

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

CO 2954 OF 2024

TAPAN KUMAR GHOSH

VS

SMT. SIMA GHOSH

For the Petitioner : Mr. Sounak Bhattacharya, Adv.
Mr. Sounak Mondal, Adv.
Mr. Abhirup Halder, Adv.
Ms. Bipasha Bhattacharya, Adv.

For the Opposite
Party : Mr. Sourav Sen, Adv.
Ms. A. Chhabraborty, Adv.
Ms. S. Bhattacharya, Adv.

Last heard on : 01.09.2025

Judgement on : 03.09.2025

CHAITALI CHATTERJEE DAS, J. :-

1. This revisional application is directed against an order dated July 4, 2024 passed by. Learned Additional District Judge, Fast Track Court number 2, in Mat SUIT No. 36 of 2013, whereby the application was filed to recall the witness dated March 9, 2023 filed on behalf of the wife /Opposite Party under Order 18 Rule 17 CPC has been allowed.

- 2.** The case of the petitioner/husband in a nut shell is that the suit for dissolution of marriage under Section 13 of the Hindu marriage act was filed by the present petitioner against the Opposite Party/wife on the ground of cruelty and desertion as has been registered as Mat Suit no 36 of 2013. The Opposite Party entered appearance and filed written statement and thereafter the matter was fixed for peremptory hearing of the suit. The petitioner/husband deposed as P.W.1 and was examined in full and discharged, and she was also cross examined and discharged. After that the suit was fixed at the argument stage when the opposite party filed an application under Order 18 Rule 17 of the Civil Procedure Code to recall the P.W.1 for the purpose of exhibiting the letter dated September 28, 1994, which was marked 'M' for identification .
- 3.** It is the case of the petitioner that earlier the opposite party filed a similar application for recall of the evidence of this petitioner, but the same was withdrawn being not pressed and also without any leave to file a fresh one on the self-same cause of action. The application filed under Order 18, Rule 17 of CPC was heard at length by the learned trial court and by an order dated July 4, 2024 allowed the said application, thereby recalling the evidence of your petitioner. Being aggrieved by this revisional application is filed.
- 4.** The learned advocate appearing on behalf of the petitioner argued that the learned trial judge acted illegally and with material irregularity without appreciating that a party cannot be permitted to fill up the lacuna in evidence under the garb of an application under Order 18 Rule 17 of the Code. It is further argued that when the said letter was produced while adducing evidence the present petitioner raised objection and the letter was not marked

with exhibit and was put as “M” for identification and therefore after completion of the evidence, the plaintiff can in no way, pray for placing the said document before the defendant for the purpose of exhibiting the said document. In this regard, a decision has been relied upon by the learned advocate representing the petitioner reported in **Gyanti Devi and others versus Shanti Devi**,¹ where after the examination in chief was tendered along with certain documents marked exhibit, an application under Section 151 of CPC was filed praying for expunging the documents marked as an exhibit on admission, save and accept two items. Those documents were not filed along with the plaint and at the time of tendering, those documents, specific objection was raised relating to the admissibility of those documents. The point as to whether the civil court should decide the objection as to the proof and admissibility of the document at the time when such document is tendered in evidence or should postpone the same to be considered at the time of the argument after tentatively marking the document as exhibit subject to the objection. The co-ordinate single bench of this Court observed ;

20;However, Order 11, Rule 12 of the code entitled any party to the proceeding to apply to the Court for an order, directing the other party to make discovery on oath of the documents which are or have been in his possession or power relating to the matter in question. The Suo Motu power is also conferred upon the court relating to the production of a document upon oath under Order 11 Rule 14 of the Code.

In paragraph 22, it was further observed that’

¹ (2012) 3 Cal LT 404

22. Order 18 rule 4 of the code provides that the examination in chief of a witness shall be on affidavit and copies thereof shall be given to the other party. By inserting a proviso, there in, it is imperative that the documents which are filed and relies upon by the parties along with the affidavit shall be subject to the orders of the court relating to the proof and admissibility thereof.

5. In this case, as it transpires from the order impugned that the wife deposed in this case as D.W.1 and tendered, her affidavit in chief and documents were also filed by her in support of her case and at the time of tendering, she filed one original letter in the handwriting of the petitioner/husband in Bengali bearing the date 28.9.1994, but the same was not exhibited in the suit on account of the objection raised from the side of petitioner/ husband, and it was then marked as “M” for identification. No objection was raised by the opposite party against such order. At this stage attention is drawn by the learned advocate representing the opposite party to the order of admission of this revisional application, where it was observed by the co-ordinate Bench that the recall of the petitioner, prima facie is not necessary since the same document should have been marked exhibit after noting objection of the petitioner and accordingly submits that it was a procedural defect occurred at the instance of the learned court and therefore recall is a mere formality . The learned court was of the view that the petition for recalling was filed without any delay immediately after the completion of the evidence of D.W.1, therefore, it was not considered as an afterthought and if allowed will not fill up any lacuna of the defence case, but would help in removing the ambiguity, which will enable the court to decide the actual controversy and proper adjudication

of the case. In this regard again, the learned Co-ordinate Bench in the decision observed;

“.....The objections as to the admissibility of documents in evidence may be classified into two classes. i) an objection that the document which is sought to be proved is itself inadmissible in evidence and ii) where the objection does not dispute the admissibility of the document in evidence, but is directed towards the mode of proof, alleging the same to be regular or insufficient. In the first case, merely because a document has been marked as an exhibit, an objection as to its admissibility is not excluded and is available to be raised, even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular, cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play.. The crucial test is whether an objection if they can at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure, the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons. Firstly, it enables the court to apply its mind and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party,

entering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to herein above in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in the superior court.”

6. In the instant case, it is seen that in the cross-examination of P.W. no.1 Tapan Kumar Ghosh specific question was put to him regarding writing several poeti, love letters to his wife when he denied that he wrote any letter to Seema Devi from Bhubaneswar. The wife petitioner did not place the letter which was previously marked “M” for identification since the husband raised specific objection at that time of evidence .Now even if it is considered that there was a procedural irregularity when the said letter was not marked with exhibit with objection, the question comes after closing of the evidence and after having the ample opportunity to place the letter before the husband P.W. 1 and after said denial by the husband whether the permission can be recorded in favour of the Opposite Party to recall P.W.1 for the purpose of exhibiting the said letter.
7. The learned advocate relied upon the decision of the Co-ordinate Bench of this Court **in SK., Ladla what is Asaduddin Ansari**² where the coordinate bench of this High Court referred the case of **Jyotindra Nath Nandi versus Krishna**

² 1999 (1) CLJ. 58

Dhan Nandi³ where it is observed that 'the High court sitting in revisional jurisdiction is competent to see that the proper orders are made when a matter comes before it. The mere fact that the plaintiff did not move should not stand in the way of this court, making an order in accordance with law as the necessary parties are represented before this Court and have been given opportunities to make submissions on the relevant point'.

The said case pertains to substitution of legal heirs and is no way similar to the point raised herein. However the observation of the made therein is the settled proposition as laid down by the superior courts and certainly binds this court to that extent that though the order marking the document as M was not challenged this court can interfere by invoking this jurisdiction under Article 227 of the Constitution of India where it is necessary.

8. The learned advocate representing the opposite party has relied upon another decision reported in, **Shubh Karan Singh versus Abhiraj Singh and others**.⁴ In the said case the provision under Order 18 Rule 17 was discussed which was under challenge and it was observed that the rule provides the court with the power which is necessary for the proper conduct of a case. If it appears to the court, trying the suit at any stage of the proceedings that it is necessary to recall and further examine a witness, it can always do so. This power can be exercised even at the stage of writing a judgement by the court. It is however, proper that this power should not be exercised lightly and the rule is that it should be used sparingly and in exceptional cases only. The power is to be used for removing ambiguities, for clarifying the statement and not for

³ AIR 1953 Cal 34

⁴ 2025 SCC online SC 1028

the purpose of filling up the lacuna in a party's case. It is true that the power can be exercised by the court at its own initiative and may even be so done at the instance of a party. Section 165 of the evidence act provides that a judge may in order to discover or obtain proper proof of relevant fact ask any question he releases in any form at any time of any witness at about any fact relevant. The section further provides that the parties shall not be entitled to make any objection to any such question, not cross examine any witness upon any answer given in reply to any such question without the leave of the Court. If the provision of Order 18 Rule 17 are read along with the provisions of section 165 of the act it is clear that the power to recall and re-examine a witness is exclusively that of the court trying the suit. The parties to the suit cannot take any objection to the question asked nor can they be permitted to cross examine any witness without the leave of the Court.

9. In the said decision, the Hon'ble Supreme court took note of the case of **K.K. Velu Samy versus in Palani Sami**⁵ and the observation made therein in paragraph 9, which read as under ;

i) 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. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling 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 the purposes of such clarification, it may, of

⁵ (2011) 11 SCC 275

course permit the parties to assist it by putting some questions.”

10. On perusal of the application filed under Order 18 Rule 17 CPC, no where it can be found that any explanation was given as to why the said document was not placed before the witness when cross examination was going on. It is only mentioned that the cross examination of D.W.1 has been concluded and now it has become necessary to recall P.W.1. That is the petitioner/husband of the suit for showing the document as being marked in for identification to him on confrontation for getting the same duly exhibited. It is also seen that in the written statement filed by the present petitioner, nowhere it was mentioned about the letter. Therefore, as discussed above that the provision is not meant for recalling any witness to place additional material or evidence which could not be produced unless it is established that due to sufficient cause, the party concerned was prevented from placing the same earlier.

11. In this case by allowing the said prayer, practically the learned court has permitted the petition/defendant to place the material which could not be placed earlier that too without any explanation. In view of the above discussion this court is of the view that the order passed by the Learned Court will cause serious prejudice to the petitioner if allowed to be retained and it would amount to fill up the lacuna which is not the intent and purpose of the provision itself.

12. Hence, this civil revisional application stands allowed.

13. No order as to cost.

14. The order passed by the Learned Court is here by set aside.

15. Urgent certified copy if applied by any of the parties to be supplied subject to observance of all formalities.

(CHAITALI CHATTERJEE DAS,J.)

