

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1046 of 2017

1. Nawal Kishore Prasad and Anr Son of Late Brijnandan Prasad,
2. Gaurav Kumar, Son of Sri Nawal Kishore Prasad, Both residents of Village- Brahmsthan, Post Office- Bhokilapur, Police Station- Hilsa, District- Nalanda.

... .. Petitioner/s

Versus

1. Mostt. Anita Devi and Ors wife of Late Sanjay Kumar, resident of Village- Ganpat Bigha, PO and PS- Hilsa, District- Nalanda.
2. Smt. Geeta Devi, wife of Sri Ramashish Prasad, resident of Village- Bakaur, P.S.- Islampur, District- Nalanda.
3. Saurav Kumar, son of Sri Nawal Kishore Prasad,
4. Rajiya Devi, wife of Late Ram Chandra Singh,
5. Anil Kumar, son of Late Ram Chandra Singh,
6. Goldu @ Kumar Anupam, son of Sri Anil Kumar,
7. Chandra Shekhar Prasad, son of Late Ram Chandra Singh,
8. Bittu @ Pushkar Ranjan, son of Sri Chandra Shekhar Prasad,
9. Sonu @ Kumar Anugrah, son of Sri Chandra Shekhar Prasad, All residents of Village- Brahmsthan, P.O.- Bhokilapur, P.S.- Hilsa, District- Nalanda.
10. Jaimanti Devi, wife of Sri Ravindra Prasad, resident of Village- Parasdiha, P.O.- Parasdiha, P.S.- Nagarnausa, District- Nalanda.
11. Sulochana Devi, wife of Narayan Prasad @ Darogajee, resident of Village- Parthu, P.O.- Parthu, P.S.- Ekangarsarai, District- Nalanda.
12. Mostt. Pano Kuer, wife of Late Bajrangi Prasad, resident of Village- Brahmsthan, PO- Bhokilapur, P.S.- Hilsa, District- Nalanda.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. J.S. Arora, Sr. Advocate
For the Respondents	:	Mr. Neeraj Kumar, Advocate Mr. Abhishek Singh, Advocate.

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT

Date : 30-11-2023

Heard Mr. J.S. Arora, learned senior counsel for the

petitioner as well as Mr. Neeraj Kumar, learned counsel appearing

on behalf of the respondents.



2. The present petition has been filed for setting aside the order dated 17th of March, 2017 passed in Title Suit No. 55 of 2002 by the court of learned Sub Judge-II, Hilsa, whereby the learned Sub Judge allowed the application of the plaintiff for further cross-examination of defendants' witnesses No. 9, 10 and 11 to the extent of a document, a mortgage deed which was marked exhibit on 13.2.2017.

3. It has been submitted by the learned senior counsel for the petitioner that before the learned trial court, a mortgage deed dated 6th of January, 1993 was filed on the record with other documents but it was not marked. The same was marked only at the time of argument. After marking the said document exhibit, the plaintiff moved an application for recalling defendants' witnesses No. 9, 10 and 11 which was allowed. The same is under challenge before this Court in this petition. Learned senior counsel further submits that the plaintiff brought a suit for partition whereas the case of defendant is that partition has already taken place way back in the year 1987 and a partition deed dated 22nd of June, 1987 was also prepared. Subsequently, the plaintiff/respondent witnessed the mortgage deed dated 6.1.1993 executed by her mother Pano Kuer wherein recital about previous partition had been made. But the said document could not be marked exhibit and the same got



exhibited at the time of argument. However, when written statement was filed by the defendants, the petitioner herein, the fact about existence of mortgage deed was brought on record. Similarly, in their evidence, the defendants' witnesses 9, 10 and 11 unequivocally stated in paragraph 9 of their deposition about execution of the aforesaid mortgage deed and they were not cross-examined on this point by the plaintiff. The plaintiff in her deposition did not deny the document dated 6th of January, 1993 though, detailed statement had been made in the written statement of the defendants. The learned trial court did not take all these facts into consideration and passed the order mechanically without addressing these issues.

4. Learned senior counsel further submits that while allowing the application of the plaintiff for further cross-examination of DWs 9, 10 and 11, the learned trial court failed to take into consideration that no new material has been brought on record for recalling of the defendants' witnesses since the documents were already on record and pleadings were also made in this regard. Apart from that, the defendants in their deposition have also made statements regarding execution of the document. So, there was no necessity of recalling DWs 9, 10 and 11 for further cross-examination as it was simply unwarranted. Learned



senior counsel relied on a decision of Hon'ble Supreme Court reported in ***(2009) 4 SCC 410 (Vadiraj Naggappa Vernekar (Dead) Through LRS. Vs. Sharadchandra Prabahakr Gogate.***

Paragraphs 25, 26 and 29 read as under:-

“25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

26. As indicated by the learned Single Judge, the evidence now being sought to be introduced by recalling the witness in question, was available at the time when the affidavit of evidence of the witness was prepared and affirmed. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of the applicant when the affidavit evidence was prepared.



29. It is ow well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.

5. Learned senior counsel further submits that Order 18 Rule 17 CPC is not intended to fill up the omission or lacunae in the evidence of the witnesses who have already been examined only for the purpose of Order 18 Rule 17 CPC to enable the court to clarify the grounds which may have arisen during the course of examination. Learned counsel further submits that the evidence now being sought to be introduced by recalling the witnesses in question was available at the time of affidavit of evidence of the witnesses was prepared. It is not that certain new facts were being introduced. Thus, the learned senior counsel submits that the impugned order is not sustainable and the same may be set aside.

6. Learned counsel appearing on behalf of the respondent vehemently contended that the impugned order is



clearly sustainable as by marking the mortgage deed, as exhibit, it was incumbent upon the plaintiff to show that the said document is not a genuine one and they were entitled to challenge its veracity. The same could be done only through recalling the witnesses who were already examined. Learned counsel further submits that the defendants took their time in producing the document and while the plaintiff examined herself as witness, the said document was not brought on record. So, there was no reason for plaintiff to rebut the said document. Learned counsel further submits that the petition for marking exhibits to the said mortgage deed was filed by the respondent only on 13th of March, 2017 when the argument of the plaintiff was almost complete and the learned lower court held that it may cause prejudice to the plaintiff and allow the application for recalling the witnesses facilitating the plaintiff opportunity to cross-examine the witnesses in accordance with principle of natural justice. The learned lower court passed the order appreciating proper facts and legal issue involved and there is no merit in the contention of the petitioners' that impugned order was passed in a mechanical manner without proper appreciation of the fact. Learned counsel relied on a decision of the Hon'ble Supreme Court in the case of *Alamelu and another V. State represented through Inspector of Police* reported in AIR 2011



SCC 715 in support of his contention as to how a document would be proved. Para 39 of the said judgment reads as under:-

“39. Considering the manner in which the facts recorded in a document may be proved, this Court in the case of Birad Mal Singhvi v. Anand Purohit, observed as follows:-

“The date of birth mentioned in the scholars’ register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....

Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue,



namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted”.

The same proposition of law is reiterated by this Court in the case of Narbada Devi Gupta v. Birendra Kumar Jaiswal, where this Court observed as follows:-

“The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the “evidence of those persons who can vouchsafe for the truth of the facts in issue” ”.



7. I have given my rightful consideration in the rival submission. When the fact has been brought on record as there being pleadings regarding the document in the written statement itself, and the plaintiff had got all opportunities to rebut the same in her deposition but she failed to do so and, thereafter, she further failed to cross-examine the defendants' witnesses who also made statement in their deposition about the document in question in a very clear and cogent terms. The plaintiff could not seek recall of defendants' witnesses merely because the said document was marked exhibit. Bringing on record the document and marking it an exhibit was only a formality. If the plaintiff was aggrieved, she should have brought on record something to show that on certain point she was going to cross-examine these witnesses after their recall. Simply for the reason that a document was left to be marked exhibit and subsequently it has been marked exhibit, though it has all along been in the pleadings, and only on this account, the plaintiff sought the recall of the defendants' witnesses, is simply not permissible.

8. Order 18 Rule 17 CPC reads as under:-

“RULE 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”.

It empowers the court to recall any witness either on its own or at the instance of the party but the same should be done only to clarify certain doubts or to seek any further clarification. In the case of ***K.K. Velusamy vs. N. Palanisamy*** (2011) 11 SCC 275 relying upon ***Vadiraj Naggappa Vernekar*** (supra) it held that the said power is not intended to be used to fill up omission in the evidence of a witness who has already been examined. The Hon'ble Supreme Court reiterated the position in the case of ***Ram Rati V. Mange Ram***, reported in (2016) 11 SCC 296 and held that the said power cannot be invoked to fill up any omission or lacunae in the evidence or on the ground that no prejudice would be caused to the parties. Similar to the effect is the decision in the case of ***Vadiraj Naggappa Vernekar*** (supra) wherein it has been held that prejudice is not a ground for exercise of power by this Court. If evidence on re-examination has a bearing on the ultimate decision of the suit, then only trial court would permit recall of witnesses for re-examination either in chief or for cross-examination.

9. Further, the authority cited by the learned counsel for the respondent (***Alamelu and another***, supra) is not of help to



the cause of the respondent since the document in question is said to be executed by the mother of the plaintiff which was witnessed by the plaintiff, so, its execution and contents could be proved by these persons only and not by any other person. So far as genuineness of the document is concerned, merely marking the document exhibit does not mean it has been found admissible as the same is to be decided by the Court. On this aspect Hon'ble Supreme Court issued certain direction with regard to exhibiting the documents in order to speed up the trial in the case of ***Bipin Shantilal Panchal Vs. State of Gujarat and Another*** reported in ***2001 Supreme Court Cases (Cri) 417 : 2001 SCC Online SC 445***.

Hence, even on this count the respondent could not claim a right to recall the witnesses of the defendant. Since the respondents have failed to furnish any material to show that the recall of witnesses of defendants was warranted, I do not think the order dated 17.3.2017 passed by learned Sub Judge-II, Hilsa, is sustainable in the eyes of law. Moreover, the case of the petitioner is covered by the decision of **Vadiraj Naggappa Vernkar** (supra) as the details of exhibited document were all along present before the plaintiff, in pleading as well as evidence. It is not as if certain new facts have been discovered subsequently which were not within the knowledge of plaintiff.



10. Hence, the instant petition is allowed and the order dated 17.3.2017 passed in Title Suit No. 55 jof 2002 by the learned Sub Judge-II, Hilsa, is set aside. However, it is made clear that this Court has not expressed any opinion on the merits of the case and whatever has been discussed is only for the purpose of disposal of the present petition.

(Arun Kumar Jha, J)

S.Ali/-

AFR/NAFR	AFR
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