

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.292 of 2024**

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Sujit Kumar Mishra @ Sujit Mishra @ Ajay Mishra Son of late Mundrika Mishra, Resident of Village Tillothou, P.S.- Tillothou, District Rohtas, at present - Resident of SRT-45, Road no.- 13 (B), Rajendra Nagar, P.S.- Bahadurpur, District Patna.

... .. Petitioner

Versus

Dr. Sanjay Kumar Mishra Son of late Mundrika Mishra, Resident of Road no.- 13 (B), Rajendra Nagar, P.S.- Bahadurpur, Dist. - Patna.

... .. Respondent

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Appearance :

For the Petitioner/s	:	Mr. Mahesh Narayan Parbat, Advocate Mr. Praveen Prabhakar, Advocate
For the Respondent/s	:	Mr. Abinash Kumar, Advocate

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**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT**

Date :30-09-2024

The present petition has been filed under Article 227 of the Constitution of India for quashing the order dated 06.02.2024, passed by the learned Civil Judge (Jr. Division)-III, Patna in Eviction Suit No. 13 of 2012, whereby and whereunder the learned trial court rejected the application filed by the petitioner under Order 18 Rule 17 of the Code of Civil Procedure, 1908 (for short 'the Code') for recalling him to prove the documents already filed by him for marking it as exhibits.

02. Briefly stated, the facts of the case are that the petitioner is defendant of Eviction Suit No. 13 of 2012 filed by respondent to evict the petitioner from the suit premises as mentioned in Schedule-2 of the plaint. The plaintiff/respondent



claims himself to be the owner of whole premises bearing suit property of Schedule-1 of the plaint and disputed part of the suit property is in Schedule-2 of the plaint. The plaintiff/respondent claims the property on the basis of gift deed executed by his uncle Rajendra Mishra on 11.11.1986 with regard to Schedule-1 property of the suit treating him as his son since he was issueless and was pleased with the services of plaintiff/respondent. Further case of the plaintiff/respondent is that the defendant/petitioner is his own brother, who was living in the village and at his request, he leased him one room with kitchen and bathroom at the rent of Rs. 1200/- per month to enable him to shift to Patna for education of his daughter. After marriage of the daughter, the defendant/petitioner again shifted to his village. Further case of the plaintiff/respondent is that another uncle of plaintiff/respondent, namely Shyam Sundar Mishra, gifted another flat to him. The defendant/petitioner became jealous and started torturing Shyam Sundar Mishra and his wife. The plaintiff further claimed that he is employed in Udaypur (Rajsthan) and his wife has been living in Patna. When the plaintiff asked the defendant to vacate his premises, the defendant refused and as he was defaulter, the present suit has been filed.



After appearance, the defendant filed his written statement claiming the disputed flat in question was his ancestral property in which he has been residing with his family and denied the relationship of landlord and tenant between the parties. The defendant claimed that one Kapildeo Mishra was the common ancestor of the parties who died leaving behind three sons, namely Shyam Sundar Mishra, Mundrika Mishra and Rajendra Mishra. Later on, Shyam Sundar Mishra died leaving behind his wife and a son. Mundrika Mishra died leaving behind three sons, who are the plaintiff, defendant and one Abhay Mishra. Rajendra Mishra had two sons, namely Rahul Kumar and Rohit Kumar. Further case of the defendant is that the property in question was earned by Kapildeo Mishra, who had been working as *Baid and Rajpurohit* and Rajendra Mishra was only the name lender and has got no right to gift the property as absolute owner.

In course of hearing, relevant documents were filed on behalf of both the parties in support their respective cases. The documents filed on behalf of the plaintiff were marked exhibits. However, the documents filed on behalf of the defendant could not be marked exhibits and his evidence was closed and this fact came to notice of the defendant during the course of argument.



Thereafter, the defendant filed an application for his recall to prove the said documents. The plaintiff filed a rejoinder contesting the claim of the defendant for his recall. After hearing the parties, the learned trial court rejected the petition filed by the defendant for his recall vide order dated 06.02.2024 which is under challenge in the present civil miscellaneous petition.

03. Learned senior counsel, Mr. Mahesh Narayan Parbat, appearing on behalf of defendant/petitioner submitted that the impugned order is wholly illegal and without jurisdiction and is fit to be quashed. The learned trial court did not take into consideration the fact that the documents were already filed on record and the petitioner only sought his recall for bringing on record the documents, so that the documents could be marked as exhibits. As the documents were already on record, marking the same as exhibits would not cause any prejudice to the other side and bringing on record the document was also necessary for the ends of justice. The learned trial court did not take into consideration the aforesaid facts and passed the order mechanically.

In support of his contention, Mr. Parbat referred to Paragraph Nos. 4 and 17 of the decision of Hon'ble Supreme



Court in the case of ***Vadiraj Naggappa Vernekar (D) Through Lrs. vs. Sharad Chand Prabhakar Gogate***, reported in ***AIR 2009 SC 1604***, which read as under:

“4. One Sadanand Sheshgiri Shet, who was alleged to be a witness to all the transactions relating to the said flat, was appointed as the Constituted Attorney by the appellant and the other heirs of deceased Vadiraj Naggappa Vernekar and as required under Order 18 Rule 4 CPC, his evidence by way of an affidavit was filed before the learned Single Judge. While the evidence was still being recorded in the suit, the appellant and the other plaintiffs moved Notice of Motion No. 463 of 2006 before the learned single Judge on 13th February, 2006, urging that certain facts which were necessary for proper adjudication of the suit had inadvertently been left out in the affidavit affirmed by Sadanand Shet and that it was, therefore, necessary to recall him for further examination-in-chief under the provisions of Order 18 Rule 17 CPC. By order dated 7th July, 2006, the learned Single Judge dismissed the said Motion upon holding that the witness could not be recalled to fill up the lacuna in his examination-in-chief on affidavit. Appeal No. 853 of 2006 filed by the appellant herein was dismissed in limine by the Division Bench of the High Court on 1st December, 2006, confirming the order of the learned



single Judge. The present appeal, by leave, has been filed against the order of the appeal court dated 1st December, 2006.

17. It is now 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. 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 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, 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.”



Learned senior counsel further submitted that the documents are necessary to prove the case of the defendant as the documents sought to be brought on record and marked exhibits by the defendant are original certificates and identity cards of the defendant of his School and College period starting from 1980 onwards. These documents are necessary to show that the petitioner was/is residing in the said house as it is his ancestral property and the defendant is one of the shareholders of the house in this case. Therefore, the learned trial court ought to have allowed the defendant to bring on record his documents. Learned senior counsel further submitted that the learned trial court wrongly held that the petition for bringing on record the documents have been filed by the defendant to fill up the omission and lacuna of his case and it has wrongly rejected the application filed by the petitioner under Order 18 Rule 17 of the Code. Therefore, the impugned order could not be sustained and needs to be set aside.

04. Submission made on behalf of the petitioner/defendant has been vehemently opposed by the learned counsel appearing on behalf of the plaintiff/respondent. Learned counsel for the plaintiff/respondent submitted that the present petition has been filed making wrong averments. The



defendant/petitioner has no claim over the suit property as the plaintiff/respondent is the owner of same. Learned counsel further submitted that the defendant/petitioner wants to delay the proceeding before the learned trial court and does not want the disposal of the suit. The petitioner got sufficient opportunity to get the documents marked as exhibit during course of his examination-in-chief but did not do so in order to save himself from cross-examination on the point. Now at the stage of argument, the petitioner has filed frivolous petition to get the document admitted into the evidence without any cross-examination and to frustrate the disposal of eviction suit pending since 2012.

Learned counsel referred to the decision of Hon'ble Supreme Court in the case of *K. K. Valusamy v. N. Palanisamy*, reported in *(2011) 11 SCC 275* on the point that 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. The said power is not intended to be used to fill up the omission in the evidence of a witness who has already been examined. The power is discretionary and should be used



sparingly in appropriate cases to enable the court to clarify any doubt it may have in regard to the evidence led by the parties. Thus, the learned counsel submitted that the learned trial court has passed the order which is well discussed and reasoned order based on the decisions of Hon'ble Supreme Court on the same point. Hence, it needs no interference of this Court.

05. I have considered the submission made on behalf of the parties and also perused the record.

Order 18 Rule 17 of the Code reads as under:

“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.

Thus, the Court at any stage of a suit may recall any witness who has been examined earlier and may put such questions to him as the Court thinks fit. Bare reading of the aforesaid provision makes it clear that it is only the requirement of court that it may at any stage of the suit, recall the witness who had been examined earlier and put him such questions as it may deem fit. It goes without saying that the said provision does not permit a party to re-examine any witness to fill the lacuna in



the case. It is an enabling provision for the convenience of the court.

06. The Hon'ble Supreme Court in the case of ***Vadiraj Naggappa Vernekar (D) Through Lrs.*** (supra) has held that the power under the provisions of Order 18 Rule 17 of the 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. The Hon'ble Supreme Court further held that power to recall any witness under Order 18 Rule 17 of the 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 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. Similar to the effect is the decision on this point of the Hon'ble Supreme Court in the case of ***K. K. Valusamy*** (supra), which relied on the decision in the case of ***Vadiraj Naggappa Vernekar (D) Through Lrs.*** (supra), wherein it has been held that the court would recall any witness either *suo motu*, 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.

07. Thus, the law on this point has been made very much clear that (i) the court may recall any witness after he has been examined-in-chief and cross-examined for re-examination; (ii) this power could be exercised *suo motu* or on an application by the parties; (iii) provision has been incorporated to enable the court to clarify any issue or doubt; (iv) the court is supposed to put questions and elicit answers once a witness is recalled; (v) the court may permit the parties to assist it by putting some questions; (vi) the power is to be exercised sparingly in appropriate cases and could not be allowed generally that it would not cause any prejudice to the parties; and (viii) the power is not intended to be used to fill up the lacunae in the evidence of witness which has already been examined.

08. Now, coming back to the facts of the case, the documents sought to be proved, were already on record. The documents may help the learned trial court to arrive at a just decision and for this reason, though the petitioner is a defaulter and has failed to avail the opportunity to get the documents exhibited at the time of his examination-in-chief, but outright denial to re-examine himself appears to be too harsh and palpably unjust. It is to be reminded that the procedural law is



handmaid of justice and could not be used to deny substantive rights of a person on the ground of delay or laches. The Hon'ble Supreme Court in the case of *Vadiraj Naggappa Vernekar (D) Through Lrs.* (supra) held that 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.

09. Therefore, for the ends of justice, I am inclined to interfere with the impugned order dated 06.02.2024 passed by the learned Civil Judge (Jr. Division)-III, Patna in Eviction Suit No. 13 of 2012. Hence, the same is set aside. In the result, the petition under Order 18 Rule 17 of the Code filed by the petitioner is allowed. The petitioner is permitted to re-examine himself to prove the documents which have already been filed on record, strictly in accordance with law. At the same time, the respondent would be given ample opportunity to cross-examine the witness to rebut the evidence so adduced by the petitioner. The learned trial court is further directed to dispose of the suit within three months from the date of receipt/production of a copy of this order since it is a suit of year 2012 and only the



defendant needs to be re-examined and cross-examined.

10. Accordingly, the present petition stands allowed. However, it is made clear that this Court has not expressed any opinion on merits of the case of the parties and learned trial court would proceed to decide the matter uninfluenced by any of the observation made by this Court.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	AFR
CAV DATE	03.09.2024
Uploading Date	01.10.2024
Transmission Date	NA

