


MHLA160000012001 	<u>RCS No.51/2008</u> <u>Vikram Vs. Govind &amp; Ors.</u>
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**ORDER BELOW EXH.261**

This is an application under Order XVIII Rule 17 read with Section 151 of the Civil Procedure Code to recall DW-5 Vinayak Baswantrao Patil.

2. The defendants contended that, they and other become shelter-less due to the earthquake in the year 1993. The plaintiff had sold land area 1 Acre 2 Gunthas out of Survey No.68/2 for Rs.23,000/-. But he executed a gift deed without showing consideration on 11/10/1994. That gift deed was submitted in the office of Tahsildar Udgir in the year 1998 for the permission of non-agricultural. The Tahsildar produced 9 files and submitted missing and lost of 2 files out of total 11 files. Therefore, the defendants cannot produce alleged gift deed. The defendants have examined Vinayak DW-5 as a scribe to prove the said gift deed. The Hon'ble High Court granted permission to adduce secondary evidence of gift deed. It is very necessary to prove that gift deed through the scribe-cum-attesting witness. Otherwise the defendant will suffer irreparable loss. Hence, he prayed to recall DW-5 for seeking clarification and removing ambiguities and not filling gaps in evidence.

3. Learned Advocate D.D. Somwad for plaintiff filed say (Exh.162) and denied all adverse pleading. According to him, the said provision is discretionary and apply in exceptional circumstances. The defendants wants to fill up lacuna, which is not

permissible. The defendants may examine other witnesses. The said witness deposed as Vikram was scribe of gift deed and, he and others were attesting witnesses. The defendants are trying to rectify the error in earlier deposition. He prayed to reject the application.

4. Heard learned advocate Shri. B.V. Patil for defendants and learned advocate Shri. D.D. Somwad for plaintiff at length. I have carefully gone through the record. This is suit for recovery of possession. The gift deed is in question in the suit. That gift deed is not available. But the copy of that gift deed is available in the proceeding of non-agricultural. The defendants have filed its copy on the record. The Hon'ble Bombay High Court, Bench Aurangabad has set aside the order below application Exh.138 and defendants are permitted to lead secondary evidence subject to all objection regarding admissibility, proof, registration and stamp duty, vide order dated 21/01/2026 passed in writ petition No.3190/2016. Accordingly, the defendants are permitted to lead secondary evidence about the said gift deed.

5. The defendants have examined Vinayak Baswaraj Patil (DW-5), who had deposed about the fact of shelter-less persons due to the earthquake and alleged gift deed. According to him, the plaintiff Vikram had scribed that gift deed and others had attested the same in his presence. On behalf of the plaintiff did not rebut that evidence. Therefore, it is established that he was witness of that gift deed. At the time of recording his evidence, the gift deed was not available. Now the Hon'ble High Court granted permissible to adduce secondary evidence of that gift deed. Therefore, DW-5 is material witness of that fact and his evidence is necessary to clarify every fact. No doubt if permission is granted as prayed, the plaintiff has every chance to cross-examine him and put forward his case. Therefore,

firstly need to go through order XVIII Rule 17 of the CPC and Section 143 of the Bharatiya Saksha Adhinyam and corresponding Section 138 of the Evidence Act.

Order XVIII Rule 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.

Section 143 (3) – the re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is by permission of Court introduce in re-examination, the adverse party may further cross-examine upon that matter.

6. Accordingly, the stage of suit is immaterial for recalling of witness. The necessity of recalling of witness is material for the purpose of deciding this application. As above stated, DW-5 is material witness of gift and his evidence is required to decide the controversy between parties and fact in issues. No doubt, recalling of witness is discretion of Court but there is need to use the said discretion cautiously. This application does not disclose the fact of defendant wants to examine DW-5 to establish the fact of scriber of gift deed. The application established the necessity of examination of witness to clarify the fact or remove the ambiguities or doubts. But it is not amounts to fill up lacuna or gaps in evidence. Even though it is assumed that the defendants wants to fill up lacuna or gaps in evidence, the plaintiff has ever chance and opportunity to cross-examine the said witness, which may helpful to decide his credibility and admissibility of his evidence. Therefore, the plaintiffs objection is not maintainable at this stage.

7. Considering nature of dispute, the defendants have need to grant an opportunity to adduce evidence on fact in issues. This is

fact finding Court. The Court is bound to find the truth. For that purpose, an opportunity is the back bone of justice. If it is refused, there is every possibility of miscarriage of justice. It is an important to mention here that, the law and rules of procedure are always handmaiden of justice and not suppose to defeat ends of justice. So, imposing costs will meet the ends of justice. Therefore, I reached to the conclusion that, defendants have to grant an opportunity for re-examine DW-5, subject to the limited purpose and costs. Considering the aforesaid reasons and necessity of re-examination of DW-5, this application deserve to be allowed. Hence, I pass the following order.

**ORDER**

- 1) The application is allowed and defendants are permitted to re-examine Vinayak Baswantrao Patil DW-5 for limited purpose as mentioned in application, subject to costs Rs.1000/- and expedite the suit on day to day basis in the interest of justice.
- 2) Order dictated on computer and pronounced in open Court.

Date – 18/03/2026.  
Deoni.

(S.A. Surjuse)  
Civil Judge (Jr.Dn.), Deoni.