

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No.1219 of 2021

Date of Decision : 26.07.2021

Surlekha Rani @ Sulekha Rani

....Petitioner

VERSUS

Pardeep Kumar

....Respondent

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Aman Dhir, Advocate for the petitioner.

ALKA SARIN, J.

Heard through video conferencing.

The present revision petition under Article 227 of the Constitution of India has been filed for setting aside the impugned order dated 10.03.2021 (Annexure P-10) passed by the Civil Judge (Junior Division), Sri Muktsar Sahib whereby the application filed by the plaintiff-respondent for permission to recall the witness PW-2, Shyam Sunder, for his re-examination has been allowed.

2. The brief facts relevant to the present case are that PW-2, Shyam Sunder son of Nand Lal, was examined in Court and he tendered his affidavit as Ex.PW-2/A in his examination-in-chief. In his examination-in-chief, PW-2 supported the version and contents of the plaint. Thereafter, his evidence was deferred for cross-examination to the next date. On the next date, he totally resiled from his examination-in-chief during cross-examination. When the cross-examination of said witness was completed, the counsel for the plaintiff-respondent requested for permission to re-examine the witness but counsel for the defendant-petitioner herein opposed the same on the ground that an application was required for the said purpose.

Subsequently, an application (Annexure P-8) was moved by the plaintiff-

respondent and a reply (Annexure P-9) to the same was also filed by the defendant-petitioner contending that the application was not maintainable. After hearing arguments of both the parties, the Trial Court vide impugned order dated 10.03.2021 (Annexure P-10) allowed the application and permitted PW-2, Shyam Sunder, to be recalled for his re-examination. However, it was made clear that the witness was being recalled for re-examination as per sequence of Section 137 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Act'). The Trial Court also ordered that the whole evidence of PW-2 will not be conducted afresh as examination-in-chief and cross-examination was already complete. The order dated 10.03.2021 (Annexure P-10) has been assailed before this Court.

3. Learned counsel for the defendant-petitioner would contend that the permission to recall the witness PW-2, Shyam Sunder, is actually for examination-in-chief as stated in the application (Annexure P-8). It has further been argued that in case the witness is permitted to be re-examined the witness could be tutored. Learned counsel has further argued that the application itself was filed under Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') and, hence, the same was not maintainable inasmuch as there was a specific section under which the application was needed to be filed. In support of his arguments, learned counsel for defendant-petitioner has relied upon the decisions of this Court in '*Dr. Tripat Deep Singh vs. Dr. (Smt.) Paviter Kaur*' [CR No.650 of 2017 decided on 04.04.2018] and '*Surjit Kaur & Anr. vs. Pritam Singh & Ors.*' [2004(1) RCR Civ 402] and that of the Hon'ble Supreme Court in '*Vadiraj Nagappa Vernekar (D) through LRs vs. Sharad Chand Prabhakar Gogate*' [(2009) 4 SCC 410] to contend that the witness could not be recalled to fill

in the lacunae.

4. Before dealing with the arguments raised by learned counsel for the petitioner, the relevant sections of the Act applicable in the present case are reproduced as below:-

“137. Examination-in-chief - The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination - The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination - The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

138. Order of examinations - Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination - The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.”

5. Order XVIII Rule 17 CPC reads as follows:-

“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.”

6. In the matter of *Vadiraj Nagappa Vernekar (supra)* it has been held that the witness cannot be recalled to fill in the lacunae in the evidence. It has also been laid down by the Hon'ble Supreme Court time and again that though lacunae cannot be filled in through re-examination, however, ambiguities can definitely be resolved and that the purpose of Order XVIII Rule 17 CPC is to enable the Court to clarify any doubts that may have arisen during the course of his examination.

7. Section 137 of the Act states that examination of a witness by a party, who calls the said witness, shall be called examination-in-chief. The examination by the opposite party shall be called cross-examination and any examination of a witness subsequent to the cross-examination by the party, who calls him, shall be called his re-examination. The order of examinations has been laid down in Section 138 of the Act. A witness shall be first examined in-chief then (if the adverse party so desires), cross-examined, then (if the party recalling him so desires), re-examined. The examination and cross-examination must relate to the relevant facts but the cross-examination need not be confined to the facts to which the witness testifies on his examination-in-chief. Further, Section 138 of the Act lays down that re-examination shall be directed to the explanation of matters referred to in cross-examination and, if any new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

8. Adverting to the facts of the present case, the witness PW-2, Shyam Sunder, had admitted his signatures on the agreement to sell in question as well as on the affidavit submitted in his examination-in-chief but in his cross-examination he denied his knowledge about the contents of both

signatures on the agreement as well as the affidavit tendered in examination-in-chief but denied the knowledge about the contents of both the documents. Immediately after cross-examination, the counsel for the plaintiff-respondent requested that the witness has resiled from his examination-in-chief and requested for permission to recall the witness for the same purpose on filing of appropriate application. Thereafter, the application (Annexure P-8) was filed under Section 151 CPC for re-examination-in-chief of PW-2, Shyam Sunder. In the reply (Annexure P-9) it was *inter-alia* contended by the defendant-petitioner that there is no provision of re-examination in chief as per the Act and that the application was vague and against law. It was also contended that since the witness was brought by the plaintiff-respondent hence it could not be said that he had resiled from his statement. The Trial Court, while allowing the application, has further clarified that the recall for re-examination would be as per sequence of Section 137 of the Ac and that whole evidence of PW-2 will not be conducted afresh as examination-in-chief and cross-examination already stand completed and witness has been recalled for his re-examination.

9. The judgments referred to by learned counsel for the defendant-petitioner would not be applicable to the present case. In the case of ***Dr. Tripat Deep Singh (supra)***, the matter pertained to recalling a witness for cross-examination, which is not the case here. Learned counsel for the defendant-petitioner has also placed reliance on the said judgment to buttress his argument that the inherent power under Section 151 CPC can be invoked only where there is no specific provision. Once a specific remedy is available to recall a witness, an application under Section 151 CPC would not be maintainable.

10. Hon'ble Supreme Court in the matter of '**P.K. Palanisamy vs. N. Arumugham & Anr.**' [(2009) 9 SCC 173] has held as under :-

"26. A contention has been raised that the applications filed by the appellant herein having regard to the decisions of the Madras High Court could not have been entertained which were filed under Section 148 of the Code.

27. Section 148 of the Code is a general provision and Section 149 thereof is special. The first application should have been filed in terms of Section 149 of the code. Once the court granted time for payment of deficit court fee within the period specified therefor, it would have been possible to extend the same by the court in exercise of its power under Section 148 of the Code. Only because a wrong provision was mentioned by the appellant, the same, in our opinion, by itself would not be a ground to hold that the application was not maintainable or that the order passed thereon would be a nullity. It is a well settled principle of law that mentioning of a wrong provision or non-mentioning of a provision does not invalidate an order if the court and/or statutory authority had the requisite jurisdiction therefor.

28. In Ram Sunder Ram v. Union of India & Ors. [(2007) 13 SCC 255 : (2008) 2 SCC (L&S) 603 : (2007) 9 Scale 197] it was held: (SCC pp. 260-61, para 19)

"19. ...It appears that the competent authority has wrongly quoted Section 20 in the order of discharge whereas, in fact, the order of discharge has to be read having been passed under Section 22 of the Army Act.

“9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.” (See N. Mani v. Sangeetha Theatre [(2004) 12 SCC 278] , SCC p. 280, para 9)

Thus, quoting of wrong provision of Section 20 in the order of discharge of the appellant by the competent authority does not take away the jurisdiction of the authority under Section 22 of the Army Act. Therefore, the order of discharge of the appellant from the army service cannot be vitiated on this sole ground as contended by the Learned Counsel for the appellant."

29. In *N. Mani v. Sangeetha Theatres & Ors.* [(2004)12 SCC 278], it is stated :

“9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.””

11. In view of the law settled by the Hon’ble Supreme Court, the argument raised by learned counsel for the petitioner that the application ought to have been rejected for non-mentioning of the relevant provision

12. The next argument raised by learned counsel for the petitioner is that a witness cannot be recalled for re-examination. The judgment relied upon by learned counsel for the petitioner in case of *Vadiraj Nagappa Vernekar (supra)* very clearly lays down that in case re-examination of a witness has a bearing on the ultimate decision of the suit it is always within the discretion of the Trial Court to permit recall of such witness for re-examination-in-chief with permission to the defendant to cross-examine the witness thereafter and further it is ultimately within the Court's discretion if it deems fit to allow such an application. In the present case, there is no illegality or irregularity in the discretion exercised by the Trial Court in permitting the re-examination of the witness. Much stress was laid upon by learned counsel for the petitioner to the decision in case of *Surjit Kaur (supra)*. However, that decision would not be relevant to the case in hand inasmuch as the application while being allowed is only being limited to re-examination and it has been clarified that whole evidence of PW-2 would not be conducted afresh as examination-in-chief and cross-examination already stand completed. The recall of PW-2 would be limited to explaining of things elicited during the cross-examination and as permissible under Section 138 of the Act.

13. In view of the above, I do not find any merit in the present revision petition which is dismissed.

(ALKA SARIN)
JUDGE

26th July, 2021

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NOTE : Whether speaking/non-speaking : Speaking
Whether reportable: YES/NO