$~53(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CM (M) 616/2022 & CM No. 29053/2022

SMT. SHASHI SEHDEV ..... Petitioner
Through: Mr.Pradeep Kumar, Adv.

versus

SH. NARENDER KUMAR SHARMA ..... Respondent
Through: None

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T(O R A L)

% 06.07.2022

1. This petition under Article 227 of the Constitution of India assails order dated 18th November 2019 passed by the learned Additional District Judge ("the learned ADJ"), rejecting an application under Order XVIII Rule 17 of the Code of Civil Procedure (hereinafter referred to as "CPC") filed by the petitioner (the defendant before the learned ADJ) in CS 576816/16 ***(Narender Kumar Sharma v. Shashi Sehdev)***.

2. CS 576816/16 was preferred by the respondent against the petitioner seeking specific performance of an agreement to sell dated 8th January 2013. Among the averments in the plaint was the averment that the respondent had completed part performance of the agreement to sell and that the petitioner was exhibiting recalcitrance in complying with her part of the deal. The respondent, as the plaintiff in the suit, examined himself as PW-1 and one Raj Rani Sharma as PW-2. The petitioner, as the defendant in the suit, cross examined the

respondent and PW-2 Raj Rani Sharma.

3. Admittedly, the recording of evidence of PW-1 was concluded on 13th October 2016 and the recording of evidence of PW-2 Raj Rani Sharma was concluded on 6th March 2017.

4. Thereafter, the respondent chose to change her Counsel. The Counsel newly engaged in the matter filed application under Order XVIII Rule 17 CPC which has come to be dismissed by the impugned order dated 18th November 2019. Paras 4 to 7 of the application, which set out the justification for seeking recall of PW-2 for further cross examination, read thus:

> "4. That at the time of adducing the evidence, the plaintiff examined himself and Smt. Raj Rani Sharma also examined on behalf of the plaintiff. The Counsel for the defendant cross-examined of both the above said witnesses, but the Counsel for the defendant due to the oversight/inadvertence could not cross-examine the veracity of the part performance done and as allegedly performed by the plaintiff on his behalf. It is also pertinent to mention here that the Counsel for the defendant also failed to cross-examined the PW-1 & PW-2 on the facts with respect to the alleged payment made to the defendant and in which circumstances the alleged Agreement dated 08.01.2013 was executed.
>
> 5. That the Counsel for the defendant could not cross-examined the PW-1 & PW-2 on the abovesaid aspects and if the witnesses would not be cross-examined on these two aspects then these facts will be treated the admission on the part of the defendant.
>
> 6. That this fact came to the knowledge of the Counsel for the defendant recently and the cross-examination of the PW-1 & PW-2 is very necessary on the abovesaid aspects and

therefore, it is necessary to call the witnesses PW-1 & PW-2 for further cross-examination by this Hon'ble Court is very necessary.

7. That the defendant is having a very valuable right in the present suit and if the Hon' ble Court shall not grant the opportunity to the defendant to cross-examine the PW-1 & PW-2 on the abovesaid aspects then the defendant shall suffer an irreparable loss and injury, which cannot be compensated in terms of time and money and it is further submitted that if the Hon'ble Court allows the present application then no prejudice shall be caused to the plaintiff in any manner. Rather it will be helpful in properly adjudication of the present case by this Hon'ble Court."

5. The learned ADJ has, in the impugned order dated 18th November 2019, observed thus:

"It is matter of record that PW-1 was examined in chief on 22.02.2016 and he was cross-examined at length on 27.04.2016 and 13.10.2016. Similarly, PW-2 Smt. Raj Rani Sharma was examined on 06.03.2017 and was cross-examined at length on same day. It seems that the learned counsel for the defendant cross-examined the witnesses on relevant aspects to the best of her understanding. The present application has been filed by the new counsel engaged by the defendant but simply because a new counsel has been engaged and the said counsel thinks otherwise about the quality of cross-examination conducted by the earlier counsel, it cannot be said that there is an valid and justifiable ground for recalling of the witnesses after such a long period. If such like requests are considered and allowed by the courts then there will be no end to the litigation. In my opinion, it recalling of PW-1 & PW-2 is allowed at this stage, the same is cause prejudice to the case of the plaintiff as well as unnecessary delay to the proceedings.

So, keeping in view the overall facts and circumstances of the case, the application filed by the defendant is found to be devoid of merits and same is accordingly dismissed."

6. Aggrieved by the said order, the petitioner has invoked the jurisdiction vested in this Court by Article 227 of the Constitution of India.

7. The jurisdiction of this Court under Article 227 of the Constitution of India is circumscribed by very well-known and well-delineated parameters. One may refer, in this context, to the following passages from the decisions in ***Sadhana Lodh v. National Insurance Co. Ltd***[1]***, Ibrat Faizan v. Omaxe Buildhome Pvt. Ltd.***[2]***, Estralla Rubber v. Das Estate (P) Ltd.***[3]***, Garment Craft v. Prakash Chand Goel***[4]***, Puri Investments v. Young Friends and Co.***[5]***.***

Sadhana Lodh[1]:

> "7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined *only to see whether an inferior court or tribunal has proceeded within its parameters* and *not to correct an error apparent on the face of the record, much less of an error of law.* In exercising the supervisory power under Article 227 of the Constitution, the High Court *does not act as an appellate court or the tribunal.* It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision."
>
> (Emphasis Supplied)

---

[1] **(2003) 3 SCC 524**
[2] **2022 SCC OnLine SC 620**
[3] **(2001) 8 SCC 97**
[4] **2022 SCC OnLine SC 29**
[5] **2022 SCC OnLine SC 283**

Ibrat Faizan[2]

> "28. The scope and ambit of jurisdiction of Article 227 of the Constitution has been explained by this Court in the case of ***Estralla Rubber***[3]**.**, which has been consistently followed by this Court (see the recent decision of this Court in the case of ***Garment Craft***[4]). Therefore, while exercising the powers under Article 227 of the Constitution, the High Court has to act within the parameters to exercise the powers under Article 227 of the Constitution. It goes without saying that even while considering the grant of interim stay/relief in a writ petition under Article 227 of the Constitution of India, the High Court has to bear in mind the limited jurisdiction of superintendence under Article 227 of the Constitution. Therefore, while granting any interim stay/relief in a writ petition under Article 227 of the Constitution against an order passed by the National Commission, the same shall always be subject to the rigour of the powers to be exercised under Article 227 of the Constitution of India."

Estralla Rubber[3]

> "7. This Court in ***Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ram Tahel Ramnand***[6] in para 12 has stated that the power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases, for the purpose of keeping the subordinate courts and tribunals within the bounds of their authority and, not for correcting mere errors. Reference also has been made in this regard to the case ***Waryam Singh v. Amarnath***[7]. This Court in ***Bathutmal Raichand Oswal v. Laxmibai R. Tarte***[8] has observed that the power of superintendence under Article 227 cannot be invoked to correct an error of fact which only a superior court can do in exercise of its statutory power as a court of appeal and that the High Court in exercising its jurisdiction under Article 227 cannot convert itself into a court of appeal when the legislature has not conferred a right of appeal. Judged by

[6] AIR 1972 SC 1598
[7] AIR 1954 SC 215
[8] AIR 1975 SC 1297

these pronounced principles, the High Court clearly exceeded its jurisdiction under Article 227 in passing the impugned order."

(Emphasis Supplied)

Garment Craft[4]

15. Having heard the counsel for the parties, we are clearly of the view that the impugned order [***Prakash Chand Goel v. Garment Craft***[9]] is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. *The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal.* [***Celina Coelho Pereira v. Ulhas Mahabaleshwar Kholkar***[10]] *The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.*

16. Explaining the scope of jurisdiction under Article 227, this Court in ***Estralla Rubber***[3] has observed : (SCC pp. 101-102, para 6)

"6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a

[9] 2019 SCC OnLine Del 11943
[10] (2010) 1 SCC 217

number of decisions of this Court. *The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals.* Exercise of this power and interfering with the orders of the courts or tribunals *is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected*. It is also well settled that the High Court while acting under this Article *cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record*. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, *if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to*."

(Emphasis Supplied)

Puri Investments*[5]*:

"14. In the case before us, occupation of a portion of the subject-premises by the three doctors stands admitted. What has been argued by the learned counsel for the appellant is that once the Tribunal had arrived at a finding on fact based on the principles of law, which have been enunciated by this Court, and reflected in the aforesaid passages quoted from the three authorities, the interference by the High Court under Article 227 of the Constitution of India was unwarranted. To persuade us to sustain the High Court's order, learned counsel appearing for the respondents has emphasized that full control over the premises was never ceded to the medical practitioners and the entry and exit to the premises in question remained under exclusive control of the respondent(s)-tenant. This is the main defence of the tenant. We have considered the submissions of the respective counsel and also gone

through the decisions of the fact-finding fora and also that of the High Court. At this stage, we cannot revisit the factual aspects of the dispute. Nor can we re-appreciate evidence to assess the quality thereof, which has been considered by the two fact-finding fora. The view of the forum of first instance was reversed by the Appellate Tribunal. *The High Court was conscious of the restrictive nature of jurisdiction under Article 227 of the Constitution of India.* In the judgment under appeal, it has been recorded that it could not subject the decision of the appellate forum in a manner which would project as if it was sitting in appeal. It proceeded, on such observation being made, to opine that *it was the duty of the supervisory Court to interdict if it was found that findings of the appellate forum were perverse*. *Three situations were spelt out in the judgment under appeal as to when a finding on facts or questions of law would be perverse. These are: —*

> *(i) Erroneous on account of non-consideration of material evidence, or*
>
> *(ii) Being conclusions which are contrary to the evidence, or*
>
> *(iii) Based on inferences that are impermissible in law.*

15. We are in agreement with the High Court's enunciation of the principles of law *on scope of interference by the supervisory Court on decisions of the fact-finding forum*. But having gone through the decisions of the two stages of fact-finding by the statutory fora, we are of the view that there was overstepping of this boundary by the supervisory Court. In its exercise of scrutinizing the evidence to find out if any of the three aforesaid conditions were breached, there was re-appreciation of evidence itself by the supervisory Court."

(Emphasis Supplied)

8. Clearly, therefore, the Court, exercising jurisdiction under Article 227 of the Constitution of India, is not concerned so much with the correctness of the order passed by the court below, as with the

manner in which the court below has exercised its jurisdiction in passing the said order. Where the manner of exercising jurisdiction does not call for supervisory correction, in exercise of the power of superintendence that under Article 227 vests, in the High Court, over the courts below, the High Court would hold its hands and would refrain from interfering. The manner in which the court below has addressed itself to the merits of the application or petition before it, assumes relevance, under Article 227 of the Constitution of India, only where such assumption of jurisdiction merits supervisory correction within the well delineated boundaries of Article 227.

9. In the present case, the impugned order is clearly discretionary in nature. There is no absolute right, vested in any party, to seek recall of a witness under Order XVIII Rule 17 of the CPC.

10. Order XVIII Rule 17 of the CPC, in fact, if read literally, operates in a very narrow compass. It reads thus:

> **"17. Court may recall witness and examine witness:**
>
> The Court may at any stage of a 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**."**

11. If one were to read Order XVIII Rule 17 as it stands, it would appear that it merely empowers a court to recall a witness for clarifying any doubt and envisages questions being put to the recalled witness by the court for the said purpose. This narrow statutory

compass within which Order XVIII Rule 17 revolves has, however, been broadened by judicial authorities, so as to make it more effective, and to subserve the cause of justice. Even so, the peripheries of Order XVIII Rule 17 still remain narrow and well-circumscribed. One may refer, in this context, to the following passages from ***Ram Rati v. Mange Ram***[11]**.**

> "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.
>
> 12. In ***Vadiraj Naggappa Vernekar (Dead) Through LRs. v. Sharadchandra Prabhakar Gogate***[12], this principle has been summarized at paragraphs- 25, 28 and 29:
>
> > "25. 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

[11] **(2016) 11 SCC 296**
[12] **(2009) 4 SCC 410**

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.

xxx xxx xxx

28. 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 1 (2009) 4 SCC 410 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.

29. 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."

13. In ***K.K. Velusamy v. N. Palanisamy***[13], the principles enunciated in ***Vadiraj***[12] (supra) have been followed, holding at paragraphs- 9 and 10:

"9. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not

[13] **(2011) 11 SCC 275**

intended to be used to fill up omissions in the evidence of a witness who has already been examined. (***Vide Vadiraj***[12].)

10. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the 2 (2011) 11 SCC 275 evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions."

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***[13] (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."
>
> *****
>
> 18. The settled legal position under Order 18 Rule 17 read with Section 151 of the CPC, being thus very clear, the impugned orders passed by the trial court as affirmed by the High Court to recall a witness at the instance of the respondent "for further elaboration on the left out points", is wholly impermissible in law."

12. A holistic reading of the aforesaid passages from ***Ram Rati***[11] makes it clear that, classically, the recall of a witness under Order XVIII Rule 17 has to be for clarifying any doubts which may exist, despite the evidence already recorded and that, in this context, the Court is entitled to co-opt the assistance of the parties and permit questioning, by the parties, of the recalled witness. Nonetheless, in exceptional cases, the parties may also be permitted to apply for recall of witnesses under Order XVIII Rule 17 for further examination or cross examination. In such cases, however, the Court would be exercising jurisdiction under Order XVIII Rule 17 read with Section 151 of the CPC. The manner in which Section 151 of the CPC would come in for application in such a case also stands identified by the Supreme Court in para 16 of ***Ram Rati***[11], which reads thus:

> "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***[13] (supra). To quote paragraph-14:

> "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."

13. The resultant legal position is that, whether under Order XVIII Rule 17 or Order XVIII Rule 17 read with Section 151 of the CPC, a party may be permitted to recall a witness for further examination or cross examination if (i) there exists any doubt, remaining after the recording of the evidence of the said witness that has already taken place, which is required to be clarified or (ii) after the evidence of the witness has been recorded, the party seeking recall has come across evidence on which he could not lay his hands earlier, or (iii) evidence in regard to the conduct or action of the other party has come into existence.

14. The decision in ***Ram Rati***[11] makes it perfectly clear that the recall of a witness is not to be permitted to fill up omission in the evidence already led by the witness, or to fill up any lacuna or omission in the evidence of the witness which has already been

recorded.

15. The ground on which the petitioner has, in her application under Order XVIII Rule 17, sought recall of PW-2 for further cross examination, clearly, envisages filling of a lacuna or omission in the evidence of PW-2, recorded during cross examination. The learned ADJ has also correctly observed that the only ground on which the said plea has been made is that the earlier Counsel who was prosecuting the matter, by inadvertence, failed to ask certain questions which, according to the Counsel who has later taken up the case, were relevant. Such requests, if accommodated, would result in endless protraction of matters and would frustrate expeditious disposal of proceedings.

16. In that view of the matter, I find no reason whatsoever to interfere with the impugned order, within the narrow confines of the jurisdiction vested in this court by Article 227 of the Constitution of India.

17. The petition is therefore dismissed with no orders as to costs.

C.HARI SHANKAR, J

JULY 6, 2022/kr