Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.2795-2796 OF 2011
[Arising out of SLP [C] Nos.18211-18212 of 2010]

K.K.Velusamy … Appellant

vs.

N.Palanisamy … Respondent

J U D G M E N T

R.V.RAVEENDRAN,J.

Leave granted.

2. The respondent herein has filed a suit for specific performance (OS No.48/2007) alleging that the appellant-defendant entered into a registered agreement of sale dated 20.12.2006 agreeing to sell the suit schedule property to him, for a consideration of Rs.240,000/-; that he had paid Rs.160,000/- as advance on the date of agreement; that the appellant agreed to execute a sale deed by receiving the balance of Rs.80,000/- within three months from the date of sale; that he was ready and willing to get the sale completed and issued a notice dated 16.3.2007 calling upon the appellant to

execute the sale deed on 20.3.2007; and that he went to the Sub-Registrar's office on 20.3.2007 and waited, but the appellant did not turn up to execute the sale deed. On the said averments, the respondent sought specific performance of the agreement of sale or alternatively refund of the advance of Rs.160,000/- with interest at 12% per annum from 20.12.2006.

3. The appellant resisted the suit. He alleged that he was in need of Rs.150,000 and approached the respondent who was a money lender, with a request to advance him the said amount as a loan; that the respondent agreed to advance the loan but insisted that the appellant should execute and register a sale agreement in his favour and also execute some blank papers and blank stamp-papers, as security for the repayment of the amount to be advanced; and that trusting the respondent, the appellant executed the said documents with the understanding that the said documents will be the security for the repayment of the loan with interest. The appellant therefore contended that the respondent - plaintiff was not entitled to specific performance.

4. The suit was filed on 26.3.2007. The written statement was filed on 12.9.2007. Thereafter issues were framed and both parties led evidence. On 11.11.2008 when the arguments were in progress, the appellant filed two

applications (numbered as IA No.216/2009 and IA No.217/2009). The first application was filed under section 151 of the Code of Civil Procedure ('Code' for short) with a prayer to reopen the evidence for the purpose of further cross-examination of Plaintiff (PW1) and the attesting witness Eswaramoorthy (PW2). IA No.217/2009 was filed under Order 18 Rule 17 of the Code for recalling PWs.1 and 2 for further cross examination. The appellant wanted to cross-examine the witnesses with reference to the admissions made during some conversations, recorded on a compact disc (an electronic record). In the affidavits filed in support of the said applications, the appellant alleged that during conversations among the appellant, respondent and three others (Ponnuswamy alias Krishnamoorthy, Shiva and Saravana Kumar), the respondent-plaintiff admitted that Eswaramoorthy (PW2) had lent the amount (shown as advance in the agreement of sale) to the appellant through the respondent; and that during another conversation among the appellant, Eswaramoorthy and Shiva, the said Eswaramoorthy (PW2) also admitted that he had lent the amount (mentioned in the agreement of sale advance) through the respondent; that both conversations were recorded by a digital voice recorder; that conversation with plaintiff was recorded on 27.10.2008 between 8 a.m. to 9.45 a.m. and the conversation with Eswaramoorthy was recorded on 31.10.2008 between 7 to

9.50 p.m.; and that it was therefore necessary to reopen the evidence and further cross-examine PW1 and PW2 with reference to the said admissions (electronically recorded evidence) to demonstrate that the agreement of sale was only a security for the loan. It is stated that the Compact Disc containing the recording of the said conversations was produced along with the said applications.

5. The respondent resisted the said applications. He denied any such conversations or admissions. He alleged that the recordings were created by the appellant with the help of mimicry specialists and Ponnuswamy, Shiva and Saravana Kumar. He contended that the application was a dilatory tactic to drag on the proceedings.

6. The trial court, by orders dated 9.9.2009, dismissed the said applications. The trial court held that as the evidence of both parties was concluded and the arguments had also been heard in part, the applications were intended only to delay the matter. The revision petitions filed by the appellant challenging the said orders, were dismissed by the High Court by a common order dated 7.4.2010, reiterating the reasons assigned by the trial court. The said order is challenged in these appeals by special leave. The

only question that arises for consideration is whether the applications for reopening/recalling ought to have been allowed.

7. The amended definition of "evidence" in section 3 of the Evidence Act, 1872 read with the definition of "electronic record" in section 2(t) of the Information Technology Act 2000, includes a compact disc containing an electronic record of a conversation. Section 8 of Evidence Act provides that the conduct of any party, or of any agent to any party, to any suit, in reference to such suit, or in reference to any fact in issue therein or relevant thereto, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. In *R.M Malkani vs. State of Maharastra* – AIR 1973 SC 157, this court made it clear that electronically recorded conversation is admissible in evidence, if the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is proved by eliminating the possibility of erasure, addition or manipulation. This Court further held that a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is admissible as evidence under Section 8 of the Act. There is therefore no doubt that such electronic record can be received as evidence.

8. 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* - 2009 (4) SCC 410]. 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 moto, 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.

9. There is no specific provision in the Code enabling the parties to re-open 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 powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the evidence and/or recall witnesses for further examination. 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.

10. The respondent contended that section 151 cannot be used for re-opening evidence or for recalling witnesses. We are not able to accept the said submission as an absolute proposition. We however agree that section 151 of the Code cannot be routinely invoked for reopening evidence or recalling witnesses. The scope of section 151 has been explained by this Court in several decisions (*See* : *Padam Sen vs. State of UP*–AIR 1961 SC

218; *Manoharlal Chopra vs. Seth Hiralal* – AIR 1962 SC 527; *Arjun Singh vs. Mohindra Kumar* – AIR 1964 SC 993; *Ram Chand and Sons Sugar Mills (P) Ltd. vs. Kanhay Lal* – AIR 1966 SC 1899; *Nain Singh vs. Koonwarjee* – 1970 (1) SCC 732; *The Newabganj Sugar Mills Co.Ltd. vs. Union of India* – AIR 1976 SC 1152; *Jaipur Mineral Development Syndicate vs. Commissioner of Income Tax, New Delhi – AIR 1977 SC 1348*; *National Institute of Mental Health & Neuro Sciences vs. C Parameshwara* – 2005 (2) SCC 256; and *Vinod Seth vs. Devinder Bajaj* – 2010 (8) SCC 1). We may summarize them as follows:

(a) Section 151 is not a substantive provision which *creates* or confers any power or jurisdiction on courts. It merely recognizes 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 recognizes 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 co-extensive 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 necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or 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 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.

11. 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 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. That provision was deleted with effect from 1.7.2002. 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.

12. 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 re-opening the evidence to examine a fresh witness or for recalling any witness 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 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.

13. The learned counsel for respondent contended that once arguments are commenced, there could be no re-opening of evidence or recalling of any witness. This contention is raised by extending the convention that once arguments are concluded and the case is reserved for judgment, the court will not entertain any interlocutory application for any kind of relief. The need for the court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely

because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extra-ordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized with reference to exercise of power under section 151 of the Code. Be that as it may. In this case, the applications were made before the conclusion of the arguments.

14. 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.

15. The appellant – defendant has taken a consistent stand in his reply notice, written statement and evidence that the agreement of sale was executed to secure a loan of Rs.150,000, as the respondent insisted upon

execution and registration of such agreement. If after the completion of recording of evidence, PW1 and PW2 had admitted during conversations that the amount paid was not advance towards sale price, but only a loan and the agreement of sale was obtained to secure the loan, that would be material evidence which came into existence subsequent to the recording of the depositions, having a bearing on the decision and will also clarify the evidence already led on the issues. According to the appellant, the said evidence came into existence only on 27.10.2008 and 31.10.2008, and he prepared the applications and filed them at the earliest, that is on 11.11.2008. As defendant could not have produced this material earlier and if the said evidence, if found valid and admissible, would assist the court to consider the evidence in the correct perspective or to render justice, it was a fit case for exercising the discretion under section 151 of the Code. The courts below have not applied their minds to the question whether such evidence will be relevant and whether the ends of justice require permission to let in such evidence. Therefore the order calls for interference.

16. 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. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the

recording before granting or rejecting the application.

17. Ideally, the recording of evidence should be continuous, followed by arguments, without any gap. Courts should constantly endeavour to follow such a time schedule. The amended Code expects them to do so. If that is done, applications for adjournments, re-opening, recalling, or interim measures could be avoided. The more the period of pendency, the more the number of interlocutory applications which in turn add to the period of pendency.

18. In this case, we are satisfied that in the interests of justice and to prevent abuse of the process of court, the trial court ought to have considered whether it was necessary to re-open the evidence and if so, in what manner and to what extent further evidence should be permitted in exercise of its power under section 151 of the Code. The court ought to have also considered whether it should straightway recall PW1 and PW2 and permit the appellant to confront the said recorded evidence to the said witnesses or whether it should first receive such evidence by requiring its proof of its authenticity and only then permit it to be confronted to the witnesses (PW1 and PW2).

19. In view of the above, these appeals are allowed in part. The orders of the High Court and Trial Court dismissing IA No. 216/2009 under section 151 of the Code are set aside. The orders are affirmed in regard to the dismissal of IA No.217/2009 under Order 18 Rule 17 of the Code. The trial court shall now consider IA No.216/2009 afresh in accordance with law.

…….J.
(R. V. Raveendran)

New Delhi;
March 30, 2011.

…….J.
(A. K. Patnaik)