

**2023 STPL(Web) 16 HP  
HIGH COURT OF HIMACHAL PRADESH**

(HON'BLE MR. JUSTICE SANDEEP SHARMA, J.)

**SUSHMA AGGARWAL**

Petitioner

*VERSUS*

**RAMESH CHAND AGGARWAL & ORS.**

Respondents

CMPMO No. 44 of 2023-Decided on 6-7-2023

**Civil, CPC**

**Code of Civil Procedure, 1908 – Section 151 – Order 18, Rule 17 – Civil Procedure - Recalling of witness** – Rejection of application by trial court – Approach to High Court – Held: Recalling of witness for further elaboration on the left out points is wholly impermissible in law. Since in the case at hand, plaintiff was afforded due opportunity to cross-examine DW-9 and he has been already cross-examined qua all aspects of the matter, no illegality can be said to have been committed by the learned Court below while passing order impugned in the instant proceedings. Petition Dismissed.

(Para 13)

Advocate(s): For the Petitioner: Mr. Shubham Sood, Advocate.

For the Respondents: Mr. Ashok Sood, Sr. Advocate with Mr. Khem Raj and Ms. Pooja Verma, Advocates, for respondents No.1 to 3. Respondents No.4 to 7 already ex-parte. Mr. Viman Kumar Soni, Advocate, for respondent No.8.

**JUDGMENT**

**Sandeep Sharma, Judge (oral).**-Being aggrieved and dissatisfied with order dated 11.1.2023, passed by learned Sr. Civil Judge, Court No.1, Shimla, whereby an application under Order 18 Rule 17 read with section 151 CPC, having been filed by the petitioner/plaintiff (hereinafter referred to as 'plaintiff') for recalling the witness i.e. DW-9, namely, Ramesh Chand, for cross-examination, came to be dismissed, plaintiff has approached this court in the instant proceedings filed under Article 227 of the Constitution of India, praying therein to set-aside the aforesaid impugned order.

2. Precisely, the facts of the case as emerge from the record are that the plaintiff filed a suit for declaration to the effect that the properties comprised in Khasra No.259/2/A measuring 504 square yards and Khasra No.259/2/B, measuring 661 square yards, situated at Bothwell Lodge Estate, Shimla-Sanjauli Road, Shimla, were purchased by Sh. Mam Raj, the real owner with the funds of joint Hindu Family Benami, in the name of his wife Smt. Darshani Devi and mutation No.1261 regarding the sale deed No.179 dated 10.9.1970, mutation No.1262, regarding sale deed No.180 dated 10.9.1970 and mutation No.1330 of inheritance of estate is illegal, null and void having been obtained by defendants No.1 to 4 by practicing fraud and misrepresentation. Beside above, plaintiff also sought for decree of declaration to the effect that she is in exclusive owner of the suit property. The aforesaid claim put forth by the plaintiff came to be resisted and contested on behalf of the defendants by way of filing written statement.

3. After framing of issues, plaintiff completed his evidence in affirmative, but before closure of evidence being led by the defendants filed an application, under Order 18 Rule 17 read with Section 151 CPC, praying therein to recall DW-9, namely, Ramesh Chand, for cross-examination on the ground that his cross-examination was deferred on 14.6.2019, but thereafter, no opportunity was granted for further cross-examination of the aforesaid witness. The aforesaid prayer made on behalf of the plaintiff came to be opposed on behalf of the defendants, who in reply to the application stated that further opportunity for cross-examination of DW-9 was granted to the plaintiff after passing of order dated 14.6.2019 and the plaintiff has already cross-examined DW-9, qua all aspects of the matter. Beside above, defendants also stated in the reply that attempt is being made by the plaintiff to fill up the lacunae by recalling the witness, who has already been cross-examined at length. On the basis of record and pleadings adduced on record in the application in question, the learned Court below dismissed the application vide order dated 11.1.2023. In the aforesaid background, plaintiff has approached this Court in the instant proceedings.

4. After having heard learned counsel for the parties and perused material available on record, this Court finds that at first instance statement of DW-9, Ramesh Chand, was recorded on 14.6.2019, but his cross-examination was deferred on account of paucity of time. Though, the matter was adjourned to 4th July, 2019 for cross-examination of DW- 9, but on that day, plaintiff filed an application under Order 17

Rule 1 read with section 151 CPC, for adjournment, as such, matter was adjourned to 13th July, 2019 for listing the same before the National Lok Adalat, on which date, afore application filed by the plaintiff was allowed and the matter was adjourned to 5.8.2019. The zimini orders placed on record clearly reveal that after 5.8.2019, matter repeatedly came to be adjourned on the request of the learned counsel representing the plaintiff. On 27.9.2019, the Court below permitted the plaintiff to move an application for leading secondary evidence and listed the matter on 15.10.2019. On 7.10.2020, an application under Section 65 of the Indian Evidence Act, having been filed by the plaintiff was considered and the matter was posted for orders on 14.10.2020. On 14.10.2020, learned counsel representing the plaintiff submitted that the cross-examination of defendant be concluded before deciding the application under Section 65 of the Indian Evidence Act, and as such, matter was again adjourned to 15.10.2020. On 15.10.2020, learned counsel representing the plaintiff submitted to the Court that application filed under Section 65 of the Indian Evidence Act, be decided first, as the document sought to be proved by way of secondary evidence is required to be put to defendant in cross-examination and as such, the matter was again adjourned to 16.10.2020. Finally, vide order dated 16.10.2020, the learned Court below disposed of the application filed by the plaintiff, under Section 65 of the Indian Evidence Act and permitted the plaintiff to lead secondary evidence to prove the sale deed, as detailed in the application. After passing of order dated 16.10.2020, matter was repeatedly adjourned on the requests having been made by the learned counsel for the parties. On 8.4.2021, an application under Order 7 Rule 14 CPC, having been filed by the plaintiff seeking therein permission to place on record certain documents was allowed. On 4.9.2021, though the matter was listed for bringing secondary evidence of plaintiff, but on that day, an application under Order 17 Rule 1 and 2 CPC, seeking adjournment came to be filed on behalf of the plaintiff, as such, the matter was again adjourned. On 14.10.2022, cross-examination of DW-9 was resumed, on that day, DW-9 admitted the factum with regard to the pendency of case at Mohali Court and stated that an application was moved under Order 41 Rule 27 CPC. The zimni order dated 14.10.2022 clearly reveals that on that day, DW-9 was examined at length and thereafter, learned counsel representing the defendants closed the evidence and time was sought by the learned counsel representing the plaintiff for rebuttal evidence.

5. Having carefully perused the zimini orders placed on record, this Court finds no force in the submission made by Mr. Shubham Sood, learned counsel representing the plaintiff that no due opportunity was granted to the plaintiff to cross-examine DW-9. No doubt, record clearly reveals that on 14.6.2019, cross-examination of DW-9 was deferred, but as has been taken note above, on 14.10.2022, cross-examination of DW-9 had resumed and on that day, after cross-examination of DW-9, learned counsel representing the defendant closed the evidence and learned counsel representing the plaintiff sought time for rebuttal. After passing of order dated 14.10.2022, as detailed hereinabove, plaintiff filed an application under Order 18 Rule 17 CPC, for recalling the witness DW-9, namely, Ramesh Chand, for cross-examination on the ground that no opportunity was ever granted to him after 14.6.2019 for further cross-examination of DW-9, which ground or plea taken by the plaintiff is totally contrary to record. After passing of order dated 14.6.2019, though the matter was repeatedly adjourned, as has been noticed hereinabove, but admittedly on 14.10.2022, cross-examination of DW-9 had resumed and on that day, after cross-examination of DW-9, time was taken by the learned counsel representing the plaintiff for leading evidence in rebuttal. Though, Mr. Shubham, learned counsel representing the plaintiff vehemently argued that on 14.10.2022, Sh. Rajesh Thakur, learned counsel representing the plaintiff was not authorized to conduct cross-examination and he failed to put material questions to DW-9, but he was unable to dispute that Mr. Rajesh Thakur, Advocate had been putting in appearance on behalf of the plaintiff from the day one.

6. A bare perusal of the zimini order placed on record clearly reveals that on number of occasions above named counsel Sh. Rajesh Thakur, had put in appearance on behalf of the plaintiff and even, on 14.10.2022, he conducted the cross-examination of DW-9 on behalf of the plaintiff. Merely non-putting of material questions, if any, to DW-9 by learned counsel may not be a ground to recall that witness, especially when due and proper opportunity was afforded to the learned counsel representing the plaintiff to cross-examine this witness. Though, learned counsel representing the plaintiff argued that on 14.10.2022, case was listed for cross-examination of DW-9 qua the records summoned in proceedings initiated under Order 13 Rule 10 CPC, but he was unable to dispute that on 14.10.2022, cross-examination of DW-9 had resumed, if it was so, counsel representing the plaintiff had an opportunity to cross-examine DW-9 qua the remaining aspects, if any, of the matter. It is not in dispute that on 14.10.2022, above named counsel Sh. Rajesh Thakur, confronted the defendant with the application filed under Order 41 Rule 27 CPC. Mere failure on the part of counsel to put some material questions qua other aspects, if any, cannot be a ground for the plaintiff to file an application for recalling the defendant's witness, who has already stand cross-examined at length. Moreover, there is no allegations, if any, in the application that the learned counsel representing the plaintiff intentionally failed to put up material question to the witness, rather the conduct/averments contained in the application clearly suggests that on 14.10.2022, learned counsel representing the plaintiff was unable to conduct proper cross-examination, but that cannot a ground to recall a witness. Moreover, the cross-examination of DW-9, conducted on 14.6.2019 clearly suggest that DW-9 was cross-examined qua all the points and now attempt is being made by the plaintiff to fill up certain lacunae, which is not permissible under the law. Though, there cannot be any quarrel with the submissions made by the learned counsel representing

the plaintiff that parties to litigation can file an application under Order 18 Rule 17 CPC for recalling the witness, but certainly such provision cannot be invoked to fill up the lacunae, if any.

7. Though, bare reading of under Order 18 Rule 17 CPC suggests that Court at any stage of a suit, recall any witness, who has been examined and put such questions to him, as the Court thinks fit, but it has been held by Hon'ble Apex Court as well as various High Courts that parties to the lis can also file an application under Order 18 Rule 17 CPC, for recalling the witnesses, if some further clarification is required from the witness sought to be re-examined by recalling the witness.

8. At this stage, it would be apt to take note the judgment passed by Hon'ble Apex Court in M/s Bagai Construction Thr. Its Proprietor Lalit Bagai vs. M/s Gupta Building Material Store, AIR 2013 Supreme Court 1849, wherein Hon'ble Apex Court having taken note of its earlier judgment rendered in Vadiraj Naggappa Vernekar (dead) through LRs vs. Sharadchandra Prabhakar Gogate (2009) 4 SCC 410, held that provisions contained under order 18 Rule 17 CPC enables the Court to recall any witness to clarify any doubts which it may have with regard to evidence led by the parties. It has been categorically held in the aforesaid judgment that said provision cannot be invoked to fill up omissions/lacunae in the evidence of a witness, who has already been examined. It is apt to reproduce para-8 to 10 of the judgment herein:-

“8. Learned Senior Advocate, Mr. P.S. Narasimha, who appeared for the appellant, briefly submitted that the provisions of Order 18 Rule 17 CPC were very wide and could be made at any stage to enable the court to do complete justice between the parties.

9. For the sake of reference, the provisions of Order 18 Rule 17 CPC are reproduced hereinbelow:-

“17. Court may recall and examine witness-The court may at any stage of 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.”

10. Mr. Narasimha also submitted that it has been held by way of judicial pronouncements that the court may recall and examine a witness not only sue motu but also on an application that may be made by the parties to the suit.”

9. Reliance is also placed upon the judgment passed by Co-ordinate Bench of this Court in case titled Communist Party of India (Marxist) vs. Bawa Jang Bahadur, Shimla Law Cases (1) 2022, wherein it has held that the main purpose of provision, under Order 18 Rule 17 CPC 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, and that this provision is not intended to be used to fill up omission in evidence of the witness, which has already been examined. Relevant portion of the judgment is reads as under:-

“6. To substantiate the plea taken by the plaintiff, learned counsel for the plaintiff has relied upon Vadiraj Naggappa Vernekar (Dead) through LRs v. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410; and a decision of this High Court in Tilak Raj v. Rajinder Sood, (1026) ILR(HP) 1580.

7. It is settled law of the land that in exercise of power under Section 115 CPC, the High Court has limited power to interfere on the ground of illegality, irregularity or perversity committed by the Court below. An order can also be interfered to have been passed in excessive exercise of the jurisdiction or failure to exercise jurisdiction.

8. Perusal of Order 18 Rule 17 CPC and judgments, referred supra, depict that main purpose of this Rule is to enable the Court, while trying a suit, to clarify any doubts which it may have with regard to evidence led by the parties, and that this provision is not intended to be used to fill up omission in evidence of the witness which has already been examined, as the power under Order 18 Rule 17 is discretionary and ought to be exercised with greatest care and only in exceptional circumstances as the Court ought not to recall a witness at the instance of party in order to fill up a lacuna in the evidence already adduced.”

10. Though, Mr. Shubham Sood, learned counsel representing the plaintiff vehemently argued that no prejudice, if any, shall be caused to the parties, if prayer made on behalf of the plaintiff for recalling of witness is accepted, but prayer to recall the witness cannot be allowed on the ground that no prejudice would be caused to other party. Though, there is no specific allegations against the learned counsel representing the plaintiff that on 14.10.2022, he failed to cross-examine DW-9, properly, but even otherwise, negligence, if any, on the part of learned counsel for the parties while conducting his cross-examination cannot be a ground for recalling of the witness. Reliance in this regard is placed on 2014 (Suppl) Civil Court Cases 485 ( P & H), titled Om Parkash vs. Vinod Kumar, wherein it has been held as under:-

“In the present case, respondent has filed petition under Section 13 of Haryana Urban (Control of Rent and Eviction) Act, 1973 seeking ejectment of the petitioner. Respondent appeared in the witness box as PW3 and was cross-examined by the counsel for the petitioner. Merely because now the petitioner has changed his counsel is no ground to recall the respondent for further cross-examination. In these circumstances, the learned Trial Court had rightly dismissed the application filed by the petitioner under Order 18 Rule 17 CPC.”

11. Reliance is also placed upon the judgment passed by Hon’ble Punjab and Haryana High Court in case titled Neeraj Jindal vs. Manju 2020 (1) Civil Court Cases 700. Relevant portion of the judgment reads as under:-

“It was held that a party cannot be allowed to recall a witness for further cross-examination with the change of counsel. PW1 had already been cross-examined by the earlier counsel in detail. Even otherwise, process of the Court in terms of Order 18 Rule 17 CPC cannot be invoked by the private party as the aforesaid provision is meant only for convenience of the Court. The Court at any stage can recall any witness who has been examined and may put such questions to him as the Court thinks fit but the said exercise does not permit a party to reexamine any witness or to fill lacuna in the case.”

12. Hon’ble Apex Court in Ram Rati vs. Mange Ram (dead) through Legal Representatives and others, 2016 (11) Supreme Court Cases 296, has held as under:-

“11. The respondent filed the application under Rule 17 read with Section 151 of the CPC invoking the inherent powers of the court to make orders for the ends of justice or to prevent abuse of the process of the court. The basic purpose of Rule 17 is to enable the court to clarify any position or doubt, and the court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. ‘No prejudice is caused to either party’ is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground.

14. The rigour under Rule 17, however, does not affect the inherent powers of the court to pass the required orders for ends of justice to reopen the evidence for the purpose of further examination or cross-examination or even for production of fresh evidence. This power can also be exercised at any stage of the suit, even after closure of evidence. Thus, the inherent power is the only recourse, as held by this Court in K.K. Velusamy (supra) at paragraph-11, which reads as follows:

“11. There is no specific provision in the Code enabling the parties to reopen the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.”

18. The settled legal position under Order 18 Rule 17 read with Section 151 of the CPC, being thus very clear, the impugned orders passed by the trial court as affirmed by the High Court to recall a witness at the instance of the respondent “for further elaboration on the left out points”, is wholly impermissible in law.

13. In the afore judgment, the Hon’ble Apex Court has held that the power being discretionary should be exercised sparingly while ensuring that trial would not be protracted thereby. No doubt in the aforesaid judgment, Hon’ble Apex Court has held that inherent powers under Order 18 Rule 17 CPC enables the Court to make orders to achieve the ends of justice or to prevent abuse of the process of the court, however, in the instant case, the cross-examination already conducted by the plaintiff nowhere suggest that further cross-examination, if any, is required. Most importantly in the aforesaid judgment, it has been clearly held that recalling of witness for further elaboration on the left out points is wholly impermissible

in law. Since in the case at hand, plaintiff was afforded due opportunity to cross-examine DW-9 and he has been already cross-examined qua all aspects of the matter, no illegality can be said to have been committed by the learned Court below while passing order impugned in the instant proceedings.

14. Consequently, in view of the aforesaid discussions made hereinabove, this Courts finds no illegality and infirmity in the impugned order passed by the learned Court below, and as such the same is upheld and present petition is dismissed being devoid of any merit.

15. Learned counsel for the petitioner undertakes to cause presence of her client in person or through counsel before the learned Court below on 7th July, 2023, enabling it to do proceed with the matter forthwith. Since matter is hanging fire for quite long, this court hopes and trusts that the learned Court below would conclude the matter, expeditiously, preferably within a period of three months.

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