

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI

ON THE 22nd OF SEPTEMBER, 2022

MISC. PETITION No. 1473 of 2017

BETWEEN:-

- 1. ROOPCHANDRA S/O KHUDDI KUMHAR,
AGED ABOUT 60 YEARS, OCCUPATION:
NIL R/O SAF COLONY VILLAGE CHANDANGAON,
CHHINDWARA (MADHYA PRADESH)**
- 2. SANTOSH S/O ROOPCHANDRA KUMHAR,
AGED ABOUT 28 YEARS, R/O SAF COLONY
VILLAGE CHANDANGAON,
CHHINDWARA (MADHYA PRADESH)**

....PETITIONER

(BY SHRI JAIDEEP SIRPURKAR- ADVOCATE)

AND

- 1. RAMCHARAN ALIAS GAPCHAND S/O KHUDDI KUMHAR,
AGED ABOUT 55 YEARS, R/O NEAR MISHRA COLONY,
KUMHARI MOHALLA, RAJPAL CHOWK,
TAHSIL AND DIST. CHHINDWARA (MADHYA PRADESH)**
- 2. SUKKU S/O KHUDDI KUMHAR,
AGED ABOUT 65 YEARS,
EAST BUDHWARI BAZAR
KUMHARI MOHALLA (MADHYA PRADESH)**
- 3. INDRA S/O PREM, AGED ABOUT 40 YEARS,
EAST BUDHWARI BAZAR KUMHARI MOHALLA
(MADHYA PRADESH)**
- 4. SURENDRA S/O PREM, AGED ABOUT 30 YEARS,
EAST BUDHWARI BAZAR KUMHARI MOHALLA
(MADHYA PRADESH)**
- 5. RAJU S/O PREM, AGED ABOUT 27 YEARS,
EAST BUDHWARI BAZAR KUMHARI MOHALLA
(MADHYA PRADESH)**

6. **GAYA S/O PREM, AGED ABOUT 19 YEARS,
EAST BUDHWARI BAZAR KUMHARI MOHALLA
(MADHYA PRADESH)**
7. **RAJESH S/O PREM, AGED ABOUT 18 YEARS,
EAST BUDHWARI BAZAR KUMHARI MOHALLA
(MADHYA PRADESH)**
8. **RAMESH S/O KHUDDI KUMHAR,
AGED ABOUT 40 YEARS, NEAR MISHRA COLONY
KUMHARI MOHALLA RAJPAL CHOWK (MADHYA PRADESH)**
9. **SUNIL S/O GANPAT, AGED ABOUT 35 YEARS,
NEAR MISHRA COLONY KUMHARI MOHALLA RAJPAL CHOWK
(MADHYA PRADESH)**
10. **ANIL S/O GANPAT, AGED ABOUT 32 YEARS,
PALATWARA TAH. PARASIA (MADHYA PRADESH)**
11. **SUSHIL W/O SHAMBHU KUMHAR,
AGED ABOUT 30 YEARS, KHEDLI BAZAR TAH. MULTAI
(MADHYA PRADESH)**
12. **URMILA W/O MUKESH, AGED ABOUT 28 YEARS,
OLD CHHAPAKHANA NEAR SAI MANDAL
(MADHYA PRADESH)**
13. **GANPAT S/O KALLU,
AGED ABOUT 65 YEARS,
PALATWARA TAH. PARASIA (MADHYA PRADESH)**
14. **MANOJ S/O MANNA KUMHAR,
AGED ABOUT 38 YEARS,
OLD CHHAPAKHANA NEAR SAI MANDAL
(MADHYA PRADESH)**
15. **VINOD S/O MANNA KUMHAR,
AGED ABOUT 30 YEARS,
OLD CHHAPAKHANA NEAR SAI MANDAL
(MADHYA PRADESH)**
- GOLU S/O MANNA KUMHAR,
AGED ABOUT 24 YEARS,**
16. **OLD CHHAPAKHANA NEAR SAI MANDAL
(MADHYA PRADESH)**
17. **REKHA W/O SUKKU KUMHAR,**

**AGED ABOUT 32 YEARS,
NEAR HEHRU SCHOOL SARNI TAH. SARNI
(MADHYA PRADESH)**

**18. KANCHAN W/O PRAKASH KUMARH,
AGED ABOUT 28 YEARS,
PALATWARA TAH. PARASIA (MADHYA PRADESH)**

**19. SMT. MANJUBAI W/O TIKKU,
AGED ABOUT 48 YEARS,
PALATWARA TAH. PARASIA (MADHYA PRADESH)**

**20. CHOTIBAI W/O RAJU,
AGED ABOUT 45 YEARS,
VILLAGE HIRDAGARH, TAH. JUNNARDEO
(MADHYA PRADESH)**

**21. TRIVENIBAI W/O RAGHUNANDAN,
AGED ABOUT 32 YEARS,
VILLAGE UMRETH JHOPADPATTI TAH. UMRETH
(MADHYA PRADESH)**

**22. COLLECTOR, BETUL
THE STATE OF MADHYA PRADESH DISTT. BETUL
(MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI KISHOR ROY- ADVOCATE)

This petition coming on for admission this day, the court passed the following:

ORDER

Heard finally with the consent of both the parties.

2. In this petition under Article 227 of the Constitution of India, the petitioners are aggrieved by the order dated 09.11.2017 (Annexure P/5) passed in Civil Suit No.800008-A/2011 by the Fourth Civil Judge, Class-II,

Chhindwara, whereby the respondent No.2 who is the defendant has been granted permission to cross-examine witness of co-defendants of petitioners.

2. Brief facts leading to filing of this case are that the respondent No.1/plaintiff had filed a civil suit seeking relief of partition, declaration and injunction in respect of suit lands as mentioned in the plaint. The claim of the suit was based on the allegations that the disputed property was owned by the mother of the respondent No.1. The petitioner No.1 and the respondent Nos.1 to 7 are real brothers. After the death of their mother, on the strength of will dated 12.11.2007 executed by the mother of the respondent No.1 in favour of the petitioners, the names were mutated in the revenue records and denied any share to the respondent No.1. On these allegations, the suit has been filed. The petitioners/defendants entered appearance and filed written statement, in which claim of the respondent No.1/plaintiff was disputed. It was *inter alia* stated in the written statement that the respondent No.1 has no right, title or interest towards the suit property.

3. The petitioners are the owners of the disputed properties by virtue of aforesaid will. During the pendency of the suit, the respondent No.2 who is the defendant No.1 filed an application seeking permission of the Court to cross examine co-defendants No. 4 and 5 i.e. the petitioners. Reply was filed by the petitioners to the aforesaid application and opposed the prayer. It was

categorically pointed out that the respondent No.2 has already had an opportunity to cross-examine the witness, therefore, the application is not maintainable. The learned trial Court vide the impugned order dated 09.11.2017 allowed the aforesaid application in a cryptic manner *inter alia* holding that interest of respondent No.2 is adversely affected in the case. As such, in the interest of justice, the prayer has been allowed for cross-examination of the witness of co-defendants/petitioners.

4. Learned counsel for the petitioner submitted that the order impugned is blatantly illegal, erroneous and contrary to law. Learned counsel further submitted that power under Order 18 Rule 17 of the C.P.C. to recall the witness cannot be exercised on an application of a party. The application filed by respondent No.2 is vague and conspicuously silent as to why and on what issue the cross examination is required. Therefore, the order impugned dated 09.11.2017 deserves to be set aside and the application under Order 18 Rule 17 of C.P.C. filed by the respondent No.2 before the trial Court needs to be rejected. Learned counsel further submitted that either there has to be conflict of interest or they have to show the specific reason why witness is to be cross examined.

5. On the other hand, learned counsel for the respondents opposed the prayer and supported the impugned order and submitted that the trial Court

has not committed any error apparent on the face of the record, therefore, this petition deserves to be dismissed. It is submitted that it is well settled that the power to recall any witness under Order 18 Rule 17 of C.P.C. can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit. However, such power is to be invoked not to fill up lacuna in the evidence of witness, which has already been recorded but to clear any ambiguity that may arisen during the Court of his cross-examination. It is always at the discretion of the trial Court to permit to recall such witness for re examination in chief. Hence, this petition deserves to be dismissed.

6. Heard the learned counsel for the parties.

7. In the case of ***Bagai Construction v. Gupta Building Material Store*** (2013) 14 SCC 1, the Apex Court has held as under:

“9. In *Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate* [Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410 : (2009) 2 SCC (Civ) 198] this Court had an occasion to consider similar claim, particularly, application filed under Order 18 Rule 17 and held as under : (SCC pp. 414-15, paras 25, 28-29 and 31) “25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule 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. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined. *** 28. The power under the provisions of Order 18 Rule 17 CPC 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. That is not the scheme or intention of Order 18 Rule 17 CPC. 29. 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. *** 31. 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.” .

10. If we apply the principles enunciated in the above case and the limitation as explained with regard to the application under Order 18 Rule 17, the applications filed by the plaintiff have to be rejected. However, the learned counsel for the respondent by placing heavy reliance on a subsequent decision, namely, K.K. Velusamy v. N. Palanisamy [K.K. Velusamy v. N. Palanisamy, (2011) 11 SCC 275 : (2011) 3 SCC (Civ) 665] , submitted that with the aid of Section 151 CPC, the plaintiff may be given an opportunity to put additional evidence and to recall PW 1 to prove those documents and if need arises other side may be compensated. According to him, since the High Court has adopted the said course, there is no need to interfere with the same.

8. In the case of *Ram Rati v. Mange Ram, (2016) 11 SCC 296*, it has been held that it is a settled legal position under Order 18 Rule 17 read with Section 151 of C.P.C., that the impugned order passed by the trial Court allowing the application to recall the witness at the instance of the respondents “for further elaboration on the left out points”, is only impermissible in law. No reason has been assigned by the respondent No.2 for recalling the witness.

9. In view of the above circumstances, impugned order dated 09.11.2017 is hereby set aside and this petition is **allowed**. The application under Order 18 Rule 17 of C.P.C. filed by the respondent No.2 is hereby rejected. Interim relief granted on 18.12.2017 stands vacated. Learned trial Court is directed to dispose of the suit as expeditiously as possible.

No order as to costs.

(S. A. DHARMADHIKARI)
JUDGE

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