
(2016) 02 CAL CK 0124
In the Calcutta High Court
Case No : C.O. 2155 of 2013

Biswambhar Dinda Trust Estate

APPELLANT

Vs

Pallab Kanti Das

RESPONDENT

Date of Decision : 02-02-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17, Section 151
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 165, Section 58

Citation : (2016) 2 ICC 152

Hon'ble Judges : Indrajit Chatterjee, J.

Bench : Single Bench

Advocate : Kaushik Dey, for the Appellant; Sibasish Ghosh and Kalipada Chakraborty, for the Respondent

Final Decision : Disposed Off

Judgement

Indrajit Chatterjee, J.—1. This is an application under Article 227 of the Constitution of India wherein the order dated 05.04.2013 passed by the court of learned Civil Judge (Junior Division), Contai, Purba Medinipore has been assailed. This order is dated 05-04-2013.

2. The matter was heard at length.

3. It was submitted by learned Advocate appearing on behalf of the petitioner by taking me to the impugned order that the learned trial court only by the stroke of a pen disposed of the application filed by the defendant and he took me to the exact ordering portion of the said order which runs thus

"Upon perusal of the petition and the materials on record and UPO (sic) hearing learned Advocates of the parties, I am of the view that the recall petition is to be allowed as that is necessary to determine the real dispute between the parties."

4. It was further submitted by learned Advocate appearing for the plaintiff/petitioner by taking me to the evidence of D.W.1 as recorded by learned trial

court as it appears at page 19 where the said witness (D.W.1) candidly deposed on 14-11-2011 "I cannot produce any tenancy agreement or rent receipt to prove that I am a tenant in respect of the suit property. I do not make any effort to make payment of rent between 2002 till date. I have no document to prove my father was a tenant in the suit property till his death". He also took me to the questionnaire as prepared on behalf of the defendant, the opposite party before this court as I get at page 21 (Annexure -D).

5. In another decision of the Apex Court as reported in , (2009) 3CHN 221 Vidiraj Naggappa Vernekar v. Sharad Chand Prabhakar Gogate held that after cross-examination of a particular witness the recalling the same witness for further reexamination where further no new facts have been discovered would cause prejudice to the parties and as such it is not permissible.

6. Learned Advocate appearing for the petitioner submitted that if all these questions are allowed to be put to the said D.W.1, then the advantage which the petitioner got from the cross-examination of that DW-1 will be totally frustrated, the order passed by learned trial court about which I have stated is to be set aside. Otherwise present petitioner will suffer irreparable injury. Learned Advocate has relied upon the decision of the Apex Court reported in , (2009)3 CHN 221 with special attention to paragraphs 16 and 17 wherein the Apex Court candidly held that while disposing of an application for recalling a witness, the prime consideration of the court would be that the earlier advantage gained by either of the parties is not washed away through such an application for recall and the questions to be put to the present witness to be recalled.

7. Learned Advocate also took me to the running page 31 of the present application to convince this court as regards the written statement of the present opposite party, Pallab Kanti Das in Title Suit No. 107 of 2002 wherein the present opposite party, Pallab Kanti Das specifically claimed in the written statement filed in that suit that there was no agreement between the parties and no receipt was given or taken to show collection of rents and it was further claimed that the present opposite party used to reside in the said premises as a tenant since the time of his predecessor. He submitted by reading and rereading the said written statement to convince this court that this defendant though claimed possession over the suit property started to play dillydallying with the specific case as to whether he was a tenant or not as no rent receipt or tenancy agreement could be filed by the present opposite party. He also took me to Section 58 of the Evidence Act to convince this court that the fact admitted need not be proved.

8. It is submitted by the learned lawyer appearing on behalf of the Opposite Party by taking me to the written statement filed by the present opposite party that it was claimed specifically that his father was a recorded tenant under the present trust and he used to give rent and that the tenancy was created orally. The Opposite party has denied specifically that he is a trespasser in respect of the suit property rather he has claimed specifically that the present plaintiff petitioner has deceived the Court without mentioning in the plaint that one Title

Suit No. 107 of 2002 has attained its finality in respect of the suit property. Thus it is the contention of the learned lawyer appearing on behalf of the opposite party that if his client is allowed to answer to the questions as framed before the learned trial Court then the original dispute will also come out which will end a lis permanently. Learned counsel took me to page 20(a) of the petition to show that the electric meter of the property is in the name of the present opposite party and entered his argument by saying that the Court has every power to put questions to the witnesses under Section 165 of the Evidence Act which may be relevant to end the lis between the parties.

9. Learned counsel appearing on behalf of the Opposite Party has also relied upon a decision of the Apex Court as reported in , (2011) 5-7 SBR 1993 [K.K. Velusamy v. N. Palanisamy] wherein in paragraph 16 the Apex Court held as under;-

".... 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 reason, the court may exercise its discretion to recall the witnesses or permit the fresh evidence."

10. In the said decision K.K. Velusamy (supra) the Apex Court held that it is true that there is power of the Court both under Section 151 or Order 18 Rule 17 of the Code to take stock of such a situation but the Hon"ble Apex Court has cautioned the Courts below that Section 151 or Order 18 Rule 17 is not intended to be used routinely, merely for asking. If so used it will defeat from parties on various amendments to the code to expedite trials but the Apex Court further held 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 of earlier was for valid and sufficient reasons, the Court may exercise its discretion to recall the witness or permit the fresh evidence.

11. I have gone through the petition along with the annexures. I have also taken into consideration the argument put forward by the learned advocates of the parties. I have put my anxious eyes on Section 58 and Section 165 of the Evidence Act and also the decisions of the Apex Court as relied upon by the learned counsel appearing on behalf of the parties.

12. In paragraphs 16 and 17 of that decision of in K.K. Veluswami (Supra) the Apex Court has interpreted that order 18 Rule 17 of the CPC and while doing so has directed the Courts below not to allow all these provisions to be used by the parties to fill up the omissions in the evidence of a witness who has already been examined.

13. On scrutiny of the written statement as filed by the present petitioner in T.S. No. 107 of 2002 the present petitioner claimed that Basanta Kumar Das i.e. the father of the present petitioner used to reside as licensee and after his demise the present Opposite Party is residing there with his family but it is claimed by the said opposite party that his occupation of the said property was not that of one trespasser.

14. I have gone through the copy of the deposition sheet wherein this opposite party categorically deposed "I cannot produce any tenancy agreement or rent receipt to prove that I am a tenant in respect of the suit property. I do not make any effort to make payment of rent between 2002 till date. I have no document to prove my father was a tenant in the suit property till his death."

15. Thus in view of this cross-examination on the part of the plaintiff I can safely say that the plaintiff has earned some extra strength in the litigation. I have also gone through the suggested questions to be put on recall. I have also kept in my mind that the decision of the Apex Court as delivered in K.K. Velusamy (supra) and also the decision of the Apex Court in Vadiraj Naggappa Vernekar (supra). It appears from the suggested questions that those were framed just to take away the air from the sail of the petitioner's boat just to deprive him of the advantages what he has earned from the cross-examination of PW 1 at page 19 of the petition.

16. I have also gone through impugned order that the learned Trial Court did not use his discretion properly to come to the conclusion at which stage or where such a petition is can be allowed. He just used only one paragraph.

"Upon perusal of petition and the materials on record and upon hearing of the learned advocates of the parties. I am of the view that the recall petition is to be allowed as i.e. necessary to determine the real dispute between the parties".

17. Thus it is ample clear that the learned trial Court did not venture to consider in his order as to whether his order will demolish the cross-examination of PW 1. The learned Trial court practically forgot that through the cross-examination or PW 1 the present petitioner has got an advantage so far as the tenancy etc. is concerned. In view of the decision of the Apex Court in K.K. Velusami (supra) wherein the Apex Court categorically held that the power under Section 151 or Order 18 Rule 17 of the Court is not intended to be used routine merely for the asking. This court may also refer to the decision of Vadiraj Naggappa Vernekar (supra) wherein the Apex Court while discussing the principle of Order 18 Rule 17 came to the conclusion that after cross-examination of one witness and recalling the same witness for further reexamination where no new facts have been discovered would cause prejudiced and as such in that case on facts held that such an order is not permissible in favour of the party so recalling the witness.

Thus in view of the discussion so long made. This court is inclined to set aside the impugned order.

18. Thus, the application under Article 227 of the Constitution of India is answered in the affirmative and in favour of the petitioner. The impugned order dated 05.04.2013 passed in O.S. No. 230 of 2005 is hereby dismissed.

19. The learned trial court after receipt of a copy of this order will proceed from the stage where he stopped due to this application for recall.

20. There will be no cost for this litigation.

21. Let a copy of this order be forwarded to the learned Civil Judge, Junior Division, 1st Court at Contai, district - Purba Medinipur, in connection with O.S 230 of 2005. The said trial court must see that this litigation which is already 10 years old be disposed of as early as possible.

22. Certified copy of this order be supplied to the parties as per rule in urgent basis.