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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7075 OF 2017

Bhimrao Yashwant Misal

..Petitioner.

V/s.

Rukhminibai Sadashiv Bhosale & Ors.

..Respondents.

Mr.Vivek V.Salunkhe for the petitioner.

Mr.Avinash N.Naikwadi for respondent No.4.

CORAM: M.S.SONAK, J.

DATE : NOVEMBER 21, 2017

PC.:-

Heard Mr.Vivekh Salunkhe for the petitioner and
Mr.Avinash Naikwadi for respondent No.4.

2. Challenge in this writ petition is to the order dated February 17, 2017, passed below Exh.248 in Regular Civil Suit No.97/1986 by 2nd Joint Civil Judge, J.D., Indapur, by which the petitioner's application for recall of witness by resort to Order 18 Rule 17 of the Civil Procedure Code came to be rejected.

3. Mr.Salunkhe, learned counsel for the petitioner submits that the application was in the nature of request to the learned trial judge to exercise right under Order 18 Rule 17 of the Civil Procedure code. The circumstances of the case warranted recall of the witness. Mr.Salunkhe further submits that in any case provisions of section 151 of the Civil Procedure Code could always have been invoked to recall the witness in the interest of justice.

4. Mr.Naikwadi, learned counsel for respondent No.4 relies on the decision this Court in ¹*Balkrishna Shivappa Shetty V/s. Mahesh Nenshi Bhakta & Ors.* He submits that section 151 of the Civil Procedure Code cannot be invoked in such matters since there is an express provision under Order 18 Rule 17 of the Civil Procedure Code. He points out that even the provisions of Order 18 Rule 17 of the Civil Procedure Code entitles the Court to recall a witness in a case if the Court is of the opinion that exercise of such powers is warranted. He submits that the suit has been pending since 1986 and there is no error in the impugned order.

¹ 2003 (5) LJSOFT 58

5. Issue raised by Mr.Salunkhe stands covered by the decision of this Court in *Balkrishna Shivappa Shetty* (supra). In para 11 of the said judgment, it is observed as follows :-

*“ 11. As already observed above, since the provisions of law contained in Order 18, Rule 17 of the Code though nowhere empowers the Court to allow a party to cross-examine a witness by recalling such witness, and the impugned order having been passed in exercise of the provisions contained in Order 18, Rule 17, the same is unsustainable and is liable to be set aside. The contention that such powers can be exercised under Section 151 of the Code may be true in a given case provided the materials on record justify such order. As already observed above, in this case, mere failure on the part of the respondent Nos. 1 to 3 to take appropriate steps at appropriate time in relation to Exhibit-5, that will not enure to their benefit to seek the assistance of the Court for exercise of its inherent powers under Section 151 to enable the party to fill the lacuna in evidence. Besides, it should not be forgotten, that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code, as has been ruled by the Apex Court in *Padam Sen and Anr. V/s. The State of Uttar Pradesh* reported in A.I.R.1961 SC 218. The impugned*

order therefore cannot be justified under Section 151 as there is no material on record to warrant exercise of powers under Section 151 to allow the respondent Nos. 1 to 3 to recall the defendant No. 1 for the purpose of further cross-examination.”

6. The impugned order has taken into consideration the plea of the petitioner and only thereafter, the learned trial Judge has opined that there is no case made out to exercise powers under Order 18 Rule 17 of the CPC. There is neither any jurisdictional error nor any perversity in the impugned order.

7. Accordingly, no case is made out for interference in the impugned order under Article 227 of the Constitution of India.

8. The petition is, therefore, dismissed. There shall be no order as to costs.

(M.S.SONAK, J.)