



2024:JKLHC-JMU:674

Serial No. 40

**COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Case:- CM(M) No. 216/2023
CM No. 6946/2023
CAV No. 1665/2023

1. **Vineeta Jamwal**Appellant(s)/Petitioner(s)
D/o Late Col. Dalbir Singh
R/o Durga Niwas, Ambphalla,
Jammu,
Age 72 years.
2. **Purnima Pathania**
D/o Late Col. Dalbir Singh
R/o Durga Niwas, Ambphalla,
Jammu,
Age 62 years.

Through: Mr. R. K. Jain, Sr. Advocate with
Mr. Mohit Jain, Advocate.

Vs

1. **Col (Retd.) Vijay Singh S/o Late Capt. Arjun Singh**
R/o 627-C, Royal Shipra, Sun City, Indra Puram Ghaziabad
UP through his present attorney Ajay Singh Chandel
S/o Sh. Dhyan Singh R/o House No. 77, Shanker Nagar, Ward No. 49,
Channi Rama, Jammu.Respondent
2. **Lalita Karki D/o Late Col. Dalbir Singh**
R/o Dari, Tehsil Dharamshala, District Kangra,
Himachal Pradesh.
3. **Manjula Newar D/o Late Col. Dalbir Singh R/o 201A Claridge,**
Lokhandwala Complex, Andheri West, Mumbai.
4. **Pratima Singh W/o Late Sh. Raghubir Singh R/o 20/83,**
Gianeshwar, Post Box No. 3622, Kathmandu, Nepal.
5. **Prashant Bir Singh S/o Late Sh. Raghubir Singh**
R/o 20/83, Gaijeshwar, Post Box No. 3622, Kathmandu, Nepal.

.....Proforma Respondent(s)

Through: Mr. Ankesh Chandel, Advocate.

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
(18.03.2024)

**(ORAL)**

- 01.** Supervisory Jurisdiction of this Court enshrined in Article 227 of the Constitution of India is being invoked by the petitioners herein seeking setting aside of order dated 26.08.2023 (for short **“the impugned order”**) passed by the court of 2nd Additional Munsiff, Jammu in case titled as **“Col (Retd) Vijay Singh Vs Col. (Retd) Dalbir Singh”**.
- 02.** The facts giving rise to the filing of the instant petition reveal that thae suit for mandatory injunction came to be filed by the plaintiff-respondent 1 herein against the defendant, namely, Col. (Retd) Dalbir Singh the predecessor-in-interest of the petitioners herein for commanding the said defendant to handover the vacant peaceful possession of land measuring 5 Kanals 11 Marlas covered under Survey No. 287 situated at Ambphalla, Jammu.
- 03.** After the defendant appeared before the trial court and filed his written statement to the suit, the trial court framed issues and called upon the parties to lead their respective evidence, whereupon both the parties filed the affidavits of their respective witnesses somewhere in the year 2004, whereafter the plaintiff led his evidence and his right to lead evidence came to be closed in 2004 itself requiring the defendant to lead his evidence and defendant produced some of his witnesses, however, in the meantime the



defendant expired and his legal heirs being the petitioners herein came to be brought on record on 15.11.2006 and whereafter on 16.03.2022 an application came to be filed by the defendants-petitioners herein before the trial court for filing affidavit of fresh witnesses which application came to be *allowed* on 06.04.2022 and consequently on 11.04.2022 the affidavit of the said witnesses came to be filed by the defendants-petitioners herein.

Aggrieved of order dated 06.04.2022, the plaintiff-respondent herein filed CM(M) No. 51/2022 before this Court, which petition after being reserved for orders on 01.06.2022 came to be *dismissed* by this Court on 06.09.2022. However, during the pendency of the aforesaid petition before this Court and also in absence of any stay order from this Court in the said petition, the trial court proceeded with the adjudication of the suit and the defendants produced their witnesses and conducted their examination-in-chief on different dates, however, the plaintiff-respondent herein did not cross-examine the said witnesses fundamentally on account of the pendency of the aforesaid petition before this Court.

After the *dismissal* of the aforesaid petition by this Court on 06.09.2022, the plaintiff-respondent 1 herein filed an application under Order 18 Rule 17 read with Section 151 C.P.C. before the trial court for recalling of the witnesses of



the defendants for cross-examination as the said witnesses have had not been cross-examined by the plaintiff-respondent 1 herein owing to the pendency of the aforesaid petition before this Court. The said application after being considered by the trial court upon filing of the objections thereto by the defendants-petitioners came to be allowed in terms of the impugned order by the trial court allowing the plaintiff-respondent 1 herein to cross-examine the witnesses of the defendants-petitioners herein on a date as and when the witnesses are produced by the defendants-petitioners herein.

- 04.** The impugned order is being challenged by the petitioners herein, *inter alia*, on the grounds that the trial court failed to appreciate the mandate of Order 18 Rule 17 as also the law laid down by the Apex Court in this regard, inasmuch as, overlooked the orders passed by it from time to time during the course of proceedings wherein the right of cross-examination of the witnesses of the defendant-petitioner herein by the plaintiff-respondent 1 herein came to be closed and that the trial court while allowing the application in terms of the impugned order committed serious error of law besides causing gross miscarriage of justice.

Heard learned counsel for the parties and perused the record.



05. Before proceeding to advert to the grounds urged in the instant petition, it would be an appropriate and advantageous to refer to the law laid down by the Apex Court in regard to the provisions of Order 18 Rule 17 read with Section 151 of Code of Civil Procedure. A reference in this regard to the judgment of the Apex Court passed in case titled as **“Ram Rati Vs Mange Ram (Dead) Through Legal Representatives & Ors.”** reported in **2016 (11) SCC 296** would be relevant herein wherein at paras 11 & 14 following has been laid down and held:-

“11. The respondent filed the application under Rule 17 read with Section 151 of the CPC invoking the inherent powers of the court to make orders for the ends of justice or to prevent abuse of the process of the court. The basic purpose of Rule 17 is to enable the court to clarify any position or doubt, and the court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. ‘No prejudice is caused to either party’ is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground.

14. The rigour under Rule 17, however, does not affect the inherent powers of the court to pass the



required orders for ends of justice to reopen the evidence for the purpose of further examination or cross-examination or even for production of fresh evidence. This power can also be exercised at any stage of the suit, even after closure of evidence. Thus, the inherent power is the only recourse, as held by this Court in K.K. Velusamy (supra) at paragraph-11, which reads as follows:

“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.”

- 06.** It is also significant to refer to the following provisions of the Evidence Act, 1872 (for short '**Act of 1872**') being relevant to the controversy:-



Section 137 provides for three stages in the examination of a witness, namely, '**examination in chief**', '**cross-examination**' and '**re-examination**'. In so far as the right of cross-examination is concerned, the said right in terms of Section 137 of the Act of 1872 is statutory in nature conferred by the Act of 1872 upon the person concerned only when he has an interest adverse to the one who is proposed to be cross-examined. The very purpose of cross-examination is to test the veracity of the testimony of the witness. It is a well established preposition of law that no oral testimony can be considered satisfactory or valid, unless, it is tested by cross-examination as the mere statement of the plaintiffs witnesses cannot constitute the plaintiffs evidence in the case unless it is tested by cross-examination. Non absence of an opportunity of cross-examination of a witness, thus, can safely be said to be vitiating a trial of a case.

Section 138 of the Act of 1872 not only lays down the manner of examination of a particular witness, but also confers upon the parties' right of examination in chief, cross-examination and re-examination. Section 138 of the Act of 1872 creates three distinct rights so far as the examination of a witness is concerned. The examination of a witness does not refer to his examination-in-chief only



but it extends to and includes his cross-examination as well as his re-examination.

07. Keeping in mind the aforesaid principles and provisions of law and reverting back to the case in hand, admittedly the plaintiff-respondent 1 herein called in question order dated 06.04.2022 passed by the trial court whereunder the defendants-petitioners herein came to be permitted to file fresh evidence/affidavits of witnesses, came before this Court in CM(M) No. 51/2022 and the said petition remained pending before this Court till 06.09.2022 on which date, it came to be *dismissed*.

The proceedings conducted by the trial court during the pendency of the said petition before this Court would be deemed to have remained subject to the outcome of the petition, notwithstanding the fact, that no stay order was passed by this Court in the said petition. It is also an admitted fact that the plaintiff-respondent 1 herein during the pendency of the aforesaid petition before this Court did not cross-examine the witnesses of the defendants-petitioners herein who had been permitted to appear as witnesses pursuant to the order of the trial court dated 06.04.2022 which order was under challenge before this Court in the petition *supra*. It is only after the *dismissal* of the petition by this Court on 06.09.2022, the plaintiff-respondent 1 herein preferred the application on



22.12.2022 which application came to be allowed by the trial court in terms of the impugned order allowing the plaintiff-respondent 1 herein to cross-examine the witnesses whose examination in chief have had been conducted by the defendants-petitioners herein during the pendency of the aforesaid petition before this Court.

As has been held by the Apex Court in the judgment "**Ram Rati**" *supra*, the power of the Court vested under Order 18 Rule 17 can be exercised by the Court *suo moto* or at the instance of either parties to the suit with the only rider that the provision is not intended to be used to fill up omission in the evidence of a witness who has already been examined.

- 08.** In the instant case, the plaintiff-respondent 1 herein had sought permission to cross-examine the witnesses of the defendants-petitioners herein who admittedly had not been cross-examined by him owing the pendency of the petition before this Court, thus, it cannot be said that the plaintiff-respondent 1 herein intended to fill up the omission in the evidence or else the lacunas therein in the said evidence.

Pertinently, it has also been held in the judgment "**Ram Rati**" *supra* that otherwise also the rigour under Order 18 Rule 17 would not affect the inherent power of the Court to pass required orders for ends of justice to reopen the



evidence for the purpose of further examination or cross-examination or for production of fresh evidence authorizing the Court to exercise power at any stage of the suit, even after closure of evidence.

09. It needs to be mentioned here that it is settled law that the provisions of Order 18 of the Code of Civil Procedure regulate the proceedings in Courts and ensures that the parties get sufficient opportunity to put forward their claims by producing evidence and, therefore, are entitled to lead evidence they think proper by examined the witnesses.

It is equally settled principle of law that in the matter of production of evidence the Court will not close the evidence of any party unless it is convinced that the conduct of such party is contumacious or is grossly negligent or is stratifying the process of Court by adopting delaying tactics by not allowing the proceeding to complete. It is also settled principle of law that the procedure laid down in the Code of Civil Procedure is intended to achieve the ends of justice and not to part it as the Courts act as impartial umpire and independent arbitrator leaving the contesting parties to proceed in their own way in accordance of law and decide the matter on the basis of the evidence of record.

10. Risking repetition, as has been noticed in the preceding paras, the plaintiff-respondent 1 herein did not cross-



examine the witnesses of the defendants-petitioners herein after the trial court *allowed* the defendants-petitioners herein to produce/file fresh additional witness/s affidavit in terms of order dated 06.04.2022 which order dated 06.04.2022 have had been thrown challenge to by the plaintiff-respondent 1 herein before this Court in CM(M) No. 51/2022 which petition remained pending before this Court and came to be decided on 06.09.2022, whereafter the plaintiff-respondent 1 herein maintained the application wherein the impugned order came to be passed on 26.08.2023. Under these circumstances, the plaintiff/respondent 1 herein can never be said to have intended to fill the lacunas while seeking cross-examination of the witnesses of the defendants-petitioners herein as the said witnesses were never cross-examined. The plaintiff-respondent 1 herein, thus, in law, could not have been divested of his statutory right to cross-examine the said witnesses.

11. Thus, the leave granted to the plaintiff-respondent 1 herein by the trial court to cross-examine the witnesses of the defendants-petitioners in terms of the impugned order cannot be said to have been granted illegally or in breach and violations of the provisions of Order 18 Rule 17 read with Section 151 of the CPC or else defeating the rights of the defendants-petitioners herein nor can it be said by any



stretch of imagination that the trial court in the process caused failure of justice to the defendants-petitioners herein. The trial court instead seemingly has advanced the cause of justice while allowing the plaintiff-respondent 1 herein to cross-examine the witnesses of the defendants-petitioners.

12. In view of what has been observed, analyzed and considered hereinabove, this Court is not inclined to exercise Supervisory Jurisdiction envisaged under Article 227 of the Constitution of India in the matter more so in view of the principles laid down by the Apex Court in case titled as **“Shalini Shyam Shetty & Anr. Vs Rajendra Shankar Patil”** reported in (2010) 8 SCC 329.

13. Resultantly, the petition fails and is, accordingly, ***dismissed.***

(JAVED IQBAL WANI)
JUDGE

JAMMU
18.03.2024

Bunty

Whether the order is speaking: **Yes**

Whether the order is reportable: **Yes**

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