as to what was the basis on which it was found that there was a delay of six years before the dispute was raised by the petitioner before the appropriate authority. Neither any evidence has been discussed nor any fact has been so referred which could be clinching for the government to hold that there was no explanation tendered by the petitioner to approach the Government late i.e. after a period of six years. This order dated 30th October, 1994, Annexure P-6, is also set aside being cryptic and non speaking and a direction is issued to the respondents to forward the case of the petitioner to the State of Haryana under Section 10(1)(a) of the Act for reference. All the three writ petitions mentioned in this para of the petition are, thus, allowed.

R.N.R.

Before Swatanter Kumar, J

BANWARI,—*Petitioner*

versus

NAGINA,—*Respondent*

CIVIL REVISION No. 4287 of 1997

6th February, 1998

Code of Civil Procedure, 1908—Order 18 Rl. 2—Has to be read in conjunction with the provisions of Order 18 Rule 17-A, CPC.

Held that additional evidence can be permitted to the party if the party permitting such relief had failed to lead the evidence at the earlier stage after exercising due diligence and there was sufficient cause for granting such permission. Primary distinction is between not to able to produce in spite of due diligence and waiver to lead evidence. 'Waiver' is an intentional act or an act which can be reasonably construed from the record that the party intentionally failed to lead evidence which it ought to have. There is also no doubt to the fact that Order 18 Rule 2 C.P.C. has to be read in conjunction with the provisions of Order 18 Rule 17-A. CPC.

(Para 4)

Code of Civil Procedure, 1908—Order 18 Rule 17-A-Case fixed for recording plaintiff's evidence in rebuttal-Plaintiff basing his claim on the written statement filed in previous suit where his

right was accepted—Would cause no prejudice to either of the party if the plaintiff permitted to lead additional evidence.

Held that the case is fixed for recording of evidence of the plaintiff in rebuttal. After production of the record of the previous suit, the defendant did not comply with the order of the Court and if the plaintiff wishes to discharge his onus in rebuttal, the same cannot be outrightly rejected. The examination of handwriting expert would held ineffective and complete adjudication of the present suit specially keeping in view the observations of the learned Presiding Officer as recorded in the order sheet dated 31st March, 1993. The parties are at issue with regard to the decree passed in the previous suit. The plaintiff and the defendant in the present suit has challenged the decree in the previous suit basing his claim on the written statement filed in the previous suit where his right was accepted. It will be in fairness and would cause no prejudice to either of the party if the plaintiff is permitted to lead additional evidence. The plaintiff is not trying to establish a case which he had not pleaded.

(Para 8)

Vikram Singh, Advocate, *for the petitioner.*

U. K. Agnihotri, Advocate, *for the respondent.*

JUDGMENT

Swatanter Kumar, J.

(1) While impugning the order dated 16th September, 1997 in this revision, the contention of the learned counsel for the petitioner is that the trial Court has failed to exercise the jurisdiction vested in it, which is apparent on the face of record, consequently the order is liable to be set aside.

(2) *Vide* order dated 16th September, 1997, the learned trial Court had declined leave to the plaintiff/petitioner to lead additional evidence. In order to appreciate the respective contentions raised on behalf of the parties before me, it will be appropriate to refer to the bare minimum facts necessary for decision of this petition.

(3) The plaintiff had filed Civil Suit No. 1033 of 1990 for declaration that the judgment and decree dated 25th October, 1985 was ineffective and not binding. The defendant contested the above suit. The defendant has taken up the plea that in the prior suit i.e. Suit No. 531 titled as Nagina *versus* Manbhari, there was an

admission of his claim and the written statement had thumb impression of Manbhari. Issues in the present case were framed and the case was fixed for rebuttel evidence when on 7th April, 1997 the present application for permission to lead additional evidence was filed. It was stated that the file of the Suit No. 531 was summoned by the defendant and the defendant had earlier filed an application for summoning of handwriting expert with leave to take photographs of thumb impressions which were fixed on the statement in that suit. The application was allowed and photographs were taken. But subsequently the defendant gave up the idea of examining the handwriting expert. However, in the order sheets of the case, the learned Presiding Officer,—*vide* order dated 31st March, 1993 had recorded that there is super-imposition of thumb impressions. It needs to be mentioned here that no expert was examined and cross-examined. As the defendant gave up the idea of examining the expert, the plaintiff in order to prove his case by leading rebuttal evidence wanted to examine an expert. As such, the present application was filed by him. In reply to the application, the defendant in the suit did not dispute this fact. However, the defendant stated that his rights were favourably decided in the previous suit.

(4) The facts which are evident from the above allegations which clearly appeared on record are that the case was fixed for leading of rebuttal evidence by the plaintiff and the records of the suit were summoned subsequently during the evidence of the defendant and the defendant while filing an application for examination of an expert, ultimately he failed to examine the handwriting expert and that the Court in its order sheet dated 31st March, 1993 had made certain observation in regard to superimposition of thumb impression. It is the settled principle of law that additional evidence can be permitted to the party if the party permitting such relief had failed to lead the evidence at the earlier stage after exercising due diligence and there was sufficient cause for granting such permission. Primary distinction is between not to able to produce in spite of due diligence and waiver to lead evidence. 'Waiver' is an intentional act or an act which can be reasonably construed from the record that the party intentionally failed to lead evidence which it ought to have. There is also no doubt to the fact that order 18 Rule 2 CPC has to be read in conjunction with the provisions of order 18 rule 17A CPC. the legislative intends behind these two rules is that the party must lead evidence on all the issues onus of which is on him on the dated

fixed by the Court. Sub-rule 4 of Rule 2 of order 18 still gave powers to the Court to permit a party to examine any witness at any stage for the reasons to be recorded in writing. This rule was introduced by amendment to the Code of Civil Procedure in the year 1976 as well as Rule 17A was also introduced by the same amendment. These amendments are obviously intended to give wider discretion to the Court for permitting additional evidence at any stage of the suit. Discretion must and has to be exercised on settled principles of law, the basic need being complete and effective adjudication between the parties in regard to the subject matter of the suit without offending any provision of the Code and causing undue advantages to the applicant over the non-applicant. Earlier to the amendment rule 17 of order 18 gave jurisdiction to the Court to recall the witness already examined, but addition of these two provisions by way of amendment can no way be interpreted so as to give no benefit to the applicant if the facts and circumstances of a case and ends of justice so demand.

(5) In the present case, the case was fixed for rebuttal evidence, the defendant had taken the plea that in the written statement filed by Manbhari in the previous suit the claim has been conceded in his favour. Thus onus of such an assertion lay on the defendant. No doubt, primary onus to prove that the decree in the previous suit was void, illegal and liable to be set aside, is on the plaintiff. The plaintiff had closed his evidence in the affirmative and the Court as per onus of issues had granted opportunity to the plaintiff to lead evidence in rebuttal. It will be difficult to conclude that it is a case of waiver and the plaintiff had acted with utter disregard to the principle of due diligence. Judicial conscious of the Court needs to be satisfied keeping in view the dual principle merging from order 18 Rule 2(4) on the one hand and order 18 Rule 17A of CPC on the other. In the case of *Kaura Ram* v. *Gobind Ram and others,* (1) the Bench of this Court permitted an order on the application under the Arbitration Act to be produced by way of additional evidence in spite of the fact that the party had already closed the evidence and the very arbitration agreement was challenged and the applicant had failed to produce the said order earlier, without any justification. Still in another case titled as *Weston Electronics Ltd.* v. *M/s Chand Radio andothers* (2) where a large number of documents which were not exhibited because of over sight, were produced, the Court held that the mistake on the

(1) A.I.R. 1980 Punjab 160
(2) 1988 P.L.J. 79

part of the counsel should not be permitted to cause prejudice to the interest of the party. The rules of procedure being meant to advance the cause of justice, additional evidence was permitted in that case as well.

(6) The concept of additional evidence has been given wider dimension in the recent judgment of Hon'ble Apex Court in *Jaipur Development Authority* v. *Smt. Kailashwati Devi* (3) where the Court held that additional evidence could be allowed even at the Appellate stage under Rule 27 (aa) of order 41 CPC if the applicant satisfies the basic requirements of the rule and even no evidence has been led by the applicant at the trial stage. In that case *ex parte* decree was passed against the defendant in the suit, the appeal was preferred before the High Court and two documents were sought to be filed which were in possession of the defendant relating to possession of the suit property. High Court rejected the said prayer, but the same was allowed by Hon'ble Apex Court.

(7) The cumulative effect of the above well enuniciated provisions governing the subject is that the Court has to exercise its jurisdiction to derive balance between ends of justice and extent of default of the applicant. The powers given to the Court under sub-rule 4 of rule 2 of order 18 cannot be curtailed by reading the provisions of rule 17A of the same order. Both these provisions must be read and constured harmonously so as to further cause of justice and necessary for effective and complete adjudication of rival contentions raised by the parties in a suit or proceedings. The procedural law must be moulded to further cause of justice rather than frustrate the same. Non-production of documents after exercise of due diligence appears to be very foundation for filing such an application. Compliance of this condition must be seen in context to the facts and circumstances of the case and in conformity with the record before the Court. Exercise of due diligence would have to give wider and meaningful connotation which must be in conformity with the basic rule of law. In some cases negligence of a party or counsel may not really have the effect or rendering such an application untenable. This view finds support from the case of Jaipur Development Authority (supra).

(8) The case is fixed for recording of evidence of the plaintiff in rebuttal. After production of the record of the previous suit, the defendant did not comply with the order of the Court and if the

(3) J.T. 1997 (7) S.C. 643

plaintiff wishes to discharge his onus in rebuttal, the same cannot be outrightly rejected. The examination of handwriting expert would held in effective and complete adjudication of the present suit specially keeping inview the observations of the learned Presiding Officer as recorded in the order sheet dated 31st March, 1993. The parties are at issues with regard to the decree passed in the previous suit. The plaintiff and the defendant in the previous suit has challenged the decree in the previous suit basing his claim on the written the statement filed in the previous suit where his right was accepted. It will be in fairness and would cause no prejudice to either of the party if the plaintiff is permitted to lead additional evidence. The plaintiff is not trying to establish a case which he had not pleaded.

(9) In view of my discussion above, I am of the considered view that the learned trial Court has failed to exercise the jurisdiction vested in it. Such as error is apparent on the face of the record. Consequently, the order dated 16th September, 1997 is set aside. The application for additional evidence filed by the plaintiff before the trial Court is accepted. The plaintiff would lead evidence in rebuttal on the date fixed before the trial Court. In order to prevent unnecessary delay, it is directed that the plaintiff would not be given any unnecessary adjournment. The revision petition is allowed. There shall be no order as to costs.

J.S.T.

Before G. S. Singhvi & Iqbal Singh, J.J.

DR. NEETA MEHTA,—*Petitioner*

versus

STATE OF HARYANA & ANOTHER,—*Respondents.*

CWP 1099 of 98

6th May, 1998

Constitution of India, 1950—Arts. 14 & 16—Haryana Civil Medical Services (Clase II) Rules, 1978—Rl. 11—Termination of services of probationer—Rule fixing period of probation at 2 years extendable by one year—Maximum period of probation specified at 3 years under the Rules—Termination after 3½ years—No order passed by the Appointing Authority under Rule 11(3) during the