

*Before Amol Rattan Singh, J.*

**M/S UTKARSH BUILDCON PVT. LTD. AND OTHERS—Petitioner**

*versus*

**CHANDER PRAKASH BANGA AND OTHERS—Respondents**

**C. R. No.4553 of 2018**

August 01, 2018

*Constitution of India, 1950 — Art. 227 — Code of Civil Procedure, 1908 — S. 151 — Petitioner, who was defendant in the suit, filed the instant petition for permission to recall the plaintiffs' witness for cross examination after the evidence was closed — The alternative prayer of the petitioner was to frame question and provide documents to the trial court, who could test the requirement of the question and put the same to the witness — Petitioner averred that they have invested substantial capital in the purchase of the land in question and their title was sought to be defeated by the plaintiff on the ground that the power of attorney was fraudulent — Having regard to the circumstances of the case, the High Court set aside the impugned order, and directed the petitioner to supply a list of question to the trial Court, who would take a decision whether such questions are indeed relevant for recalling the plaintiffs' witness — Revision petition allowed.*

*Held*, that having considered the arguments raised on both sides, looking into the fact that a power of attorney executed in the year 1989 is stated to have been challenged in the year 2011, without however making any comment on that fact, which naturally would be gone into wholly independently of this observation of this Court, by the trial Court, in my opinion, the alternative relief sought by the petitioners as regards presenting the questions that they wish to put to the witness sought to be recalled, i.e. the plaintiff, deserves to be granted, subject to payment of some costs for the delay that it would cause.

(Para 10)

*Further held*, that consequently, the petition is allowed with the impugned order set aside. The petitioners are directed to supply a list of questions that they wish to put to the witness that they want to recall, i.e. PW-1 Chander Prakash Banga (respondent no. 1 herein), which would then be looked into by the learned trial Court and a decision taken by that Court, as to whether such questions are indeed relevant enough for recalling of PW-1, in the entire circumstances of the case as enumerated hereinabove.

(Para 11)

*Further held that* it is further to be clarified that if the trial Court allows the application now to be made by the petitioners, along with the questions that they wish to put, one effective opportunity shall be granted to the petitioners to further cross examine PW-1.

(Para 13)

*Further held that* the list of questions proposed to be now put to PW-1 be submitted to the learned trial Court within 15 days from today in a sealed cover, with the learned trial Court to take a decision thereon within the next 15 days thereafter and pronounce its decision.

(Para 14)

Sanjeev Sharma, Senior Advocate, with Shekhar Verma, Advocate, *for the petitioners.*

Salinder Khyshap, Advocate, with Parshant Sethi, Advocate, for respondent no. 1-caveator.

### **AMOL RATTAN SINGH, J. (ORAL)**

(1) As recorded in the order dated 30.07.2018, learned Senior Counsel appearing for the petitioners had relied upon a judgment of the Supreme Court in *K.K. Velusamy versus N.Palanisamy*<sup>1</sup>, to submit that recalling of a witness can be ordered upon an appropriate application filed and that there would be no absolute bar for doing so, the contention being that the impugned order does not take into account the fact that the witness (PW-1), who is the plaintiff himself, is necessarily required to be re-examined, counsel for the petitioners before the trial Court (defendants no.14 to 19 and 21 to 23), having, as contended, missed out on certain vital questions, which he noticed at the time when he was preparing the case for arguments.

(2) Learned counsel for respondent no. 1 before this Court (plaintiff) had sought time to distinguish the said judgment and today has pointed to the following observations made by their Lordships to submit that that case was decided in the specific circumstances enumerated in paragraph 4 thereof and hence, the ratio of that judgment could not apply to the present case with in fact the Supreme Court having also further held in that very judgment, as follows:-

“9. There is no specific provision in the Code enabling the parties to re-open 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 Code 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 re-opening of evidence or recall of any witness for further examination or

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<sup>1</sup> 2011 (2) RCR (Civil) 875

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 re-open 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.”

(3) He further points to paragraphs 8, 11, 12, 14 and 16 to reiterate to the same effect.

(4) He next points to the application filed by the petitioners seeking recalling of the witness (copy Annexure P-6 herewith), to submit that, firstly, not even the provision under which the application had been filed has been mentioned therein and further, no specific questions that the petitioners wished to put to the witness who has to be recalled (the plaintiff himself), were disclosed in the application and consequently, in fact the ratio of the judgment aforesaid actually is in favour of the said respondent.

(5) In response thereto, Mr. Sharma, learned Senior counsel appearing for the petitioners, points to the grounds of revision, where an alternative relief has been sought, (i.e. as an alternate to immediately directing for recalling of the witness), which is as follows:-

“Or in the alternative, in order to prove their bona fide, the petitioners can frame questions and provide documents to the learned Presiding Officer, who can test the requirement of the questions, so framed and put the same to the witness.”

(6) Mr. Sharma has further reiterated that the petitioners are in fact the persons who are most affected by the litigation as they are subsequent purchasers of the land which has changed hands many times since it was originally sold in the year 1989, and they have spent more than Rs.115 crores on the purchase of the land alone, with other requisite fee having been paid for change of the land user.

(7) He further points to the fact that the relief claimed by the respondent- plaintiff is based on the fact that, as contended in the plaint, he (plaintiff) came into knowledge of the fact only recently, that an impostor had used a power of attorney in the year 1989, and that the person who is shown to have issued it, had died in the year 1973. He therefore submits that an instrument used in the year 1989 having been

questioned in the year 2011, the balance of convenience is in the favour of the petitioners.

(8) In response to the aforesaid contention, learned counsel for respondent no. 1-plaintiff submits that as a matter of fact the last son of the original allottee (who died in the year 1973), died in the year 2011, who is stated to have been in possession of the suit land and was looking after it, after which the plaintiff (who is contended to be the grand-son of the original allottee) “came to know of the fraud”, in respect of which the criminal proceedings are also going on.

(9) He further submits that in fact even the licence issued to the petitioner company has been cancelled, which learned Senior Counsel refutes on the ground that a specific averment has been made by the petitioners in their written statement to the effect that they have been issued a licence, to which no replication has been filed (though learned counsel for respondent no. 1-caveator counters by saying that such contention came in the evidence of PW-3).

(10) Having considered the arguments raised on both sides, looking into the fact that a power of attorney executed in the year 1989 is stated to have been challenged in the year 2011, without however making any comment on that fact, which naturally would be gone into wholly independently of this observation of this Court, by the trial Court, in my opinion, the alternative relief sought by the petitioners as regards presenting the questions that they wish to put to the witness sought to be recalled, i.e. the plaintiff, deserves to be granted, subject to payment of some costs for the delay that it would cause.

(11) Consequently, the petition is allowed with the impugned order set aside. The petitioners are directed to supply a list of questions that they wish to put to the witness that they want to recall, i.e. PW-1 Chander Prakash Banga (respondent no. 1 herein), which would then be looked into by the learned trial Court and a decision taken by that Court, as to whether such questions are indeed relevant enough for recalling of PW-1, in the entire circumstances of the case as enumerated hereinabove.

(12) The petitioners shall pay costs of Rs.10,000/- at the time when they submit the questions to the learned trial Court. (It is to be noticed that though this Court had indicated that costs to be paid would be higher, however, having reconsidered that in view of what has been noticed hereinabove, costs of Rs.10,000/- are considered appropriate at this stage).

(13) It is further to be clarified that if the trial Court allows the

application now to be made by the petitioners, along with the questions that they wish to put, one effective opportunity shall be granted to the petitioners to further cross- examine PW-1.

(14) The list of questions proposed to be now put to PW-1 be submitted to the learned trial Court within 15 days from today in a sealed cover, with the learned trial Court to take a decision thereon within the next 15 days thereafter and pronounce its decision.

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*P.S. Bajwa*