

(1966) 07 CAL CK 0022
In the Calcutta High Court
Case No : Civil Revision Case No. 3043 of 1963

Shyamapada Neogy and Others

APPELLANT

Vs

Asoke Kr. Biswas and Others

RESPONDENT

Date of Decision : 15-07-1966

Acts Referred:

Citation : 71 CWN 747

Hon'ble Judges : Bijayesh Mukherji, J

Bench : Single Bench

Advocate : C.F. Ali and Md. Rafiqul Islam, for the Appellant; S.K. Deb and Chandrachur Sen Gupta, for the Respondent

Judgement

Bijayesh Mukherji, J.—On April 17, 1958, Asoke Kumar Biswas and two others instituted a suit in the second court of the munsif at Sealdah for a permanent injunction restraining the defendants, the Neogis, from raising a wall on two specified plots which, it was said, would close their way for egress and ingress. It is hardly necessary to go through the vicissitudes through which the suit passed. Suffice it to record that it was brought to trial on August 21, 1962, when the case was opened and one witness for the plaintiffs examined in part, only to be postponed for further hearing till September 3, 1962. That day too it was heard in part and ultimately adjourned to December 10, 1962. That day again it was heard in part and ultimately adjourned to January 22, 1963. In between several other postponements were had. From Jan. 22, 1963 when some evidence was recorded the hearing was adjourned over again to February 19, 1963 when the examination of one witness whose evidence was taken in part earlier was concluded and the plaintiff Asoke Kumar Biswas, the fifth witness was examined in full. Some documents were received in evidence and marked. And the plaintiffs' case was closed. Postponements again to March 7, 1963, from March 7, 1963 to March 8, 1963, from March 8, 1963 to March 18, 1963, from March 18, 1963 to March 21, 1963 and from March 21, 1963 to April 4, 1963 when the defendants' evidence was closed. April 26, 1963 was then set down for the

hearing of arguments. That day however arguments were not heard. The plaintiffs prayed for Asoke Kumar Biswas, himself a plaintiff, and examined as the fifth witness of the plaintiffs, being recalled for further evidence. Why ? Because, as the plaintiffs' petition dated April 26, 1963 avers, when he was examined, "the claim has not been specifically and particularly explained and clarified in that light (that is, in the light of the easement claimed) and his deposition is vague on the point." Or still better, as the munsif recorded in his order No. 117 dated June 21, 1963 because Asoke Kumar Biswas did not state in his evidence had on February 19, 1963 that they were enjoying the disputed passage for 20 years openly, peaceably, uninterruptedly and as of right. After three more adjournments, (in which the learned munsif seems to revel), on June 17, 1963 he heard such a petition for recalling Asoke for further evidence and by his order No. 117 dated June 21, 1963 allowed the prayer.

2. The Neogis, the defendants, have now come up to this court in revision and obtained the Rule.

3. To catalogue the facts as I have done is to see with what material irregularity the learned munsif has acted in the exercise of his jurisdiction. Evidence on behalf of the plaintiffs closed on February 19, 1963 some two months and seven days rolled by. And on April 26, 1963 when the case was set down for arguments, it dawned upon the plaintiffs and their advisers that Asoke Kumar Biswas was not made to say anything about their having enjoyed the pathway in controversy here peaceably, openly, without interruption and as of right, for 20 years. So, such an extraordinary prayer was made for recall of Asoke to fill up the lacuna in his evidence. But the defendants had exhausted their witnesses and closed their case on April 4, 1963 - 22 days ahead of April 26, 1963. A court of law should no doubt always be ready to show the utmost latitude to the litigants before it. But there is a limit beyond which it cannot go. That limit was reached here on April 4, 1963. To allow the plaintiffs to re-examine one of them (Asoke Kumar Biswas) at this stage is to pamper them to a degree and to negate a fair deal to the defendants.

4. Mr. S. K. Deb, the learned Advocate appearing for the plaintiffs opposite parties, refers me to Order 18, Rule 17 of the Procedure Code which enables the court to recall and examine a witness at any stage and put such questions to him as it thinks fit, with a view to clearing up any ambiguity or the like. That has little to do with recalling a witness at the instance of a party (as here) to fill up the lacuna in the evidence already led. No doubt, the court can invoke its power under Order 18, Rule 17, even at the instance of a party. But that it can do, in its discretion, when an unforeseen situation has developed or even when an inadvertent omission is there, provided that it causes no surprise or prejudice to the other party. Here the other party has dismissed its witnesses and closed its evidence. So it will cause the other party surprise and the gravest of prejudice. Worse still, the plaintiffs are really out to fill up a lacuna in evidence under the pretext of re-examination in chief.

5. In a case of this type, the following classic passage from the judgment of Tilghman, C.J. in (1) Curren v. Connery. 5 Binn. 488, one cannot do without:

It may be necessary, in order to come at the truth of the case, to examine him (a witness) as to new matter, and after that there may be a second cross-examination. The courts at their discretion may permit a witness to be examined by either party over and over again at any time during the trial. But they will take care to exercise this discretion, so as not to suffer any advantage to be gained or trick or artifice. If the plaintiff should declare that he had finished his testimony, in consequence of which the defendant should dismiss some of his witnesses and then the plaintiff should offer to produce new testimony, which might perhaps have been contradicted by the witnesses who have been dismissed, the court would not suffer him to avail himself of such disingenuous conduct.

Indeed, the Judge will seldom under special circumstances, permit a plaintiff, after his case and his adversary's case are closed, to recall a witness to prove a material fact. In the result, I accept Mr. Ali's submission and make the Rule absolute with costs.

The records be sent down with the utmost expedition.

The munsif concerned here is Shri S. B. Putatunda. The Registrar, Appellate Side, will be so good as to send a copy of this judgment to the District Judge under whom Shri Putatunda is serving now so that there may be periodic inspection of his work, with a view to ensuring that he is not violating the de die in diem rule (rule 115, sub-rule 2, of the High Court Civil Rules and Orders, Vol. I) with impunity, as the record before me reveals.