

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

WRIT PETITION NO. 3885 OF 2018

Pratibha Subhash Narkhede,  
Age. 51 years, Occ. Agri.  
R/o. Salve, Tq. Dharangaon,  
District. Jalgaon.

Versus

1. Mandabai Pandit Patil,  
Age. 73 years, Occ. Labour,
2. Ganesh Pandit Patil,  
Age. 52 years, Occ. Labour,

Both R/o. Kharda (Bdk),  
Tq. Dharangaon, Dist. Jalgaon.

Advocate for Petitioner : Mr. K.C. Sant.  
Advocate for Respondents : Mr. G.V. Wani.

CORAM : RAVINDRA V. GHUGE, J.  
Dated : 20.02.2019

Oral Judgment :

1. Rule. Rule made returnable forthwith and heard finally by consent of the parties.
2. The petitioner/original plaintiff is aggrieved by the order dated 12.01.2018, passed by the trial Court, by which, the application Exhibit 88 filed by the LR's of the deceased respondent praying for permission to further cross-examine the plaintiff and his

witnesses in RCS No. 179/2008 (Old No. 172/2004), has been allowed.

3. This Court (Coram : V.L. Achliya, J.) had heard the petitioner and had passed an order on 18.04.2018, referring to his submissions which reads as under :

*“1. The petitioner – plaintiff has challenged the impugned order dated 12/01/2018 passed by the trial Court, allowing the application filed by the respondents – defendants seeking recall of witnesses.*

*2. In nut-shell, it is the contention of the learned counsel for the petitioner that the powers under Order XVIII Rule 17 of C.P.C. to recall the witness can be invoked by the Court on its own motion and such right is not available for the party to the proceeding. In this context, learned counsel for the petitioner has referred and relied upon decision of this Court in the case of **Balkrishna Shivappa Shetty Vs. Mahesh Nenshi Bhakta & Ors. Reported in 2003 (3) Mh.L.J. 47**. He further submits that recourse to Section 151 of C.P.C. is not permissible to entertain such request. Learned counsel further submits that the powers under the said provision can be used sparingly and that too in a case of exception in nature. By referring the facts of the case, learned counsel submits that the application for recall of witness was filed by legal heirs of defendant No. 1 who can not have the defence contrary to the defence taken by the defendants. During the life time of original defendant, witness of the plaintiff was cross examined at length. In*

this back-ground it is contended that case of exceptional in nature made out by respondents to exercise the discretion under Order XVIII Rule 17 of C.P.C. In this context, learned counsel referred and relied on the decision of the Apex Court in the case of **Vadiraj Naggappa Vernekar (dead) through L.Rs. Vs. Sharadchandra Prabhakar Gogate reported in 2009 (5) Mh.L.J. 142.**

3. In the case of **Vadiraj** [supra], the Apex Court has held that the powers under Order XVIII Rule 17 of C.P.C. can be invoked either at the motion of the Court as well as the parties to the proceeding. In this view, the contention that powers under Order XVIII Rule 17 of C.P.C. can not be examined, is not sustainable. However, it is held that such powers can be examined sparingly and the exercise of discretion by the Court should confine to the principles akin to Order XLVII of C.P.C.

4. In view of the contentions raised, I am of the view the same needs to be considered by giving notice to the respondents. Hence, the following order is passed.

#### ORDER

[i] Issue notice to the respondents, making it returnable on 19/06/2018. The petitioner is permitted to serve the respondents by all other modes of service in addition to the service through process of Court.

[ii] Liberty to the petitioner to apply for interim relief before the next date if any exigency arose.

5. *Stand over to 9/06/2018.”*

4. The petitioner relies upon the judgments of this Court in the matters of Balkrishna (supra) and the judgment of the Hon'ble Apex Court in Vadiraj (supra) to contend that the recall of witnesses under Order XVIII Rule 17 of the Code of Civil Procedure (CPC), is not an order to be passed routinely.

5. I find that in Vadiraj (supra) the Hon'ble Apex Court has concluded that the purpose of Order XVIII Rule 17 of the CPC, is to enable the trial Court to have certain doubts cleared which may have regard to the evidence led by the parties. The rule is not intended to be used to fill up lacunae in the evidence which has already been adduced. The rule is to be exercised sparingly in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to other side.

6. Learned advocate for the respondent submits that the original defendant passed away during the trial. The present respondents are LRs of the deceased defendant. They were granted permission to file a separate written statement. In the said written statement, it was averred in paragraph No. 13 that the LRs are agriculturists and they are surviving on their income derived from agriculture from the land,

which is the defendants' joint property. They never desired to sell the said land and never desired to enter into any agreement to sell.

7. Reliance is placed upon the judgment of this Court in Anand Rangrao Ingle and another Vs. Govind Rangrao Ingle and others [2012 (5) *Mh. L. J.* 955], the decision delivered by the Hon'ble Apex Court in K.K. Velusamy Vs. N. Palanisamy, [2011 (11) *SCC* 275], and the judgment of this Court in *Balkrishna* (supra). It is canvassed that Order XVIII Rule 17 read with Section 151 of the C.P.C., would vest power in the Court to recall a witness for cross-examination or re-examination.

8. I find from the judgment delivered in *Anand* (supra) that this Court merely considered the power of the trial Court to recall a witness for examination or re-examination. This Court did not deal with the issue as to when and in what circumstances could the trial Court direct further cross-examination.

9. In the instant case, the LRs of the deceased defendant have not come forward with the case that the plaintiff and his witnesses were not cross-examined on all issues or that a particular aspect of the pleadings of the plaintiff was not dealt with properly in cross-examination. Application Exhibit 88 filed by the LRs, would indicate

that though the deceased had cross-examined the plaintiff and his witnesses, since a fresh written fresh written statement was filed by the LR's, they should be granted the opportunity to cross-examine the plaintiff and his witnesses.

10. I do not find from the pleadings in Exhibit 88 that the LR's have specifically pointed out a particular aspect of their pleadings which was not earlier averred by the deceased defendant and therefore, there was no cross-examination of the plaintiff and his witnesses from the angle of such an aspect. As has been held by the Hon'ble Apex Court in *Vadiraj* (supra), the order of recalling a witness for further cross-examination is not a general order to be passed routinely. A specific case has to be made out by the applicant which would convince the trial Court that such cross-examination needs to be permitted.

11. Even otherwise, it is the case of the LR's in their capacity as defendants that the property which they cultivate for their livelihood is their joint family property. The burden to prove this aspect would vest on the shoulders of such LR's. As they have entered their written statement, they would legally and legitimately get the opportunity to adduce evidence on the basis of their pleadings.

12. Considering the above, I find that the trial Court has passed the impugned order casually by concluding that the LR's of the defendant claimed that their family property is jointly owned. Such an order could not have been passed merely because the LR's desire to cross-examine the plaintiff. If the issue to be canvassed, has emerged for the first time in the pleadings of the LR's, the onus and burden of proving the stand newly taken would lie on the shoulders of such LR's. Though the trial Court would have the power to recall the witness, I find that such power was not appropriately exercised, in view of the law laid down by the Hon'ble Apex Court in the matter of Vadiraj (supra) and K.K. Velusamy (supra).

13. This petition, is therefore, allowed. The impugned order dated 12.01.2018, is quashed and set aside and application Exhibit 88 stands rejected.

14. Needless to state, the present defendants are at liberty to lead evidence in respect of their entire contentions and averments in the written statement.

15. Rule is made absolute in the above terms.

( RAVINDRA V. GHUGE, J. )