

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

WRIT PETITION NO.14845 OF 2021

Prashant Jaywantrao Shirsath and Another ... Petitioners

Versus

Bhatu Rajdhar Borse ... Respondent

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Mr. S. B. Varma h/f Mr. B. R. Waramaa, Advocate for Petitioners

Mr. M. M. Bhokarika , Advocate for Respondent

...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 16th June, 2022

ORDER :

1. The petitioners are aggrieved by the order dated 01-10-2021, passed by the learned Civil Judge, Senior Division, Amalner, District Jalgaon, below Exhibit-149 in Special Civil Suit No.19/2014, thereby allowing the application filed by the respondent/original defendant for recalling of plaintiff no.1 for further cross-examination.

2. It is not in dispute that the parties have led their respective evidence. By order dated 03-01-2019, following additional issue was framed by the trial court :

"Does the defendant prove that the plaintiffs have stolen the blank papers having signature of defendant and thereafter misused the same for preparing the agreement to sale of the suit property?"

Both the parties were granted liberty to adduce additional evidence in respect of the additional issue.

3. After framing of this issue, the plaintiff no.1 led evidence of his witness-Bharat Ramdas Koli. Thereafter, the defendant led his evidence and filed evidence close pursis. Then on 22-01-2021, the present application (Exhibit-149) is filed seeking to recall plaintiff no.1 for further cross-examination in view of framing of additional issue. The said application is allowed by the trial court. The petitioners/plaintiffs are aggrieved by the same.

4. The learned Advocate for the petitioners by relying on **K. K. Velusamy Vs. N. Palanisamy** reported in **(2011) 11 SCC 272**, submits that, once plaintiff no.1 had led his evidence by examining witness-Bharat Ramdas Koli and the defendant had also led his evidence and filed evidence close pursis, the application filed seeking recall of plaintiff no.1 should not have been allowed by the trial court. According to him, the defendant is trying to fill-up lacuna in the evidence led by him, by seeking recall of plaintiff no.1 for further cross-examination. He, therefore, submits that the impugned order is unsustainable and the same may be quashed and set aside.

5. The learned Advocate for the respondent, on the other hand, supports the impugned order.

6. It is not in dispute that after framing of the additional issue, the trial court has granted liberty to the parties to lead additional evidence in respect of the said issue.

7. Pursuant to the framing of additional issue, plaintiff no.1 has examined his witness-Bharat Ramdas Koli and the defendant has examined himself and has closed his evidence. However thereafter, the present application (Exhibit-149) is filed seeking recall of plaintiff no.1 for further cross-examination on additional issue.

8. The trial court has allowed the said application holding that for arriving at a just decision of the dispute between the parties, it is necessary to give an opportunity to the defendant to cross-examine the plaintiff no.1. If the said opportunity is denied, the relevant incidents in respect of dispute in question would not come on record.

9. Admittedly, after framing of the additional issue, plaintiff no.1 has not examined himself. Though it is a fact that the defendant has filed evidence close pursis, that by itself cannot be a ground to deny reasonable and fair opportunity to the defendant to cross-examine the plaintiff no.1, on the additional issue. In light of the

liberty granted by the trial court to both the parties to lead additional evidence, the trial court was justified in allowing the application (Exhibit-149) filed by the defendant. No prejudice is likely to be caused to the plaintiff no.1, if he is recalled for further cross-examination. It is not possible to accept the submission of the learned Advocate for the petitioners that by recalling the petitioner no.1/original plaintiff, the defendant is trying to fill-up lacuna in the evidence. There does not appear to be any such lacuna, as is being claimed by the petitioners.

10. In K. K. Velusamy Vs. N. Palanisamy (Supra), the Apex Court has held that the power to recall any witness is to 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.

11. There cannot be any dispute about the above proposition. However, in the facts of the present case, since the trial court has rightly exercised its discretion by allowing the application (Exhibit-149), as it is held that recall of plaintiff no.1 for further examination

would enable the trial court to resolve the real controversy between the parties, this Court is of the opinion that this ruling would not help the petitioners' case.

12. For the aforestated reasons, no merit is found in the challenge raised in this petition. Writ Petition is therefore dismissed.

[NITIN B. SURYAWANSHI, J.]

Sameer