

ORDER BELOW EXH.95

By this application, plaintiffs want to lead additional evidence after closing their evidence on 26.02.2019 vide Exh.50. It is contended that, present suit had been filed by husband of plaintiff No.1/a named Pandurang Sandipan Aghav in the year 2014. During pendency of suit, he passed away in the year 2015. Due to which he could not lead his evidence. Thereafter, his legal heirs in the form of present plaintiffs had been brought on record. At the time of bringing them on record of the suit, plaintiff No.1/b to 1/d were minors. After bringing them on record, suit was listed for plaintiffs' evidence on 09.12.2016.

02. It is the case of the plaintiffs that, the parental house of plaintiff No.1/a is at village Dahiphal, Tq. Kaij, Dist. Beed. Since after the marriage of plaintiff Pandurang with Plaintiff No.1/a, he had been living at village Dahiphal. Even the birth place of plaintiff No.1/b to 1/d is Dahiphal. When the evidence of plaintiffs begun, plaintiff No.1/a was unbacked widow not known to the person having knowledge of the transaction in respect of suit land. Therefore, she could not led evidence of important witnesses in the present suit.

03. Proposed witness named Malhari Babasaheb Jadhvar is the most material witness in the present suit who has personal knowledge about the transaction in respect of suit land. In addition to it, Sheshrao Bhaskar Wanve, an attesting witness of sale deed in question, is also material witness who has not been examined. Due to not having

knowledge about those witnesses and being laywoman, she could not led evidence of those material witnesses in the present suit and closed her oral evidence on 26.02.2019 vide evidence close Purshis Exh.50. Thereafter, on 13.09.2022, evidence of defendant was closed by the Court. From 20.09.2022 the suit was pending for final argument. On 13.08.2024 additional issue was framed by the Court thereafter, plaintiffs' evidence opened again for leading further evidence on the additional issue. On 19.10.2024, plaintiff No.1/a had led her additional oral evidence on the additional issue of limitation and she has been cross-examined by the other side.

04. As the evidence of plaintiffs is going on, they though don't want to lead further evidence on the issue of limitation, want to lead additional oral evidence of supra mentioned witnesses on the other framed issues for adjudicating the suit on merit. Therefore, they prayed to allow the application, else irreparable loss would be caused to them which could not be compensated in terms of money. It is also contended that, the powers of Court are wide and those can be used if the evidence of such witness is necessary for just decision of the suit.

05. It is objected by the defendant by filing say on back-leaf of the application. It is stated by him that, the application is moved merely to prolong the matter. It is further contended that, the reason mentioned in the application is not justifiable. Plaintiffs had filed list of witnesses vide Exh.35 and as per it, they have examined witnesses No.1, 3, & 4. The proposed witness Sheshrao Wanve was named in the said list and by moving application at Exh.43, they requested to delete

his name from the list. With intention to harass defendant, present application is filed to prolong the suit. Thus, he prayed to reject the application.

06. I have heard Mr. R.A.Gulve appearing for plaintiffs and learned advocate Mr. S.S.Saruk appearing for the defendant. They both had reiterated contentions of application and its reply. Learned advocate for the plaintiff had relied upon the decision of **Salem Advocate Bar Association, Tamil Vs. Union of India, AIR 2005 Supreme Court 3353**, wherein it was held that, “*Additional Evidence In Salem Advocates Bar Association’s case, it has been clarified that on deletion of Order XVIII Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment, i.e., 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just.*”

07. Before discussing legality or tenability of present application, it is necessary to go through the relevant provisions of law. Order XVIII Rule 17 of The Code of Civil Procedure, 1908, reads 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.

08. The plain reading of above provision clearly says that the Court at any stage of a suit, recall any witness who has been examined earlier. So the question of tenability of present application goes out.

09. Perused the record and proceeding. It appears from the record that, vide Exh.35, plaintiffs had given list of witnesses to be examined by them. Proposed witness named Sheshrao Bhaskar Wanve was listed at serial No.2 on said list of witnesses. Record further shows that, vide Exh.43, plaintiffs prayed to delete his name from the list of witnesses and accordingly said witness was removed from the list of witnesses vide order dated 19.10.2018. Most important to note here that, said list of witnesses was filed by the plaintiff No.1/a herself and not by original plaintiff. Meaning thereby, plaintiffs' had knowledge of said witness and she herself had waived her right to examine him.

10. So far as evidence of second proposed witness named Malhari Babasaheb Jadhvar is concerned, this witness, according to plaintiffs, is the person who took personal efforts to settle the dispute

between original plaintiff and defendant. His act of taking effort to settle the dispute is not as such that can be hide from the present plaintiffs however, considering the fact that, the present plaintiffs are the resident of Village Dhiphal and not acquaintance with proposed witness Malhari Jadhvar could not be ruled out.

11. Order XVIII Rule 17 of The Code of Civil Procedure, 1908, empowers the Court to recall any witness whose evidence is already recorded or to call for any witness who has not been examined yet. However, the test for exercising such powers is needed for just decision of case. If at all the witness is necessary and his evidence is of utmost important to decide the case before the Court, the powers can be used at any point of time prior to the decision in the case. It does not mean that, any matter, which is closed for final argument, shall be opened merely because plaintiff or defendant wants to prove his case or defence or prove that some witness is wrong at any particular fact. No doubt, the powers are wide and can be used at any point of time. However, it shall not be exercised as per the wish and whim of any party irrespective of need of such evidence.

12. To support my view, I would like to refer the decision of Hon'ble Supreme Court in K.K.Velusamy Vs. N. Palaanisamy, 2011 AIR SCW 2296 wherein the Court has summarised the scope of Section 151 as under:

- (a) *Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts. It merely recognizes the discretionary power inherent in every court as a necessary*

corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong', that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

- (b) *As the provisions of the Code are not exhaustive, section 151 recognizes and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is co-extensive with the need to exercise such power on the facts and circumstances.*
- (c) *A Court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or necessary implication exhaust the scope of the power of the court or the jurisdiction that may exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.*
- (d) *The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the Legislature.*
- (e) *While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and the facts and circumstances of the case. The absence of*

an express provision in the code and the recognition and saving of the inherent power of a court, should not however be treated as a carte blanche to grant any relief.

- (f) *The power under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bonafides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.*

13. It is further held in para No.11, 12 & 16 of supra judgment that,

11. *The Code earlier had are specific provision in Order XVIII Rule 17A for production of evidence not previously known or the evidence which could not be produced despite due diligence. It enabled the court to permit a party to produce any evidence even at a late stage, after the conclusion of his evidence if he satisfied the Court that even after the exercise of due diligence, the evidence was not within his knowledge and could not be produced by him when he was leading the evidence. That provision was deleted with effect from 01.07.2002. The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only mean that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceeding under the pretext of discovery of new evidence.*
12. *The amended provision of the Code contemplate and expect a trial Court to hear the arguments immediately after the completion of evidence and then proceed to judgment.*

Therefore, it was unnecessary to have an express provision for re-opening the evidence to examine a fresh witness or for recalling any witness for further examination. But if there is a time gap between the completion of evidence and hearing of the arguments, for whatsoever reason, and if in that interregnum, a party comes across some evidence which he could not lay his hands earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the court may in exercise of its inherent power under Section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the Court may deem fit to impose.

16. We may add a word of caution. The power under Section 151 or Order XVIII Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bonafide and where the additional evidence, oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice, and the Court is satisfied that non-production earlier was for valid and sufficient reason, the Court may exercise its discretion to recall the witnesses or permit fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The Court should firstly award appropriate costs to the other party to compensate for the delay. Secondly the Court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs. If the application is allowed and the evidence is permitted and ultimately the Court finds that the evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be

made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had no opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the Court should reject the application. If the evidence sought to be produced is an electronic record, the Court may also listen to the recording before granting or rejecting the application.

14. On the basis of decisions of Hon'ble Supreme Court in Salem Advocates Bar Association, and the ratio led down in K.K. Velusamy supra it is clear that the power given under Section 151 of the Code should not be exercised in routine manner and in case of exercising power under section 151 of the Code to recall the witness or permitting to lead fresh evidence, the Court must taken into consideration whether the such fresh evidence is not outcome of protracting tactic. It must be taken into consideration that the witness despite due diligence, could not be produced at the time when plaintiff or defendant was leading his evidence. In the present case proposed witness Sheshrao Bhaskar Wanve is not the person with whom plaintiffs were not acquainted.

15. Before passing the operative order, It must be seen that, the suit is of year 2014 and stage prior to filing of this application was plaintiffs' evidence on additional issue of limitation only. This Court had almost heard the final arguments of the respective parties. During the course of argument, issue in respect of limitation was raised by the

learned advocate for the defendant and accordingly same was framed. After framing the additional issue, clever plaintiffs filed joint Vakalatnama vide Exh.94 and thereafter, new advocate appointed by plaintiffs took this effort to remove the weakness of plaintiffs' case. This act of the plaintiffs caused inconvenience to defendant which can be compensated by imposing cost on plaintiffs. Considering the age of the suit, acceleration is necessary and Mr. R.A.Gulve appearing for plaintiffs and learned advocate Mr. S.S.Saruk appearing for defendant shall note that suit is expedite as on the direction of Hon'ble Hight Court, present suit is listed in targeted suit to be dispossessed off as earliest. Reverting to present application, the following order is passed:

ORDER

1. Application at **Exh.95** is partly allowed subject to cost of **Rs.2,000/-** (Rupees Two Thousand only) to be paid by plaintiffs collectively to defendant on or before next date, failure to which present application shall stand cancelled.
2. Plaintiffs are permitted to lead evidence of Malhari Babasaheb Jadhvar on next date and to remain present for cross-examination.

Date: 07.11.2024

Sd/-
(Husna R. Khan)
2nd Jt. Civil Judge Jr. Dn., Bhoom.