annexure P-5, vehemently contended that the same is not sustainable in the eyes of law, as such, same deserves to be quashed and set aside. Mr. Attri, further contended that bare perusal of impugned order passed by learned Court below, suggests that there is no application of mind, on the part of learned Court below, who, without looking into controversy at hand, dismissed the application preferred by the defendants in a slipshod manner. Mr. Attri, learned counsel representing the defendants, further contended that since specific case was set up by the defendants in the written statement that suit property was bequeathed in favour of the defendants by the testator namely Ridku, by way of Will, Ext. PW-1/D, no harm, if any, would have caused to the opposite party, if opportunity was granted to the defendants to prove the Will, which was already on record. While inviting attention of this Court to the impugned order, passed by learned Court below, learned counsel representing the defendants

contended that the findings recorded by the learned Court below to the effect that "no explanation has been put forth by the defendants that why witnesses could not be examined during the course of evidence", are totally contrary to the material available on the record. To substantiate aforesaid argument, learned counsel invited attention of this Court to the application made by the defendants to demonstrate that plausible explanation has been rendered on record qua omission on the part of the defendants to cite certain persons as defendants'' witnesses, to prove valid execution of Will. Lastly, Mr. Attri, learned counsel representing the defendants, contended that in case, one opportunity is granted to the defendants to examine persons as mentioned in the application, no prejudice would be caused to the opposite party, rather it would help the court below to adjudicate the matter in proper manner. Mr. Attri, in support of his arguments, invited attention of the Court to the judgment passed by a Coordinate Bench of this Court in CMPMO No. 164 of 2016, titled Smt. Kiran Bala and others vs. Smt. Mansha Devi and others decided on 27.9.2016.

7. Mr. Anup Rattan, learned counsel representing the respondents-plaintiffs vehemently opposed aforesaid prayer having been made by the learned counsel representing the defendants. Mr. Anup Rattan, learned counsel representing the plaintiffs, while inviting attention of this Court to the impugned order passed by learned Court below, contended that there is no illegality or infirmity in the same, rather, Court below taking note of the averments made in the application, so preferred by the defendants, rightly came to the conclusion that no plausible explanation has been rendered on behalf of the defendants for not examining the persons, who were sought to be examined at this stage. Mr. Anup Rattan, further contended that bare perusal of application suggests that same has been filed in a very casual manner because there is no specific averment in the application that the applicants-defendants despite due diligence failed to examine certain witnesses to prove validity of Will in question. Mr. Rattan, further contended that bare reading of application so filed by the defendants suggests that contents of same are vague, evasive and as such, learned Court below rightly dismissed the same. Mr. Rattan, further contended that factum with regard to Will dated 19.11.2007, if any, executed by testator Ridku, was very much in the knowledge of the defendants, as such, defendants ought to have examined certain witnesses to prove the same in accordance with law. Mr. Rattan, further contended that evidence of both the parties stands closed and at this stage, application has been filed solely with a motive to fill up the lacuna and laches in the case and great prejudice would be caused to the plaintiffs, in case, application is allowed and defendants are permitted to lead evidence to prove contents of Will Ext. PW-1/D. In support of aforesaid contentions, Mr. Anup Rattan, placed reliance upon judgments passed Hon''ble Apex Court in Ram Rati v. Mange Ram, (2016) 11 SCC 296 and Satish Kumar Gupta v. State of Haryana, (2017) 4 SCC 760.

8. I have heard the learned counsel for the parties and also gone through the record of the case carefully.

9. Perusal of material adduced on record by respective parties, vis-a-vis impugned order passed by Court below, clearly suggests that defendants, while refuting claim of the plaintiffs, as put forth in the plaint, specifically contended that the suit land was bequeathed by late Ridku, in favour of the defendants (successors of Mangal Chand), through Will executed on 19.11.2007 and registered on 20.11.2007, in the office of Sub Registrar, Manali. It also emerges from the record that pursuant to aforesaid Will, mutation was attested in favour of the defendants on 17.1.2011, whereas, suit for declaration and permanent prohibitory injunction seeking therein declaration that Will dated 19.11.2007, is null and void, only came to be filed in the year 2012. It also emerges from the pleadings that the Will as referred to above, came to be tendered in evidence by the plaintiffs during his examination-in-chief, as Ext. PW-1/D and Ext. PW-1/E. It is also not in dispute that defendants prior to moving of instant application for examining certain witnesses had closed their evidence and application only came to be filed at the fag end of litigation, when matter was listed for arguments. Learned Court below, while acknowledging the fact that it had framed specific issue i.e. issue No.2, with regard to genuineness of Will dated 19.11.2007, proceeded to observe that applicants/defendants in their written statement have claimed the Will to be genuine and as such, they should have examined the Scribe and marginal witnesses of the Will at the time of leading their evidence.

10. Bare reading of application preferred on behalf of the defendants, seeking therein permission to lead additional evidence, nowhere suggests that there is specific averment, if any, that applicants/ defendants, despite being diligent, failed to examine and produce Scribe, marginal witnesses of Will dated 19.11.2007 and Registration Clerk of the office of Sub Registrar, Manali, while leading defendants'' evidence. In para-2 of the application, it has been mentioned on behalf of the defendants that applicants, inadvertently could not examine and produce aforesaid persons.

11. Earlier, there was a specific provision of law in Code of Civil Procedure i.e. Order 18 Rule 17, whereby, evidence, previously not known could be produced, which otherwise could not be led/produced despite due diligence. But aforesaid provision of law stood repealed with effect from 1.7.2002, vide Act No. 46 of 1999, as such, application, if any, for production of additional evidence and recalling of evidence for examination/cross-examination after evidence led by the parties, can be filed under Section 151 CPC i.e. inherent powers.

12. Hon''ble Apex Court, in K.K. Velusamy v. N. Palanisamy, (2011) 11 SCC 275, has held that in the absence of any provision for reopening of evidence or recalling of

any witness for further examination/cross-examination, for the purpose, other than seeking clarification required by Court, inherent power under Section 151 CPC, subject to its limitations, can be invoked in appropriate cases, to reopen the evidence or recall witnesses for further examination. Hon''ble Apex Court, in the judgment referred to above, has further held that if there is time gap between completion of evidence and hearing of arguments, for whatsoever reasons and if in that interregnum, party comes across some evidence, which it could not lay its hands earlier or some evidence with regard to conduct or action of other party, comes into existence, court may, in exercise of its inherent powers, under Section 151 CPC, permit production of such evidence, if it is relevant and necessary in the interest of justice, subject to such terms, as Court may deem fit.

13. However, in this regard, it would be apt to have a glance at the contents of application filed by the defendants for summoning witnesses, perusal of which shows that there is no mention of any new fact or piece of evidence, which may have come to the knowledge of the defendants after closure of their evidence, rather, what is mentioned is that, "...applicants inadvertently could not examine and produce the scribe, marginal witnesses of WILL dated 19-11-2007 and Registration clerk of the office of Sub- Registrar Manali...". As such, it is clear that no new fact has come to the knowledge of the defendants, which necessitated filing of application. Further, there is no averment worth the name that despite ''due diligence'', applicants could not examine witnesses earlier.

14. Besides this, in the judgment referred to above, Hon''ble Apex Court, while examining the scope of inherent powers of Court vis-a-vis power conferred by the Courts under Order 18 Rule 17 CPC, which otherwise stands repealed, categorically held that power to recall any witness under Order 18 Rule 17 CPC, can be exercised by the Court on its own motion or on an application filed by parties to the suit, requesting the Court to exercise said power. Said power being discretionary, should be used sparingly in order 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, by recalling any witness, so that Court can put questions to elicit anything. But, most importantly, in the judgment referred to above, Hon''ble Apex Court has held that this power is not intended to be used to fill up omissions in the evidence, which has already been examined. Hon''ble Apex Court, though has also held that though Order 18 Rule 17 stands deleted with effect from 1.7.2002, but deletion does not mean that no evidence can be received at all after a party has closed its evidence, but, it should be specifically proved that evidence came to the knowledge of a party after closure of evidence, which certainly is not the case here.

15. Though, in the aforesaid judgment, Hon''ble Apex Court, has held that if there is time gap between completion of evidence and hearing of arguments, and in that interregnum, a party comes across some evidence which he could not lay his hands

earlier, or some evidence in regard to the conduct or any 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. But, in the case at hand, defendants have not uttered even a single word regarding new facts, if any, having come to their notice, after closure of their evidence, thus, the ratio of aforesaid judgment is not applicable to this case.

16. Hon''ble Apex Court in Ram Rati v. Mange Ram, (2016) 11 SCC 296 has held that the power to recall witness 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. The Hon''ble Apex Court has held as under:

> "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 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 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.
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> 12. In Vadiraj Naggappa Vernekar (Dead) Through LRs. v. Sharadchandra Prabhakar Gogate1, this principle has been summarized at paragraphs- 25, 28 and 29:
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> > "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 1 (2009) 4 SCC 410, 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."

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.)

10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examinationin- chief or cross-examination or to place additional material or evidence which could not be produced when the 2 (2011) 11 SCC 275 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."

17. Hon''ble Apex Court, in Satish Kumar Gupta v. State of Haryana, (2017) 4 SCC 760 has also held that additional evidence cannot be permitted to fill-in the lacunae or to patchup the weak points in the case. The Hon''ble Apex Court has held as under:

"20. It is clear that neither the Trial Court has refused to receive the evidence nor it could be said that the evidence sought to be adduced was not available despite the exercise of due diligence nor it could be held to necessary to pronounce the judgment. Additional evidence cannot be permitted to fill-in the lacunae or to patch-up the weak points in the case[17]. There was no ground for remand in these circumstances."

18. It would be apt to mention here that there is admittedly no new fact or action of the other party, which has come to the knowledge of the defendants, after closure of their evidence, which would necessitate/justify filing of application for examination of more witnesses. Further, the judgment rendered by this Court, referred to supra, as has been relied by the learned counsel representing the defendants, has no application in this case, as the Will, which the defendants intend to prove, was already on record, as such, it was their duty to have produced witnesses to prove the same. Thus, the application has rightly been dismissed by the learned Court below, as the application itself, does not disclose any new fact having come to the knowledge of the defendants, rather, same seems to be an attempt on the part of defendants to fill up lacuna/omissions in their evidence, which can not be allowed.

19. Accordingly, in view of detailed discussion made herein above and law laid down by the Hon''ble Apex Court, in the judgments cited above, this court does not find any reason to differ with the findings returned by learned trial Court, while dismissing application under Section 151 CPC, preferred by the defendants. Accordingly, the petition being devoid of merit, is dismissed. Pending applications, if any, are also disposed of.