IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 12807 of 2013

FOR APPROVAL AND SIGNATURE:

HONOURABLE SMT. JUSTICE ABHILASHA KUMARI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**No**
2	To be referred to the Reporter or not ?	**No**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**No**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?	**No**
5	Whether it is to be circulated to the civil judge ?	**No**

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MAYADEVI KISHNSWARUP GUPTA....Petitioner(s)

Versus

SHAH RAKESH RAJENDRABHAI & 1....Respondent(s)

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Appearance:

MR ASIT M MEHTA, ADVOCATE for the Petitioner(s) No. 1

MR KAMLESH S KOTAI, ADVOCATE for the Respondent(s) No. 1 - 2

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CORAM: **HONOURABLE SMT. JUSTICE ABHILASHA KUMARI**

Date :30/08/2013

ORAL JUDGMENT

1. The present petition under Articles 226 and 227 of the Constitution of India has been preferred, inter alia, with a prayer to quash and set aside the order dated 28-01-2013, passed by the learned 5th Additional Senior Civil Judge, Mahesana (“the Trial Court” for short) below the application at Exh.200, the order dated 08-04-2013 passed by the Trial Court below the application for review of the aforestated order at Exh.211, and the order dated 20-07-2013 passed by the learned Additional District Judge, Mahesana (“the Appellate Court” for short) in Civil Misc. Appeal No.33 of 2013.

2. The brief factual background of the case is as follows:

The petitioner is the plaintiff in Regular Civil Suit No.204 of 2007, wherein it is inter alia prayed that the Sale Deed in respect of the suit property, executed by Defendant No.1 in favour of Defendant No.2 (respondents herein) on the basis of an allegedly forged Power of Attorney and other fabricated documents, be declared as fraudulent and

null and void. During the trial, the petitioner preferred an application at Exh.62, praying that certain documents be given tentative Exhibit Numbers. By an order dated 03-08-2010, the Trial Court granted the prayer and the documents mentioned in the application were given tentative Exhibit Numbers. Thereafter, the petitioner moved a closing Pursis at Exh.19, on 29-09-2010, for closure of her evidence, as no other witnesses were required to be examined. Defendant No.1 led his evidence. After completion of the evidence of Defendant No.1 by closing Pursis dated 17-07-2012, the Suit reached the stage of leading evidence by Defendant No.2, who filed his affidavit in examination-in-chief. At this stage, the petitioner filed the application at Exh.200, for reopening her right to lead evidence. This application has been rejected vide order dated 28-01-2013, by the Trial Court. The petitioner preferred an application at Exh.211, for review of the aforestated order, before the Trial Court which was rejected vide order dated 08-04-2013. Aggrieved by the above two orders, the petitioner filed Civil Misc. Appeal No.33 of 2013, before the Appellate Court. The said appeal has been dismissed by order dated 20-07-2013. Aggrieved by the

above-mentioned orders, the petitioner has approached this Court.

3. Mr.Asit M.Mehta, learned advocate for the petitioner has submitted that the Trial Court has failed to appreciate the factual and legal position correctly and has thereby caused injustice to the petitioner by rejecting her application for re-opening her right to lead evidence. That, after the petitioner moved the closing Pursis and the evidence came to be closed, she discovered that the report of the Forensic Science Laboratory (”FSL” for short) is required to be proved, which has not been done. Secondly, it is to be proved that the lay-out plan produced by the Defendants is false and fabricated, as the original plan is with the petitioner. Thirdly, the letter of the Mamlatdar, Mahesana, has to be proved and he is to be examined in this regard. It is further submitted that as per the settled principles of law, the petitioner ought to have been granted an opportunity to lead additional evidence to prove her case. That, the Trial Court has not considered the above aspects while rejecting the applications made by the petitioner at Exhs.200 and 211, respectively. Learned

Advocate for the petitioner has further submitted that the Appellate Court has not taken into consideration the aspect that the petitioner has a right to lead evidence and that the need arose for re-opening the said right after the closure of evidence, when it was discovered that certain documents are required to be proved and witnesses examined, as the petitioner had no knowledge regarding the same before closure of her evidence. It is submitted that the impugned order of the Appellate Court has been passed without application of mind as certain judgments cited by the petitioner have been wrongly mentioned in the said order.

4. On the strength of the above submissions learned advocate for the petitioner has submitted that the impugned orders deserve to be stayed and, ultimately, quashed and set aside.

5. Reliance has been placed on behalf of the petitioner on the following judgments:

(1) K.K.Velusamy v. N.Palanisamy, reported in (2011) 11 SCC 275

(2) Jeet Mohinder Singh v. Harminder Singh, reported in (2004) 6 SCC 26

(3) Saiyed Sahejadmiya Sulemanmiya, deceased through heir Sahedabegum and others v. Abdul Razak Isabhai Memon, reported in 1999(2) GLH 188

6. The submissions advanced on behalf of the petitioner have been strongly resisted by Mr.Kamlesh S.Kotai, learned advocate for the respondents (defendants in the Suit) who has appeared on Caveat. He submits that the impugned orders of the Trial Court and the Appellate Court are just and proper, having been passed upon a proper appreciation of facts and law. That the petitioner had herself prayed for giving tentative Exhibit numbers to the documents mentioned in the application Exh.62, on the ground that Government/Official documents need not be proved. Accordingly, the opinion of the FSL has been given a tentative Exhibit number. It is submitted that the lay-out plan was very much in the knowledge of the petitioner, which is an admitted fact. In any event, this document has also been given a tentative Exhibit Number. The burden of proving the case is on the petitioner and she has voluntarily given a closing

Pursis, that has been accepted. It is contended that at the late stage when the evidence of Respondent No.1 is over and Respondent No.2 has filed the affidavit in examination-in-chief and all the defences have been disclosed, the petitioner has filed the application at Exh.200, in order to fill in the lacunae in her case, which has rightly been rejected by the Trial Court, by giving cogent reasons. It is further contended that no grounds of review of the said order are made out by the petitioner, therefore, the order below Exh.211 is just and proper, as held by the Appellate Court.

7. On the above grounds, it is prayed that the petition be not entertained.

8. This Court has heard learned counsel for the respective parties at length and perused the material on record.

9. The admitted facts may be enumerated at this stage. During the pendency of the Suit, the petitioner filed an application at Exh.62, for giving tentative Exhibit numbers to certain documents. This application was allowed vide an order dated 03-08-2010, by the

Trial Court, and the documents mentioned therein were given tentative exhibit numbers. These documents include the opinion of the FSL and the lay-out plan. Thereafter, on 29-09-2010, the petitioner filed a closing Pursis at Exh.119, voluntarily, stating that it is not necessary to examine other witnesses, and plaintiff's evidence be declared closed. The Suit was the kept for the evidence of the respondents/defendants. Respondent No.1 examined his witnesses and filed his closing Pursis at Exh.163, on 19-07-2010. Thereafter, Respondent/Defendant No.2 filed his affidavit in examination-in-chief, vide Exh.164. It is at this stage that the petitioner filed the application at Exh.200, for reopening the stage to lead evidence, on 05-11-2012. While rejecting the said application, the Trial Court has observed that the petitioner has filed the application after a period of about two years from the voluntary closure of her evidence, during which period the Defendants have led evidence and disclosed their defence. It is further observed that there is no reasonable explanation for the delay and if the application is allowed, the trial would be delayed considerably.

10. The Appellate Court has observed in its impugned order that the documents of the petitioner have been given tentative Exhibit Numbers, on her own asking. However, without reserving the right to prove them, the petitioner has filed a closing Pursis for closure of her evidence. Thereafter, she has filed the application at Exh.200, after a delay of two years, when the defendants have already led their evidence, without any reasonable or cogent reason.

11. Considering the legal and factual aspects of the matter, in the considered view of this court, both the Trial Court and the Appellate Court have not committed any error in rejecting the application for re-opening of the evidence of the petitioner, the application for review and the appeal.

12. At this stage it would be germane to advert to the legal position in this regard. In **K.K.Velusamy v. N.Palanisamy (Supra),** (cited by the petitioner) the Supreme Court has held as under:

> *"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 intended to be used to fill up omissions in the evidence of a witness who has already been examined.*** *[Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate - 2009 (4) SCC 410].*

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 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 moto, 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.

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 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 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.

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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."*

(emphasis supplied)

13. As held by the Apex Court in the above-quoted judgment, the provisions of Order 18 Rule 17 of the Code of Civil Procedure, 1908 ("the Code" for short)

enable the Court to recall any witness who has been examined. However, this power is discretionary and should be exercised sparingly and in appropriate cases, in order to clarify any doubts that the court may have with regard to the evidence led by the parties. This power is not to be used to fill up omissions in the evidence of witnesses.

14. After the deletion of Order 18 Rule 17A from the Code there is no specific provision for reopening the evidence of parties. However, resort can be had to the provisions of Section 151 of the Code, wherein in exercise of its inherent powers, the Court can pass any order that may be necessary to rescue the ends of justice and prevent the abuse of the process of the Court. However, the power under Section 151 ought not to be used in a routine manner but only in cases where the additional evidence will assist the Court in clarifying the evidence on the issues involved. The Court must be satisfied that there are valid and sufficient grounds for not producing the evidence earlier and that the party is not trying to intentionally delay the trial of the Suit.

15. In the present case, the application for recall of evidence has been filed after two years of the closure of evidence voluntarily by the petitioner. In the interregnum, Respondent/Defendant No.1 has examined his witnesses and disclosed his defence. Respondent/Defendant No.2 has filed his affidavit for examination-in-chief. The petitioner has not pleaded any valid or sufficient reason to explain the delay in filing the application. It certainly appears that the application is an afterthought, on the part of the petitioner, who wants to gain advantage by the defence disclosed by the respondents and thereby try to fill in the lacunae and omissions in her evidence. The view taken by the Trial Court and Appellate Court by rejecting the application is, therefore, just and proper.

16. Insofar as the rejection of the application at Exh.21 for the review of the order passed by the Trial Court at Exh.200 is concerned, it is clear from the material on record that the petitioner was in the knowledge and in the possession of, the FSL report and the lay-out plan. This is an admitted fact. There is no discovery of any new or important material or

evidence by the petitioner which, by the exercise of due diligence, could not be brought to the knowledge of the petitioner or produced at the relevant point of time. The concerned documents were very much in the knowledge and possession of the petitioner and have also been given tentative exhibit numbers, at her own behest. The petitioner was represented by a lawyer throughout, therefore, there is no question regarding her not being aware of the legal requirements. The Trial Court has, in my view, rightly rejected the application for review, by giving cogent grounds.

17. The Appellate Court has correctly appreciated and considered the legal and factual position while rejecting the appeal against the above-mentioned orders.

18. The other judgments cited by the petitioner, being not directly relevant to the legal and factual matrix of the case, are not being discussed in detail.

19. The cumulative result of the above discussion is that there is no merit in the present petition, which deserves to be rejected, at this stage.

20. It is, accordingly, rejected.

(SMT. ABHILASHA KUMARI, J.)

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