

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

WRIT PETITION NO.11606 OF 2022

**NANDKUMAR GOPALRAO KULKARNI
VERSUS
MOHANRAO GOPALRAO KULKARNI**

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Mr. Balbhim R. Kedar, Advocate for the Petitioner.

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**CORAM : SANDEEP V. MARNE, J.
DATED : 23rd NOVEMBER, 2022.**

PER COURT:-

1. By this petition petitioner assails order dated 03.10.2022 passed by the Joint Civil Judge, Junior Division, Ambad, Dist. Jalna thereby allowing plaintiff's application below Exhibits-100 and 103 for examination of handwriting expert, as plaintiff's witness to prove his report.

2. It appears that after closure of plaintiff's evidence, plaintiff had applied for examination of the partition deed by handwriting expert and his application was allowed. Petitioner who is the original defendant did not challenge that order. While the report of handwriting expert was awaited, evidence of defendant started. Plaintiff later filed applications below Exhibits-100 and 103 to call the handwriting expert for examination to prove his report. That application has been allowed by impugned order dated 03.10.2022.

3. Mr. Kedar, learned counsel appearing for petitioner raises strong objection to the breaking of evidence of defendant for

the purpose of examining plaintiff's witness. He would submit that plaintiff deliberately filed application for calling report of the handwriting expert only after closure of his evidence. He would further submit that plaintiff did not immediately sought examination of the handwriting expert after receipt of the report and moved applications in the middle of the recording of the evidence of defendant's witnesses. Mr. Kedar would rely upon the judgment of the Supreme Court in **K. K. Velusamy Vs. N. Palaanisamy, (2011) 11 SCC 275**. In paragraph nos.8 and 16 of judgment the Supreme Court has held as under:

“8. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate - 2009 (4) SCC 410]. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in- chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

16. We may add a word of caution. The power under section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will

defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bonafide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application.”

4. Relying on the judgment of the Supreme Court, Mr. Kedar would contend that the examination of handwriting expert is sought by plaintiff to fill in gaps in evidence. Mr. Kedar would further submit that the Trial Court ought not to have disturbed the recording of evidence of defendant for the purpose of enabling plaintiff to examine his own witness.

5. After hearing the learned counsel for petitioner, it is apparent that, even though petitioner has strong objections to the Trial Court allowing applications for calling report of the

handwriting expert after closure of plaintiff's evidence, the order passed by the Trial Court allowing such applications remained unchallenged. Accordingly, the handwriting expert has examined the questioned documents and has submitted his report which has reached the Trial Court. In my opinion, therefore, the Trial Court has not committed any error in permitting plaintiff to examine the handwriting expert for the purpose of proving the report. If the objection of Mr. Kedar are upheld, the same would result in frustrating the earlier order passed by the Trial Court by which the handwriting expert was deputed to examine the questioned documents. It is also a matter of record that defendant himself has filed application for examination of the very same documents through Government handwriting expert and that the same application has been allowed. Defendant himself would like to examine the handwriting expert who has given report. The Trial Court would ultimately decide which report is to be relied upon. Therefore, plaintiff cannot be denied of opportunity to examine the handwriting expert appointed on his own application.

6. Considering the above events of the present case, the ratio laid down by Apex Court in **K. K. Velusamy Vs. N. Palaanisamy** (supra) has no application to the peculiar facts and circumstances of the present case.

7. The writ petition is devoid of merits and the same is dismissed without any orders as to cost.

(SANDEEP V. MARNE)
JUDGE