



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 2364 OF 2019

(Shalini wd/o Ashok Kanere and another vs. Govt. of India, Ministry of Defence Ordinance
Factory, Nagpur through Senior General Manager and other)

*Office Notes, Office Memorandum of Coram,
appearances, Court's orders of direction,
and the Registrar's orders.*

Court's or Judge's order

Mr. M.P. Sagdeo, Advocate for the petitioners.
Mr. P.N.Khadgi, Advocate for respondents.

CORAM : ABHAY J. MANTRI J.

DATE : SEPTEMBER 13, 2024.

Heard learned counsel appearing for the parties.

2) By this petition, the petitioners/Original plaintiffs have challenged the order dated 12/02/2019 passed below Exh.91 by the learned 12th Joint Civil Judge, Senior Division, Nagpur, thereby permitting the defendant No.2 to recall the witness (herself) for further chief examination to explain certain documents running against her.

3) Learned Counsel for the petitioners has drawn my attention to the application (Exh.91) and order thereon and canvassed that in the application itself, defendant No.2 has stated that to fill up the lacuna, she wants to recall the witness. Moreover, the application is vague. However, the learned trial Judge, without considering the settled position of law, that the party is not entitled to recall the witness to fill up the lacuna, passed the impugned order; therefore, the said order is liable to be set aside.

4) Learned Counsel has also filed a written submission along with citations on record. He has relied upon paras 8, 9, and 10 of the judgment of the Hon'ble Apex Court in the case of ***K.K.Velusamy vs. N.Palanisamy reported in 2011 AIR SCW 2296*** and submitted that in view of the law laid down in the above judgment, petition needs to be allowed.

5) Learned Counsel for respondents submitted that though in the application it was stated that to fill up the lacuna, she wanted to recall the witness; however, from the entire tenor of the application, it does not seem that defendant No.2 wanted to fill up lacuna. He further submitted that due to the mistake of the learned Counsel for defendant No.2, the party should not suffer. Therefore, he contended that passing the impugned order is just, legal, and proper, and no interference is required.

6) I have considered the rival submissions, perused the impugned order and record, as well as the Authorities relied upon by the petitioners.

7) It is pertinent to note that the application to recall the witness was filed after the conclusion of her testimony. (Defendant No.2).

8) A bare perusal of the application reveals that it is vague. Nothing has been stated for what purpose she wants to recall the witness or which questions she wants to ask the witness, which her Advocate has forgotten. However, it is vaguely contended that her advocate left or forgot the questions to ask the witness on the exhibited documents, so, to fill up the lacuna, she wants to recall the witness.

9) As per the mandate of the Apex Court in the case of **K.K.Velusamy** (supra), "There is no specific provision in the code enabling the parties to re-open the evidence for the purpose of further chief examination to fill up the lacuna or to elicit any clarification from the witness by recalling him. Therefore, it appears that the learned trial Judge, without considering the settled legal position, passed the impugned order, observing that due to the mistake of the Advocate, defendant No.2 should not suffer. Furthermore, it is observed that if defendant No.2 is permitted to recall the witness in that case, the plaintiffs would get an opportunity to cross-examine her and their right would not be prejudiced.

10) Having considered the aforesaid submissions and facts, I would like to reproduce Order XVIII Rule 17 of the Civil Procedure Code (CPC) 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.

11) It reveals that Order XVIII Rule 17 of the CPC enables the Court, at any stage of the suit, to recall any witness who has been examined to put such questions to him as the Court thinks fit. The said power is not intended to be used to fill up lacuna in the evidence. In the case at hand, defendant No.2 has neither reproduced the questions that she wanted to put to the witness nor clarified in her application for what purpose she desired to recall the witness. Thus, it seems that the learned

Judge might have, after considering the oral submissions, passed the order, as the same could not be reflected in the application, which was filed by defendant No.2. Instead, it is apparent from the application that to fill up the lacuna, defendant No.2 wants to recall the witness. Thus, it is evident that the learned Judge, without considering the averment in the application and mandate of Order XVIII Rule 17 of the CPC has allowed the application. Therefore, the said order is not sustainable in the eyes of the law, and it is liable to be quashed and set aside. In this backdrop, I deem it appropriate to pass the following order :-

ORDER

1. The Writ Petition is allowed.
2. The impugned order dated 12/02/2019 passed by the 12th Joint Civil Judge, Senior Division, Nagpur, below Exh.91, is hereby quashed and set aside.
3. Needless to clarify, defendant No.2 is at liberty to file a fresh application, if any, by giving details as to why she wants to recall the witness. If such an application is filed, the trial Court shall decide the same in accordance with law.
4. Inform the trial Court accordingly.

(ABHAY J. MANTRI, J.)