

**VADIRAJ NAGGAPPA VERNEKAR (D) THROUGH LRS.
V.**

**SHARAD CHAND PRABHAKAR GOGATE
Civil Appeal No. 1172 of 2009**

FEBRUARY 24, 2009

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

The Judgement of the Court was delivered by

ALTAMAS KABIR, J.

1. Leave granted.

2. The short question for decision in this appeal is whether a witness having been examined by way of affidavit evidence can be recalled for giving further evidence with regard to facts not mentioned in the affidavit.

3. The aforesaid question arises in respect of a suit filed by one Vadiraj Naggappa Vernekar and Smt. Mainabai Ranade, being Suit No. S.925 of 1990, before the learned Single Judge of the Bombay High Court, seeking a declaration that the Letters of Administration obtained by one Sharadchandra Prabhakar Gogate on 5th November, 1998, in respect of the estate of Dr. Sudha Gogate, was not binding on the plaintiffs or any of them and did not affect their right, title and interest in the suit property, being Flat no.402, situated in Amogh Vikram Cooperative Housing Society Ltd., Murari Ghag Marg, Prabhadevi, Bombay 400025. Vadiraj Naggappa Vernekar died during the pendency of the suit and his legal representatives were brought on record in his place. The appellant No.1, being the wife of the deceased, was made plaintiff no.1A and his sons and daughters were made plaintiff Nos.B, C and D respectively.

4. One Sadanand Sheshgiri Shet, who was alleged to be a witness to all the transactions relating to the said flat, was appointed as Constituted Attorney by the appellant and the other heirs of deceased Vadiraj Naggappa Vernekar and as required under Order 17 Rule 4 CPC, his evidence by way of an affidavit was filed before the learned Single Judge. While the evidence was still being recorded in the suit, the appellant and the other plaintiffs moved Notice of Motion No.463 of 2006 before the learned Single Judge on 13th February, 2006, urging that certain facts which were necessary for proper adjudication of the suit had inadvertently been left out in the affidavit affirmed by Sadanand Shet and that it was, therefore, necessary to recall him for further examination-in-chief under the provisions of Order 18 Rule 17 CPC. By order dated 7th July, 2006, the learned Single Judge dismissed the said Motion upon holding that the witness could not be recalled to fill up the lacuna in his examination-in-chief on affidavit. Appeal No.853 of 2006 filed by the appellant herein was dismissed in limine by the Division Bench of the High Court on 1st December, 2006, confirming the order of the learned Single Judge. The present appeal, by

leave, has been filed against the order of the Appeal Court dated 1st December, 2006.

5. Learned Senior Advocate, Mr. P.S. Narasimha, who appeared for the appellant, briefly submitted that the provisions of Order 18 Rule 17 CPC were very wide and could be made at any stage to enable the Court to do complete justice between the parties. For the sake of reference, the provisions of Order 18 Rule 17 CPC are reproduced hereinbelow:-

“17. Court may recall and examine witness. –

The Court may, at any stage of 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.”

6. Mr. Narasimha also submitted that it has been held by way of judicial pronouncements that the Court may recall and examine a witness not only *suo motu* but also on an application that may be made by the parties to the suit. Learned counsel also submitted that the affidavit of evidence of Sadanand Shet had been prepared by the learned advocate, who had inadvertently left out certain vital facts which were necessary for a complete and proper adjudication of the suit. He urged that on account of the omission of the learned counsel, the plaintiffs/appellants herein should not be made to suffer since the evidence of Sadanand Shet went to the very root of the issues to be decided in the suit. Mr. Narasimha also submitted that although the cross-examination of the witness on affidavit had been completed, the defendants could always be permitted to re-examine the witness on the fresh evidence that would be adduced. Mr. Narasimha also submitted that while ensuring that proper justice was done between the parties, allowing the recall of Sadanand Shet would not in any way prejudice the defendants.

7. In support of his aforesaid submissions, Mr. Narasimha firstly referred to the decision of this Court in Smt. M.N. Amonkar & Ors. Vs. Dr. S.A. Johari (1984 (2) SCC 354), wherein this Court, while considering the scope of Article 227 in dealing with an application under Order 18 Rule 17 CPC, came to a finding that unless the reasons given by the Trial Court in rejecting an application under Order 18 Rule 17 CPC can be said to be moonshine, flimsy or irrational, the rejection of the application cannot be dubbed as suggestive of non-judicial approach or bias or partiality on the part of the Trial Court merely because in the exercise of its discretion another Court might have taken a different view and allowed the application. Mr. Narasimha submitted that, in other words, an application under Order 18 Rule 17 CPC should not be rejected as a matter of course, unless it was shown that such an application was moonshine, flimsy or irrational.

8. Mr. Narasimha then referred to a Single Bench decision of the Madras High Court in S.S.S. Durai Pandian Vs. Samuthira Pandian (AIR 1998 Mas 323) in which it had been held that under Order 18 Rule 17 CPC, the Court could not only recall a witness on its own but also on an application made by the defendants. Similar views were expressed by the Himachal Pradesh High Court in the case of Satinder Singh Vs. Sukhdev (AIR 1999 HP 72) and by the Punjab & Haryana High Court in the case of Om Prakash Vs. Sarupa & Ors. (AIR 1981 P&H 157).

9. In this regard, Mr. Narasimha also referred to another Single Bench decision of the Rajasthan High Court in Jodhpur Gums & Chemicals Pvt. Ltd. Vs. Punjab National Bank & Ors. (AIR 1999 Raj. 38), wherein while expressing the same views as expressed in the above-mentioned matters, it was also observed that by allowing such an application for recall of a witness, no prejudice could be caused to the defendants as, apart from being compensated by costs, they would also have the opportunity to cross-examine the witness.

10. On the basis of the above, Mr. Narasimha submitted that the orders of the learned Single Judge, as also the Division Bench, were passed on an erroneous understanding of the law and were liable to be set aside.

11. Strongly opposing the submissions made on behalf of the appellants, Mr. Shivaji M. Jadhav, learned Advocate, submitted that as has been held by the learned Single Judge and subsequently confirmed by the Division Bench, the application made under Order 18 Rule 17 CPC was nothing but an attempt to fill up the lacunae in the evidence of Sadanand Shet after his examination had been completed. He urged that it is settled law that an application under Order 18 Rule 17 CPC could not be allowed when the deponent, while preparing his affidavit evidence, had full knowledge of all the facts which were now being proposed to be included in his evidence, and that the same had been held to be impermissible. Mr. Jadhav also contended that the power under Order 18 Rule 17 CPC, though giving wide power to the Court to recall any witness at any stage of a suit in order to examine him/her, was also meant to be exercised sparingly so that after the examination and cross-examination of a witness, the said witness was not utilized for filling up the gaps in the evidence of the witness which had been elicited during cross-examination.

12. Mr. Jadhav submitted that both the learned Single Judge as well as the Division Bench of the High Court had rightly dismissed the appellants' application under Order 18 Rule 17 CPC and the orders did not merit any interference.

13. In support of his submissions, Mr. Jadhav referred to a Single Bench decision of the Allahabad High Court in Sunder Theaters Vs. Allahabad Bank, Jhansi (AIR 1999 All. 14), where a similar question arose and the Court observed that the power of the Court under Order 18 Rule 17 CPC is discretionary and has to be exercised with the greatest care and only in exceptional circumstances. It was further observed that under the garb of this rule, the Court ought not to recall a witness at the instance of a party in order to fill up a lacuna in the evidence already led.

14. Mr. Jadhav, therefore, submitted that the application filed by the appellants under Order 18 Rule 17 CPC had been rightly rejected by the Courts below following the well-established principles as to invocation of power by a Court under Order 18 Rule 17 CPC.

15. Having heard learned counsel for the respective parties, we are unable to agree with Mr. Narasimha that both the Single Judge and the Division Bench of the High Court had erred in rejecting the appellants' application under Order 18 Rule 17 CPC since, according to Mr. Narasimha, no prejudice would be caused to the respondent as he would be given a chance of cross-examination after re-examination-in-chief by the plaintiff.

16. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined. As indicated by the learned Single Judge, the evidence now being sought to be introduced by recalling the witness in question, was available at the time when the affidavit of evidence of the witness was prepared and affirmed. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of the applicant when the affidavit evidence was prepared. In the instant case, Sadanand Shet was shown to have been actively involved in the acquisition of the flat in question and, therefore, had knowledge of all the transactions involving such acquisition. It is obvious that only after cross-examination of the witness that certain lapses in his evidence came to be noticed which impelled the appellant to file the application under Order 18 Rule 17 CPC. Such a course of action which arises out of the fact situation in this case, does not make out a case for recall of a witness after his examination has been completed. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

17. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination. Of course, if the evidence on re-examination of a witness has a bearing on the ultimate decision of the suit, it is always within the discretion of the Trial Court to permit recall of such a witness for re-examination-in-chief with permission to the defendants to cross-examine the witness thereafter. There is nothing to indicate that such is the situation in the present case. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the Court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out.

18. We, accordingly, have no hesitation in dismissing the appeal, but without any order as to costs. The appeal is accordingly dismissed.