

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2597 OF 2017

Shyam Chandulal Agrawal ... Petitioner
V/s.
Balkrushna Trambak Wani (Pingale) & Ors. ... Respondents

- Mr.Akshay M. Gosavi i/b. GMS Legal for the Petitioner.
- Mr.V.V. Salunke for Respondent Nos.1 & 2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 9th MARCH, 2018.

P.C. :

1] Heard learned counsel for the Petitioner and the Respondent Nos.1 & 2.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 4th January 2017, passed by the Jt. Civil Judge Senior Division, Malegaon, below Exhibit-162 in Special Civil Suit No.42 of 2011.

3] The Application at Exhibit-162 was filed before the trial Court by the present Petitioner for recalling of the Respondent/Plaintiff witness for cross-examination. The Petitioner is

Defendant No.35 before the trial Court. It is stated in the application that, when the Respondent/Plaintiff was under cross-examination before the trial Court, Petitioner's Advocate was busy in arguing Election Appeal before the Hon'ble District Court at Malegaon; therefore, Plaintiff could not be cross-examined on behalf of the Petitioner and as a result, the order of "No cross and evidence closed" is passed against him. Hence, it is necessary to give him an opportunity to cross examine the Respondent/Plaintiff. For that purpose the Respondent/Plaintiff may be recalled.

4] This application was strongly resisted by the Respondents/Plaintiffs contending *inter-alia* that the evidence in the suit is already closed and the matter is for "hearing of arguments". At this stage, this application cannot be maintainable; especially on the spacious plea advanced by the Petitioner about his Advocate being busy in another Court.

5] The trial Court has also, after considering the Provisions of Order-18 Rule-17 of Civil Procedure Code (*for short "C.P.C."*), which permit the Court to recall the witness at any stage of the suit, who has been examined and may subject to law of evidence for the time being in force, the Court may put such questions to him, as the Court thinks fit, held that the if the Respondent/Plaintiff was in the witness box for

four sittings and despite that the Petitioner could not cross-examine him and when already Respondent/Plaintiff was cross-examined on behalf of other Defendants at length, no ground was made out to recall the witness for cross-examination.

6] This order of the trial Court is challenged in this Writ Petition by learned counsel for the Petitioner by submitting that the Respondent/Plaintiff was cross-examined on behalf of the Defendant Nos.1 to 8; however, he was not cross examined on behalf of the present Petitioner. It is submitted that the present Petitioner is Defendant No.35 before the trial Court and he is subsequent purchaser of the suit property. He was joined in the suit also, during the pendency of the suit and in such situation, in order to protect his independent right in the suit property, he is required to be given an opportunity to cross-examine the Respondent/Plaintiff. According to learned counsel for the Petitioner, the application is not for the recall for further cross-examination, but it is for cross-examination; as Petitioner was not able to cross-examine the Plaintiff when Plaintiff was in the witness box. According to him, therefore, as the impugned order passed by the trial Court is unjust, he being deprived from an opportunity to rebut the evidence of the Plaintiff, in the interest of justice, it is necessary to set-aside the impugned order.

7] Per contra, learned counsel for the Respondents/Plaintiffs has supported the impugned order for the reasons stated therein and also relying upon the judgment of this Court in the case of *Balkrishna Shivappa Shetty V/s. Mahesh Nenshi Bhakta & Ors., 2003(5) LJ Soft-58*.

8] As rightly submitted by learned counsel for the Respondents/Plaintiffs, the Provisions of Order-18 Rule-17 of C.P.C. under which the present application is filed by the Petitioner before the trial Court clearly sets out that they are for the purpose that the witness may be recalled for putting him such questions as the Court thinks fit and therefore, permitted at any stage of the suit. The very provision confers the discretion on the Court as the word “may” used in the said Rule makes it clear and this discretion is to be exercised for illustrating any material which the Court wants to do by putting certain questions to the witness in his cross-examination. The purport of this provision was considered by this Court in the case of *Balkrishna Shivappa Shetty (supra)* and it was categorically held that, “jurisdiction under Order-18 Rule-17 of C.P.C. is limited for the purpose of examination of the witness by the Court itself. The Court has no jurisdiction to recall the witness for the purpose of cross-examination by either of the parties”. It was also made clear that,

inherent powers under Section 151 of C.P.C. are not to be exercised in a manner which will be contrary or different from the procedure expressly provided by the Court. Thus, as per the law laid down in this Court's judgment recalling of the witness for the purpose of cross-examination on behalf of Petitioner is contrary to the provisions of law.

9] It is true that, in the present case, the Petitioner is not recalling the witness for further cross-examination but as he could not even open his cross-examination of the Respondent/Plaintiff on the count of his Advocate being not available to do so, but then the fact remains that, as observed by the trial Court itself, the witness i.e. Respondent/Plaintiff was under cross-examination for four sittings conducted by the Advocate of the other Defendants. Hence, it becomes difficult to accept that on none of these dates, the Advocate of the Petitioner could not make himself available for cross-examination of the Respondent/Plaintiff.

10] Moreover, a very vague plea is raised by the Petitioner that his Advocate was busy in arguing Election Appeal in the District Court. If it was the case, the Petitioner could have requested the trial Court to adjourn the matter to some other date for cross-examination; but no such application appears to have been filed and only after the

order of “no cross and evidence closed” was passed, the present application was moved.

11] It is also pertinent to note that, the Petitioner is a purchaser/transferee pendent-lite and as regards the sale-deed under which he has purchased the said property, original owners i.e. Defendant Nos.1 to 8, as observed by the trial Court, have elaborately and extensively cross-examined the Respondent/Plaintiff. In such situation, on the spacious plea that his Advocate was busy in another Court, thus putting entire blame on the Advocate, without supporting it in any way or without showing that he himself was present in the Court when cross-examination of the Respondent/Plaintiff was conducted and has made a request to the Court to defer the cross-examination as his Advocate was busy in another Court or without filing the Affidavit or even pursis of his own Advocate stating that he was busy in another Court on that day, such plea, which is most easy and convenient plea to blame Advocate, cannot be accepted.

12] As observed by this Court in the case of *Steelage Industries Limited and another V/s. Smt. Chander Bagai*, AIR 1992 Bombay 406, “a stage of finality must be imported to each segment of the proceedings and if a degree of firmness is not insisted upon, the litigants and their counsel may feel encouraged to make multifarious

applications for recalling witnesses and thereby take the case virtually in circles". Therefore, such power of recall of the witness, when the witness was in the witness-box for four sittings, it is as good as setting the clock back to its original position. Therefore, as the discretion exercised by the trial Court in the present case is just, legal and proper, this Court should not interfere in the said discretion in writ jurisdiction.

13] The Writ Petition therefore stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]