IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMPMO No.30 of 2021

Decided on: 5th February, 2021

Arvind Kumar and others **.....Petitioners**

Versus

Raj Kumar **.....Respondent**

Coram

Ms. Jyotsna Rewal Dua, Judge

Whether approved for reporting?[1] Yes.

For the Petitioners: Mr. Ashwani Kaundal, Advocate, through Video Conference.

Jyotsna Rewal Dua, Judge (Oral)

An application under Section 151 of the Code of Civil Procedure moved by the petitioners (defendants) for reopening the evidence by summoning, calling and examining the witnesses of will has been dismissed by the learned Trial Court vide order dated 15.01.2021. Aggrieved, instant petition under Article 227 of the Constitution of India has been preferred by them.

2. Heard learned counsel for the petitioners and gone through the appended record. Parties are hereinafter referred to as they are before the learned Trial Court.

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[1] Whether reporters of print and electronic media may be allowed to see the order?

3. Suit was filed by the respondent/plaintiff for declaration to the effect that he and defendant No.1 are the joint owners in possession with half share each of the suit land detailed in the plaint. The will dated 09.06.2005 executed by their father late Sh. Ram Asra in favour of defendant No.1 and Satish Kumari (widow of late Sh. Ram Asra) and the will dated 28.06.2006 executed by Smt. Satish Kumari in favour of defendants No.2 and 3 (sons of defendant No.1) are fraudulent, illegal and void ab-initio qua the rights of the plaintiff. The suit was contested by the defendants and evidence was led by them for proving the authenticity of the wills in question. The defendants closed their evidence on 05.08.2017, whereafter the matter was fixed for arguments. On 23.12.2020, defendants moved an application under Section 151 CPC for permission to reopen the evidence. The same having been declined by the learned Trial Court vide the impugned order, instant petition has been preferred.

4(i). The petitioners/defendants invoked inherent powers of the Court under Section 151 of the Code of Civil Procedure for reopening the evidence. In the application, the petitioners/defendants intended to examine three

witnesses. First is Sh. Bachitar Singh, Tehsildar, who is stated to be the Sub-Registrar concerned. According to the defendants, he could not be examined earlier as he was transferred and his correct address was not available with them till 17.12.2020. Second witness intended to be examined is Registration Clerk from Sub-Registrar Office, Una. The defendants submit that the entries on the back side endorsement column of the wills were made by the Registration Clerk in his own handwriting and therefore, he was in a better position to authenticate the handwriting of the Sub-Registrar as well as marginal witnesses of the wills. Thirdly, the defendants seek to examine one Sh. Subhash Chand, Lambardar on the ground that the questions, which were required to be put to the already examined attesting witnesses DW2 and DW3, were not put to them due to inadvertence, therefore, there was necessity to examine Sh. Subhash Chand, Lambardar for proving the will. His name was already there in the list of witnesses, but inadvertently was not summoned by them. The respondent/plaintiff contested the application by submitting that petitioners/defendants had availed nine adjournments for leading their evidence. After thorough

application of mind, they produced their witnesses and closed the evidence on 05.08.2017. Even thereafter an application was moved by them under Order 8 Rule 1-A(3) CPC without any reference to prayers being made now. Law does not permit them to fill up lacuna in their evidence and certainly not at this stage.

4(ii). Suit was filed by the respondent/plaintiff in 2008. It is seen from the impugned order that the case was listed for production of defendants' witnesses on 22.02.2016. The defendants failed to produce the evidence. Thereafter, the matter was listed on 21.04.2016. It was again adjourned to 16.06.2017. On failure of the defendants to lead evidence, the matter was adjourned to 05.08.2017 as last opportunity for production of witnesses by them on self-responsibility. This order was accepted by them. Four witnesses were examined by the defendants on 05.08.2017 and by way of a separate statement, closed their evidence. The matter was thereafter ordered to be listed for arguments on 30.08.2017. It is now stated to be fixed for final arguments on 08.02.2021. It is thus seen that the defendants had themselves closed their evidence on 05.08.2017 after examining four witnesses in support of

their defence. It is not their case that adequate opportunity to lead evidence was not granted to them. Defendants were also satisfied with the evidence led by them. No effort was made by them to move any application immediately thereafter for reopening the evidence as is prayed now in the application moved more than three years after closing their evidence. Not only that, it appears from the record that an application later moved by the defendants under Order 8 Rule 1-A(3) of the Code of Civil Procedure was decided by the learned Trial Court on 01.11.2019. Even in that there was no reference or any prayer for reopening the evidence as is made in the instant petition.

The half-hearted plea taken for summoning the Sub-Registrar on the ground that his present address was not known to the petitioners prior to 17.12.2020 is an apparent lame excuse and cannot be believed for the reason that Sh. Bachitar Singh is a government employee and it would not have been difficult to ascertain his official address. If the petitioners/defendants wanted to examine him, it was for them to ascertain his address at the appropriate time. No reason has been accorded for not summoning the Registration Clerk earlier. Petitioners

despite having included Sh. Subhash Chand, Lambardar in the list of witnesses chose not to produce him. It was for them to produce this witness as vide order dated 16.06.2017, they were directed to produce their evidence on self-responsibility. The order was accepted by them.

4(iii). In matters relating to recall of evidence, relying upon ***(2011) 11 SCC 275,*** titled ***K.K. Velusamy Versus N. Palanisamy***, the Hon'ble Supreme Court in ***(2016) 11 SCC 296, titled Ram Rati Versus Mange Ram (Dead) Through Legal Representatives and others***, held that 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. The relevant paras are extracted hereinafter:-

> *"15. After surveying the various principles stated by this Court on Section 151 from 1961, in K.K. Velusamy, they have been succinctly summarized as follows under para 12: (SCC pp.282-83)*
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> *a) Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognises 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 recognises 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."

16. *Some good guidance on invocation of Section 151 of the CPC to reopen an evidence or production of fresh evidence is also available in K.K. Velusamy. To quote para 14: (SCC p.284)*

"14. The amended provisions of the Code contemplate and expect a trial court to hear the arguments immediately after the completion of evidence and then

proceed to judgment. Therefore, it was unnecessary to have an express provision for reopening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands on earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the court may deem fit to impose."

It will also be appropriate to reproduce hereinafter the word of caution highlighted in *K.K. Velusamy's case*, supra, while exercising power under Section 151 CPC:-

"19. 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 reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs."

In this regard, It will also be pertinent to take note of following observations made in ***(2013) 14 SCC 1***,

titled ***Bagai Construction Versus Gupta Building Material Store***:-

> *"15. After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC."*

4(iv). In the backdrop of above legal position, in the instant case, it is not the case of the petitioners/defendants that adequate opportunity to lead evidence was not granted to them. Instant is also not a case where the petitioners came across any evidence, which was not in their knowledge or upon which they could not lay their hands earlier. They had accepted the order passed by the learned Trial Court on 16.06.2017 to produce their entire evidence by way of last opportunity on self-responsibility, failing

which their right to adduce the evidence was to be deemed to have been closed. Accordingly, after leading their evidence on 05.08.2017 and themselves closing evidence on that day, no application was moved by them for reopening the evidence in proximity to this date. Even in the application moved under Order 8 Rule 1-A(3) CPC, there was no prayer for reopening of the evidence. It was for the defendants to exercise due diligence at the appropriate time. The conduct of the petitioners/defendants goes to show that in the guise of instant application, attempt is being made to protract the trial and to cause serious prejudice to the rights of the respondent/plaintiff. Lacunae, if any, occurred in the evidence led by the defendants, cannot be permitted to be plugged in at this stage, more so in the facts and circumstances of the present case. Benefit of Section 151 CPC cannot be taken to make good the lacunae. In its facts and circumstances, present is not an appropriate case for exercising discretion in favour of the petitioners/defendants for reopening the evidence led more than three years ago. No plausible explanation for non-examination of witnesses earlier, which are now sought to be examined, has been accorded by the petitioners/

defendants. Therefore, in dismissing the application filed by the defendants, learned Trial Court has exercised its discretion in accordance with law.

In view of the above, there is no merit in the instant petition and the same is dismissed alongwith pending miscellaneous application(s), if any. The Registry is directed to bring this order to the notice of learned Trial Court forthwith for expeditious disposal of the civil suit pending since 2008.

Jyotsna Rewal Dua
Vacation Judge

February 05, 2021
Mukesh