

CR No.3776 of 2023

1

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

(119)

CR No.3776 of 2023
Date of Decision:12.07.2023.

Suresh Kumar

.....Petitioner

Versus

Babita and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE VIKRAM AGGARWAL

Present: Mr. Yagsimant Attri, Advocate
for the petitioner.

VIKRAM AGGARWAL, J. (ORAL)

1. The present petition filed under Article 227 of the Constitution of India assails the order dated 23.03.2023 (Annexure P-6) passed by the Civil Judge (Jr. Division), Pehowa, vide which the application filed by the petitioner under Order 18 Rule 17 read with Section 151 CPC for recalling PW-2-Babita for producing documents/photographs was dismissed.

2. A suit was filed by respondent No.1-Babita against her brothers i.e., the present petitioner and respondents No.2 and 3 for declaration to the effect that she was the owner and in joint possession of the suit land measuring 27 Kanal 12.5 Marlas situated at Village Mangna, Tehsil Pehowa, District Kurukshetra. A decree for joint possession was also sought.

3. During the course of the trial, the plaintiff-Babita appeared as PW-2. Subsequently, application (Annexure P-4) was moved by the present petitioner (defendant No.2) under Order 18 Rule 17 read with Section 151 CPC for recalling PW-2-Babita. It was averred that when the cross-examination of Babita had been

Babita were not in existence as the marriage of her daughter-Mamta Devi was solemnized on 22.02.2020 and the re-marriage was subsequently solemnized on 09.03.2023. It was averred that the re-examination of PW-2-Babita was essential with a view to falsify the averments made by her in the plaint to the effect that the defendants had committed a breach of trust and had plundered the fiduciary relationship between the parties.

4. The application came to be dismissed by way of the impunged order leading to the filing of the present revision petition.

5. Learned counsel for the petitioner has submitted that the trial Court erred in dismissing the application. Reference has been made to the pleadings in the plaint (Annexure P-1) especially those made in Para-6 (f) of the plaint. It has been submitted that Babita was initially examined as a witness on 17.01.2019 and the marriage of her daughter-Mamta Devi was solemnized on 22.02.2020. Re-marriage of the said Mamta Devi was solemnized on 09.03.2023 and it was attended by the petitioner and his brothers wherein all rites and rituals were duly performed. He submits that since these photographs were not in existence, when PW-2-Babita had been examined as a witness and further since these photographs are in possession of PW-2-Babita, her cross-examination would be essential for the just decision of the case. Learned counsel further submits that he would not avail more than one effective opportunity for re-examination of PW-2-Babita. To support his contentions, learned counsel has placed reliance upon the judgment of the Hon'ble Apex Court in the case of **Vadiraj Naggappa Vernekar (D) Through Lrs Vs. Sharad Chand Prabhakar Gogate, 2009 (2) RCR (Civil) 508** as also upon judgments of Coordinate Benches of this Court in the cases of **Sikandar Singh Maluka Vs. Gupreet Singh Kangar 2010 (5) RCR (Civil) 661, Surjit**

Kaur Vs. Ajit Singh and others 2020 (3) RCR (Civil) 825 and Paramjit Vs. Prem Pal @ Mehar Pal and others 2014(1) RCR (Civil) 98.

6. I have considered the submissions made by learned counsel for the petitioner.

7. As the outcome of the present petition will not prejudice the rights of the respondents, notice is not required to be issued to them and the petition can be disposed of.

8. The suit was filed by respondent No.2 Plaintiff-Babita against her brother Rajesh Kumar, Suresh Kumar and Chandi Ram seeking an equal share in the suit land. Amongst other averments it was also averred in Para-6(f) as under:-

“f. That the fraud was played by cleverly managing the show by the defendants in collusion with the witnesses i.e. Brij Bhushan and Ram Kumar. It is also pertinent to mention that Brij Bhushan has also committed fraud by imposing herself to be Numberdar whereas he was never a Numberdar of any village of Mangna. Even in the knowledge of the defendants as the Brij Bhushan shown wrongly as Numberdar as real cousin of defendant No.1 to 3. Even Ram Kumar witness shown in the impugned transfer deed was Siri/servant of the defendants and under the influence of defendant. So all the persons i.e. witnesses and defendants have colluded with intent to cheat for causing unlawful loss.

That the defendants have committed breach of trust and have plundered the fiduciary relationship between the parties to the suit.”

9. An application was moved by the present petitioner under Order 18 Rule 17 read with Section 151 CPC in which it was clearly stated that the evidence of PW-2-Babita had been recorded on 17.01.2019. The evidence of even the defendants had been closed on 10.10.2019 and the case was adjourned for rebuttal evidence with arguments for 31.10.2019. It was also averred that the marriage of

re-marriage was solemnized on 09.03.2023. It was duly attended by the defendants and all rites and rituals were duly performed. Photographs were also clicked. It is the case of the petitioner that at the time of cross-examination of the plaintiff-Babita, these photographs were not in existence as a result of which the same could not be put to her. Since these photographs were not in existence and these may have some bearing upon the merits of the case especially in view of the averments made in the plaint, the trial Court should have considered giving one opportunity to the petitioner for re-examining/cross-examining PW-2-Babita. The view taken by the trial Court that Order 18 Rule 17 CPC could not have been invoked by the petitioner is erroneous since it is settled law that if the evidence of a witness has some bearing on the ultimate decision of the *lis*, it is always within the discretion of the Court concerned to permit recall of such a witness for re-examination/cross-examination as the case may be. A categorical view in this regard was taken by the Hon'ble Apex Court in the case of **Vadiraj Naggappa Vernekar (D) Through Lrs Vs. Sharad Chand Prabhakar Gogate (Supra)**, wherein this very question was examined. In that case, though the request made by the applicant therein was rejected, it was held that it is now well settled that the power to recall any witness under Order 18 Rule 17 Civil Procedure Code 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 witnesses which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination. The observations of the Hon'ble Apex Court are as under:-

“16. In our view, though the provisions of Order 18 Rule 17 Civil Procedure Code have been interpreted to include applications to be filled 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. 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. In the instant case, Sadanand Shet was shown to have been actively involved in the acquisition of the flat in question and, therefore, had knowledge of all the witness that certain lapses in his evidence came to be noticed which impelled the appellant to file the application under Order 18 Rule 17 CPC. Such a course of action which arises out of the fact situation in this case, does not made out a case for recall of a witness after his examination has been completed. The power under the provisions of Order 18 Rule 17 Civil Procedure Code is to be sparingly exercised and 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 the parties. That is not the scheme or intention of Order 18 Rule 17 Civil Procedure Code.

17. It is now well settled that the power to recall any witness under Order 18 Rule 17 Civil Procedure Code 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 witnesses which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination. Of course, if the evidence on 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 a witness for re-examination-in-chief with permission to the defendants to cross-examine the witness thereafter. There is nothing to indicate that such is the situation in the

present case. Some of the principles akin to Order 47 Civil Procedure Code may be applied when a party makes an application under the provisions of Order 18 Rule 17 Civil Procedure Code, but it is ultimately within the Court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out.

10. Applying the said judgment to the facts of the present case, it would be abundantly clear that in the present case, the petitioner was not trying to fill up any lacunae and is just wanting to re-examine/cross-examine the witness with regard to certain subsequent events.

In view of the aforesaid, the present revision petition is allowed. The order dated 23.03.2023 passed by the Civil Judge (Jr. Division) Pehowa (Annexure P-6) is set aside. The application filed by the petitioner for recalling of PW-2-Babita is allowed. One effective opportunity shall be granted to the present petitioner to cross-examine PW-2-Babita. This shall however be subject to payment of Rs.5000/- as costs to be paid to the witness i.e., PW-2-Babtia.

July 12th, 2023
Rekha

(VIKRAM AGGARWAL)
JUDGE

Whether speaking/reasoned : *Yes/No.*
Whether reportable : *Yes/No.*