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**(2015) 08 DEL CK 0124**

**In the Delhi High Court**

**Case No : FAO (OS) 398, 399/2015 and CM No. 13150 of 2015**

ARB Inc.

APPELLANT

Vs

United India Insurance Co. Ltd. and Others

RESPONDENT

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**Date of Decision : 11-08-2015**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17

**Citation : (2015) 08 DEL CK 0124**

**Hon'ble Judges : Badar Durrez Ahmed, J;Sanjeev Sachdeva, J**

**Bench : Division Bench**

**Advocate : Suhail Dutt, Senior Advocate, Ravi S. Mittal, Ankur Manchanda, Karishma Singhania and Azhaa Alam, for the Appellant**

**Final Decision : Dismissed**

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## **Judgement**

Sanjeev Sachdeva, J—Since, these two appeals arise out of orders in the same suit, they are being taken up for disposal together. FAO (OS) 399/2015 impugns order dated 19.09.2014 passed in OA No. 186/2014 arising out of order dated 29.08.2014 passed by the Joint Registrar closing the right of the appellant/plaintiff to further cross examine the Defendant Witness DW-1. FAO (OS) 398/2015 impugns the order dated 17.03.2015 passed in OA No. 96/2015 arising out of order dated 23.02.2015 passed by the Joint Registrar dismissing the application filed by the appellant under order 18 rule 17 seeking recall of DW-1 for cross examination.

2. On 29.08.2014, the Joint Registrar, noticing that repeated adjournments were being sought by the counsel for the plaintiff to cross examine DW-1, closed the right of the plaintiff to cross examine DW-1. The Joint Registrar noticed that, on 26.11.2012, DW-1 was partly cross examined and thereafter a request was made by the counsel for the plaintiff for an adjournment. The cross examination was deferred to 06.05.2013. However, on the said date there was a request for adjournment as the senior counsel for the plaintiffs who had to cross examine DW-1 was not available. The cross examination was thereafter deferred to

07.11.2013 on which date again a request for adjournment was made as the senior counsel was not available. Thereafter the case was adjourned to 15.04.2014 on which date yet again an adjournment on the same ground was sought. Thereafter the case was adjourned to 29.08.2014 on which date again the counsel for the plaintiff was not available and an adjournment slip was moved. In view of the earlier adjournments sought by the plaintiffs, the joint registrar was of the view that sufficient opportunities had been given to the plaintiff to cross examine the witness DW-1 and the plaintiff had failed to cross examine the said witness. The opportunity to cross-examine DW-1 was closed.

3. Impugning the order dated 29.08.2014 passed by the Joint Registrar, the appellant/plaintiff filed chamber appeal OA No. 186/2014. The chamber appeal was dismissed by the court on 19.09.2014, noticing the conduct of the plaintiff in failing to cross-examine DW-1 on five occasions. The court refused to interfere with the order passed by the Joint Registrar and the OA was dismissed with costs of Rs. 25,000/-.

4. The plaintiffs instead of impugning the order dated 19.09.2014 dismissing the chamber appeal, on 14.02.2015 after a gap of about 5 months filed an application under Order 18 Rule 17 of the Code of Civil Procedure seeking recall of DW-1 for cross examination. The said application was dismissed by the Joint Registrar by order dated 23.02.2015 on the ground that the rights of the plaintiff to cross examine DW-1 stood closed and the appeal against the order closing the right also stood dismissed and the plaintiff could not bypass the said orders and in an indirect method seek to cross examine DW-1.

5. Impugning the order dated 23.02.2015 whereby the application under Order 18 rule 17 had been dismissed, the appellant filed the chamber appeal No. OA 96 of 2015. The chamber appeal has also been dismissed by the learned single judge by order dated 17.03.2015 which order is impugned in FAO 398/2015. The learned single judge has noted the conduct of the Plaintiff and the failure of the Plaintiff to cross examine DW-1 on five occasions and has also noted the dismissal of the earlier chamber appeal filed by the Plaintiff confirming the order closing the right of the Plaintiff to cross examine DW-1. Learned single Judge has thus dismissed the chamber appeal and confirmed the order dismissing the application under order 18 rule 17.

6. By the impugned order, the Learned Single Judge held that though powers under order 18 rule 17 are wide and the court is empowered to recall a witness at any stage, but the rule does not permit the recalling of any witness for the purposes of reexamination or cross examination to fill up any lacunae in the trial. The learned Single Judge held that the rule does not confer any right on a party to recall a witness where proper opportunities had been given to cross examine the witness. Learned Single Judge held that the application seems to be an endeavour to bypass the orders passed earlier in the chamber appeal.

7. The learned Single Judge held that the chamber appeal was not maintainable

as the earlier order had become final with respect to further cross examination of the witness and the appeal was an endeavour to overcome previous appellate order by way of a second round of applications seeking to set aside the closure of the right to cross examine the witness.

8. We are in complete agreement with the orders passed by the Joint Registrar and the Learned Single Judge impugned in both the appeals. Perusal of the record reveals that not only one but five opportunities have been availed of by the plaintiff for the purposes of cross examination of DW-1. The witness was made to travel to court on five occasions for cross examination and on each occasion a request for adjournment was made on behalf of the Plaintiff on the ground that the counsel was not available. DW- 1 was partly cross examined on 26.11.2012 and thereafter an adjournment was sought by the counsel for the plaintiff. Thereafter on four occasions i.e., 06.05.2013, 07.11.2013, 15.04.2014 and 29.08.2014 adjournments were sought on the ground that the counsel was not available. The joint registrar has noticed that sufficient opportunity was given to the plaintiff to cross examine DW-1 and the cross was not conducted. The chamber appeal filed by the plaintiff impugning the order passed by the joint registrar closing the right to cross examine DW-1 was dismissed. We are in agreement with the view formed by the joint registrar that sufficient opportunities had been granted to the plaintiff to cross examine DW-1 and for no valid reason DW- 1 was not cross examined. Unavailability of the counsel on five occasions cannot be a ground to defer the cross examination of a witness. In our view also sufficient opportunities had been granted to the plaintiff to cross examine, the opportunities have not been availed of and rightly the right to cross examine has been closed. We find no reason to interfere with the view taken by the single judge in confirming the order of the joint registrar closing the right to cross the witness.

9. If the Plaintiff was aggrieved by the order dated 19.09.2014, the plaintiff should have filed an appeal impugning the same in the first instance, however the plaintiff chose not to file an appeal and kept silent for over 10 months. The plaintiff instead filed an application under order 18 rule 17.

10. Order 18 rule 17 is as under:

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.

11. 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. 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. K.K. Velusamy Vs. N. Palanisamy, (2011) 3 CTC 422 : (2011) 4 JT 38 : (2011) 2 RCR(Civil) 875 : (2011) 4 SCALE 61 : (2011) 11 SCC 275 : (2011) 4 SCR 31 .

12. The power under Order 18 Rule 17 is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that the recall and re-examination of a witness would not cause any prejudice to the parties.

13. Once the right to cross examine DW-1 has been closed by way of a speaking order and the said order has been confirmed in a chamber appeal, the plaintiff could not have sought the right to cross examine DW-1 by way of an application under order 18 rule 17. Even the application was moved after over five months of the closure of the right to cross examine. This clearly shows the lackadaisical attitude of the plaintiff. Order 18 rule 17 cannot be used by the plaintiff to circumvent the orders passed by the court specifically closing the right to cross examine DW-1. The joint registrar by order dated 23.02.2015 has rightly dismissed the application under order 18 rule 17 and the impugned order dated 17.03.2015 confirming the order of the joint registrar and holding that the application under 18 rule 17, in these circumstances, was not maintainable does not suffer from any infirmity.

14. We find no reason to take a view different from the view taken in both the impugned orders, one confirming the order of closure of right to cross examine and the other confirming the order dismissing the application under order 18 rule 17. We are in complete agreement with both the impugned orders.

15. The appeals are without any merit and are accordingly dismissed. Leaving the parties to bear their own costs.

CM 13150/2015 in FAO (OS) 399/2015 (application seeking condonation of delay of 271 days in filing the appeal)

Since we have already on merits held that the application under order 18 rule 17 is not maintainable, the explanation that the appellant did not file an appeal as the appellant had filed an application under order 18 rule 17 and was awaiting the decision on the same, in our view, would not constitute sufficient cause for condoning the delay in filing the appeal. In the said circumstances the application

is also dismissed.