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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.9678 OF 2016

Sharnappa s/o Bashweshwar Sakhare,
Age: 40 years, Occ: Agril,
R/o. Bitargaon, Tq. Renapur,
Dist. Latur. ..PETITIONER

VERSUS

1. Vaijinath s/o Gundappa Sakhare,
Age: 18 years, Occ: Education,
2. Chandrakalabai w/o Gundappa Sakhare,
Age: 57 years, Occ: Household,
Both R/o. Bitargaon, Tq. Renapur,
Dist. Latur, At present
Chincholi (B), Tq. & Dist. Latur.
3. Madhukar s/o Sambhaji Shette,
Age: 50 years, Occ: Agri.,
R/o. Bitargaon, Tq. Renapur,
Dist. Latur. ..RESPONDENTS

Mr A.N. Sabnis, Advocate h/f Mr V.D. Gunale,
Advocate for petitioner;
Mr S.S. Deshmukh, Advocate for respondents

CORAM : NITIN W. SAMBRE, J.

DATE : 26th SEPTEMBER, 2017

ORAL ORDER :

In Special Civil Suit No.98 of 2014
defendant No.1 was minor and was represented

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through defendant No.2, his natural guardian, mother. The said suit reached at the stage of cross examination of the witnesses of the defendant, when defendant No.1 moved application at Exhibit-97 seeking recalling of the witnesses of the plaintiff for cross examination on the ground that defendant No.1 has attained majority during the pendency of the suit. Such application at Exhibit-97 is allowed by the impugned order passed by the 4th Joint Civil Judge, Senior Division, Latur, on 20th August, 2016. As such, this petition by the plaintiff.

2. Learned Counsel for the petitioner-plaintiff would urge that provisions of order 18 Rule 17 of the Code of Civil Procedure are already interpreted by this Court in the matter of **Shri. Balkrishna Shivappa Shetty vs Shri Mahesh Nenshi Bhakta, Shri. Mahendra Nenshi Bhakta Shri. Vijaysingh Gordhandas Kapadia, being the present Trustees of the Trust of Haridas Hemraj Trusts, Shri. Hanumant Ganesh Kulkarni (since deceased),**

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Smt. Sulabha Hanumant Kulkarni, Shri. Satish Hanumant Kulkarni, Smt. Vandana Vishnu Deshpandey, Mrs. Madhavalata Balchandra Naniwadekar, Mrs. Vasumati Brahmanand Raje, Mrs. Shraddha Pradeep Lalit and Mrs. Deepa Harish Alwa, reported in **A.I.R. 2003 Bombay 293.** According to him, upon plain reading of the said provision, it could be inferred that the said provision is only for the assistance of the Court and cannot be extended to the aid of either of the parties to the suit. According to him, in view thereof, in absence of any legal provision, the application of defendant No.1, on the basis of he having attained majority is illegally allowed.

3. Mr. Deshmukh, learned Counsel appearing for defendant No.1 would urge that it is with intention to effectively give an opportunity to represent the case, Court under Section 151 of the Code of Civil Procedure has exercised the powers in favour of the defendant No.1. He would submit that if required, appropriate opportunity of re-

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examination will be given to the plaintiff and as such no prejudice is caused. He sought dismissal of the petition.

4. Having considered the rival submissions, it is required to be noted that provisions of Order 18 Rule 17 of the Code of Civil Procedure reads thus :

"17. Court may recall 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."

5. Upon plain reading thereof, it could be inferred that the said provision is made in air of the Court and not to provide remedy to either of the parties to the suit. Apart from above, the said provision felt for consideration in the judgment of **Shri. Balkrishna Shivappa Shetty**, cited supra, before learned Judge of this Court, in which, it has been specifically observed that the said

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provision is not extending any benefit or confer right on the party to the suit to ask for recall of the witness for cross examination, much less for reason that party to the suit, who is seeking such relief of recalling of the witnesses for cross examination has attained majority.

6. If such relief cannot be read down under Section 151 of the Code of Civil Procedure, wherein inherent powers of the Court are saved, particularly when, by express provision, under Order 18 Rule 17 of the Code of Civil Procedure do not permit so.

7. From the conduct of the proceedings, it could be easily inferred that at the relevant time, when the plaintiff and his witnesses were cross examined, defendant No.1 was minor, he was represented through his mother – natural guardian – defendant No.2, who had engaged a common Advocate. The witnesses of the plaintiff had already undergone cross examination at the behest of

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defendant Nos. 1 and 2. It is not the case of present respondent-defendant that such cross examination was in absence of his dependent or he was denied opportunity to represent his case within framework of law.

Relief under Order 18 Rule 17 of Code of Civil Procedure can be invoked at the instance of party to the suit or *suo-moto* in given exceptional case, however, such relief is discretionary. Word 'May' provided in the Rule cannot be read as 'Shall'. The respondent has not demonstrated before Court below or this Court any serious lapse has occurred while recording evidence of witness of plaintiff resulting into serious consequences. No material is brought on record to demonstrate that circumstances in which earlier evidence was recorded have undergone such drastic change which warrant the Court below to exercise discretionary power.

8. In view of above, in my opinion, the order

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impugned is not sustainable. As such, order impugned dated 20th August, 2016 below Exhibit-97 in Special Civil Suit No. 98 of 2014 passed by 4th Joint Civil Judge, Senior Division, Latur is hereby quashed and set aside. The application at Exhibit-97 stands rejected.

9. Writ Petition stands allowed in above terms.

(NITIN W. SAMBRE, J.)

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