

(2014) 08 OHC CK 0019
In the Orissa High Court
Case No : W.P.(C) No. 7935 of 2013

Bairagi Moharana and Others

APPELLANT

Vs

The Collector and Others

RESPONDENT

Date of Decision : 25-08-2014

Acts Referred:

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

Citation : (2014) 2 ILR 1213 : (2014) 2 OLR 839 Suppl. : (2014) 2 OLR 839

Hon'ble Judges : B.K. Nayak, J

Bench : Single Bench

Advocate : R.C. Mohanty, G. Nayak and S. Mohanty, Advocates for the Appellant

Judgement

B.K. Nayak, J.—Order dated 16.03.2013 passed by the learned Civil Judge (Senior Division) First Court, Cuttack in Title Suit No. 160 of 2002/Title Suit No. 117 of 1994 allowing the petition filed by the defendants to recall P.W. 10 (plaintiff) for further cross-examination, has been assailed in this writ application. The petitioners have filed the suit for declaration of right, title and interest over the suit land, against the State. After closure of evidence, while arguments in the suit were being heard, the Government pleader representing the defendants-State filed an application under Order 18 Rule 17 of the C.P.C. with a prayer to recall P.W. 10 (plaintiff) for his further cross-examination on the ground that the previous G.P. having expired during the pendency of the suit, P.W. 10 could not be effectively cross-examined by the A.G.P. and that after he was engaged to conduct the suit, while going through the evidence he found that P.W. 10 has not been effectively cross-examined. Along with the application, a list of questions necessary to be put to the witness during further cross-examination was attached. The petition was opposed to by the plaintiff by filing objection stating that P.W. 10 was cross-examined at length and discharged and that at the belated stage the petition has been filed to recall the witness only to fill up the lacuna which should not be allowed.

2. By the impugned order, the learned trial court allowed the petition holding that

the questions appended to the recall petition appear to be genuine and required for just and proper adjudication of the matter in controversy and to clarify the ambiguities in the evidence of P.W. 10 and that since P.W. 10 is the plaintiff himself no prejudice will be caused to him for further cross-examination on the questions appended to the petition.

3. With regard to the scope of Order 18 Rule 17 of the Civil Procedure Code, the Hon"ble Supreme Court in the case of K.K. Velusamy Vs. N. Palanisamy, held as follows:

"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 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.

11. There is no specific provision in the Code enabling the parties to reopen 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 court 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 reopening 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 reopen 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.

12. The respondent contended that Section 151 cannot be used for reopening

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 v. State of U.P.*, *Manohar Lal Chopra v. Seth Hiralal*, *Arjun Singh v. Mohindra Kumar*, *Ram Chand and Sons Sugar Mills (P) Ltd. v. Kanhayalal Bhargave*, *Nain Singh v. Koonwarjee*, *Newabganj Sugar Mills Co. Ltd. v. Union of India*, *Jaipur Mineral Development Syndicate v. CIT*, *National Institute of Mental Health & Neuro Sciences v. C. Parameshwara and Vinod Seth v. Devinder Bajaj*]. We may summarise 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 coextensive 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 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.

(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 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.

(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."

4. It is clear from the aforesaid decision of the apex Court that power of the Court under Order 18 Rule 17 of the C.P.C. is a discretionary power which should be used sparingly in appropriate cases to enable the court to clarify any doubt it may have in regard to the evidence led by the parties and 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 also not intended to enable the parties to recall any witnesses for further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced at the time of recording of evidence. After deletion of Order 18 Rule 17-A, the court may in appropriate cases in exercise of its inherent power under Section 151 of the Code may permit cross-examination of a witness, but this inherent power cannot be routinely invoked or exercised for reopening evidence or recalling witnesses.

The principles laid down in K.K. Velusamy (supra) have been followed in a subsequent decision of the apex Court reported in Bagai Construction Thr. Its Proprietor Mr. Lalit Bagai Vs. Gupta Building Material Store, .

5. In the impugned order except stating that the questions appended to the recall petition appear to be genuine and required for just and proper adjudication of the matter in controversy and to clarify the ambiguities in the evidence of P.W. 10, the learned Civil Judge (Senior Division) has not considered the petition in the light of the principles laid down by the apex Court in the decision referred to above. There is also no mention in the impugned order as to what ambiguities are there in the evidence of P.W. 10 which need clarification. The impugned order allowing the prayer for recall of P.W. 10 for further cross-examination does not indicate whether the Court below exercised power under Section 151 of the C.P.C., since within the scope of Order 18 Rule 17 of the C.P.C., it is not permissible to allow a party for further examination-in-chief of his own witness or for further cross-examination of a witness of adversary on recall. In the aforesaid circumstances, I allow the writ petition and set aside the impugned order and remit the matter back to the court below to reconsider the defendants' petition for recall of P.W. 10 for further cross-examination in the light of the principles governing the field. No costs.