(2012) 07 BOM CK 0022

Bombay High Court (Aurangabad Bench)

Case No: Writ Petition No. 9626 of 2011

Anand Ingle and Another		APPELLANT
	Vs	
Govind Ingle and Others		RESPONDENT

Date of Decision: July 18, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 18 Rule 17, Order 18 Rule 17A, 151

Citation: (2012) 5 ALLMR 228

Hon'ble Judges: S.S. Shinde, J

Bench: Single Bench

Advocate: V.R. Jain, for the Appellant; M.D. Thube-Mhase, Advocate, for the Respondent

Judgement

S.S. Shinde, J.
Rule. Rule made returnable forthwith. By consent, heard finally. This writ petition takes exception to the order dated 8.11.2011, passed by the learned C.J.S.D. Nilanga below Exh.51 in Special Civil Suit No. 44 of 2010.

2. A limited grievance, raised in this petition, is that the application filed by the petitioners herein for recalling the witnesses i.e. P.W. 1 and P.W. 2 for cross examination after filing of written statement by original defendants i.e. petitioners herein has been rejected on the ground that once the witnesses are cross examined, there is no power vested in the Court to call the witnesses for examination or re-examination by the plaintiff or defendants, as the case may be.

3. The learned counsel for the petitioners submitted that the Supreme Court in case of K.K. Velusamy Vs. N. Palanisamy, had an occasion to deal with the provisions of 0.18, R. 17 and has taken a view that the 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. It is submitted, even in the facts of that case, the Supreme Court held that even the powers u/s 151 of the C.P.C. can be exercised for reopening the

evidence or for recalling the witnesses. Therefore, relying upon the said decision of the Supreme Court, the Counsel for the petitioners submits that the writ petition may be allowed.

4. On the other hand, the learned counsel for the respondents submits that under 0.18, R. 17 of the Code of Civil Procedure, the parties to the proceedings cannot file an application for recalling the witness for examination or cross-examination. The powers under 0.18, R. 17 of the Code are to be exercised by the Court in appropriate cases, if it is felt necessary by the concerned Court. However, the power under 0.18, R. 17 is to be exercised by the Court itself by asking the questions or clarification from the witness. However, the said powers under 0.18, R. 17 cannot be invoked or exercised allowing the parties to examine or cross-examine the witness. The learned Counsel submitted that the powers conferred upon the Court to permit a party under 0.18, R.17-A to produce additional evidence, has been taken away by the legislature by deleting the said provision from the Code. Therefore, according to the learned Counsel for the respondents, in the instant case, the trial Court has rightly rejected the application. The learned Counsel for the respondents invited my attention to the judgment of this Court in case of Shri Balkrishna Shivappa Shetty Vs. Shri Mahesh Nenshi Bhakta, Shri Mahendra Nenshi Bhakta, Shri Vijaysingh Gordhandas Kapadia, being the present Trustees of the Trust of Haridas Hemraj Trusts, Shri Hanumant Ganesh Kulkarni (since deceased), Smt. Sulabha Hanumant Kulkarni, Shri Satish Hanumant Kulkarni, Smt. Vandana Vishnu Deshpandey, Mrs. Madhavilata Balchandra Naniwadekar, Mrs. Vasumati Brahmanand Raje, Mrs. Shraddha Pradeep Lalit and Mrs. Deepa Harish Alwa, and submitted that the provisions contained in 0.18, R. 17 of C.P.C. do not empower the Court to recall the witness for the purpose of examination or cross-examination by either of the parties though it does permit recall the witness for the purpose of examination of the Court itself. The learned Counsel, therefore, would submit that there is no merit in the petition and the same deserves to be dismissed.

5. I have given due consideration to the rival submissions. It is true that on plain reading of provisions of 0.18 R. 17 of the Code, it appears that only the Court is empowered to recall the witness to put such questions to elicit any clarification. However, the Supreme Court in case of K.K. Velusamy, [2011(3) ALL MR 455 (S.C.)] (supra) had an occasion to consider the provisions of 0.18 R.17 and also the provisions of Section 151 of the Code. Upon considering the said provisions, the Supreme Court in para 9 of the judgment held that, the inherent powers of the court u/s 151 of the Code 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 Supreme Court, in para 11 of the judgment has also considered that, the Code earlier had a specific provision in Order 18 Rule 17A 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 belated 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. That provision was deleted with effect from 1.7.2002. It is held that, 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. In para 12 of the said judgment, the Supreme Court has observed that, in appropriate cases, the Court may exercise its inherent powers u/s 151 of the Code, permitting 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.

In para 16 of the said judgment, the Supreme Court has also added a word of caution while exercising the powers u/s 151 of the Code or 0.18 R. 17 thereof.

Therefore, it follows from the said authoritative pronouncement of the Supreme Court that the witnesses can be recalled for examination or reexamination, as the case may be, by invoking the provisions of Section 151 of the Code since the said inherent power is not affected by the provisions of 0.18 R. 17 of the Code.

6. In the light of the judgment of the Supreme Court in the case of K.K. Velusamy, [2011(3) ALL MR 455 (S.C.)] (supra) this Court feels it necessary that the petitioner should get one more opportunity to put forth his case before the trial court and it is left open to the trial court to decide the said application in the light of the Judgment of the Supreme Court, cited supra. Therefore, the impugned order is set aside. Application below Exh.41 is restored to its original file. The petitioners and the respondents will appear before the trial court and advance their arguments on merits. It is also left open for the concerned Court to decide the application afresh on merits, however, taking into consideration the exposition of the Supreme Court in the case of K.K. Velusamy, [2011 (3) ALL MR 455 (S.C.)] (supra).

7. Rule is made absolute accordingly. The petition is disposed of in the terms, indicated above. The trial court is directed to hear the said application afresh within a month from today and render its decision thereon. It is made clear that the trial court shall not be influenced by any of the observations made in this order.