

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR-4499-2022 (O&M)
Date of decision: 09.05.2023

Balwinder Singh

...Petitioner

VS

Subeg Singh and another

...Respondents

CORAM: HON'BLE MR. JUSTICE ARUN MONGA

Present: Mr. Gagandeep Singh Sirphikhi, Advocate,
For the petitioner.

Mr. Amandeep Sharma, Advocate for
Mr.A.S.Manaise, Advocate,
For respondent No.1.

ARUN MONGA, J. (ORAL)

Revision petition herein *inter alia* is to set aside impugned order dated 22.08.2022 (Annexure P-6) passed by learned Civil Judge (Junior Division), Batala, vide which the application filed by plaintiff/respondent No.1 herein for recalling the witness PW2-Sarabjit Kaur for cross-examination, was allowed.

2. Succinct facts first, as pleaded in the instant petition.

2.1. Plaintiff/respondent No.1 herein filed a suit for partition while alleging that plaintiff and defendants are co-sharers of the house in dispute and there remains a dispute between and amongst the parties regarding smooth use of suit property.

2.2. Plaintiff's evidence was closed on 13.12.2019 and the evidence of defendants was closed on 25.07.2022. During rebuttal evidence, the application for recalling of PW-2 Sarabjit Kaur was filed by

plaintiff/respondent No.1 herein subsequently, whereas he has a right to re-examine the witness only before closure of the plaintiff's evidence or soon thereafter.

2.3. Learned trial Court illegally allowed the application vide order dated 22.08.2022 (Annexure P-6) impugned herein. Hence the instant petition.

3. Learned counsel for petitioner would urge that plaintiff/respondent No.1 herein vide application (Annexure P-4) had sought to recall witness PW-2 Sarabjit Kaur for cross-examination, whereas learned Court below vide order impugned herein permitted plaintiff/respondent No.1 to re-examine the said witness, which is impermissible in law and is against the procedural mandate of Sections 137 and 138 of the Indian Evidence Act, 1872. To buttress his claim, he relies on a judgment dated 28.04.2015 passed in Civil Revision No.2850-2015 titled '**Satnam Singh Vs. Phoola Singh and others**' reported in¹.

4. Learned counsel for the respondent No.1 strenuously opposes the revision petition and supports the impugned order being based on correct findings.

5. I have heard learned counsel for the parties and gone through the case file.

6. Impugned order dated 22.08.2022 (Annexure P-6) passed by learned Civil Judge (Junior Division), Batala, is premised, *inter alia*, on the following reasoning:

"5. It is well settled that the object of the provision under Order 18 Rule 17 of the Code read with Section 151 is to allow bona fide applications 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 not valid and sufficient reasons.

6. *In the case of Vadiraj Naggappa Varnekar (Dead) Through LRs. Vs. Sharadchandra Prabhakar Gogate, (2009) 2 SCC (Civ) 198 it had been held that the under the provisions of Order 18 Rule 17 CPC for recall of witness 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 such power is to be exercised sparingly in an appropriate case and not as a general rule merely on the ground that the recall or re-examination of witness would not cause any prejudice to the parties. Such power is not to be invoked to fill up the lacuna 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. It is always within the jurisdiction of the trial court to permit to recall such a witness for re-examination-in-chief with further permission to the defendant to cross-examine the witness, thereafter. It is ultimately within the Court's discretion, if it deems fit, to allow such an application.*

7. *The present suit has been filed for partition of the suit property i.e. a house. Whereas it is the case of the plaintiff that both the parties are co-sharers, defendants have denied the claim of the plaintiff and put forth a will dated 06.10.2009 in defence. Perusal of the cross-examination of PW2 Sarabjit Kaur, conducted by defendants reveal that defendants have put original will Ex. DX to the witness to which she testified to be the attesting witness and has admitted the defence. Undoubtedly, the plaintiff counsel failed to exercise his right to re-examine the witness at that time and now this application has been filed during the stage of rebuttal evidence. Although, delay in filing such like applications is one of the relevant factors, however, the ultimate test to be applied by the court is whether the recalling of a witness is necessitated for purpose of any clarification and will assist in rendering justice. Such an application can be filed at any stage of the trial. The plaintiff intends to re-examine PW2 on the point of will which is evidently, a relevant aspect in deciding the present case and to do complete justice. Plaintiff should not be denied a valuable right to clarify ambiguities in the evidence of his witness merely because she failed to exercise the same right after her cross-examination. Thus, one opportunity is granted to the plaintiff to re-examine PW2 strictly on the point of the alleged will.*

8. *The application stands allowed accordingly. However, the findings herein are only for the purpose of deciding this application and will have no impact on the merits of this case."*

7. The application has been resisted on the ground that trial is at the final stage of culmination as most of the evidence is over and case is now fixed

for rebuttal evidence/arguments. The delay, if any, is more detrimental to plaintiff, who has approached the Court and mitigation of whose grievance is likely to take longer on his own volition. Defendant No.1/petitioner herein, therefore, cannot claim that he is prejudiced by the delay of trial. In my opinion, for reasons recorded in the impugned order, the learned trial court rightly exercised its discretion to recall of PW-4 Sarabjit Kaur.

8. As pointed out by Learned counsel for the petitioner, the prayer in the plaintiff- respondent's application Annexure P-4 was that PW-4 Sarabjit Kaur may be recalled for her cross examination. Perusal of the impugned order shows that thereby this application was allowed as such.

9. Sections 137 and 138 of the Indian Evidence Act, 1872 are reproduced herein below:

"Section 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.

Section 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 the 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 the matter."

10. It would be seen that the examination of the witness by the party calling him/her is described in section 137 of the Act *ibid* as the examination in chief and/or re-examination and his/her examination by the

adverse party is described as the cross- examination. Section 142 read with section 141 of the Act provides that leading questions must not, if objected to by the adverse party, be asked in an examination in chief and/or re-examination, but the court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

11. PW-4 Sarabjit Kaur had been earlier called by the plaintiff-respondent, was examined-in-chief and also cross-examined. In view of this factual position and the aforesaid legal provisions, it is directed that the recall of PW-4 Sarabjit Kaur is for her re-examination by the plaintiff subject to the condition that if new matter is introduced in her re-examination, the adverse party may further cross-examine her upon that point.

12. With these directions, the petition is disposed of.

13. Pending civil miscellaneous application(s), if any, shall also stand disposed of.

(ARUN MONGA)
JUDGE

09.05.2023
vandana

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