Order below Exh. 117 in R.C.S. No. 29/2013

By virtue of this application and provision under Order 18 Rule 17 of the Code of Civil Procedure defendant No. 1 is hereby seeking to recall the plaintiff for additional cross examination.

2. According to him, the plaintiff has filed the present suit for partition and declaration on 03/04/2013. The plaintiff has supplied list of witnesses at Exh. 54 wherein name of witness Dr. Borfalkar is mentioned. On 15/10/2016, the plaintiff has filed his evidence affidavit at Exh. 56. Accordingly, on 12/02/2018, 22/03/2018, 11/10/2018, 15/11/2018, the plaintiff was cross examined. On 01/07/2019, the plaintiff has produced certificate of Dr. Borfalkar at Exh. 109 application. After perusal of the certificate, it seems that from 24/06/2013 this document is in possession with the plaintiff. Therefore, defendant No. 1 did not get opportunity to cross examine the plaintiff in respect of this certificate. The present suit is filed in respect of will deed, therefore the plaintiff is requires to cross examine in respect of this medical certificate. Hence, prayed to allow the present application.

3. The plaintiff has resisted this application by filing his say (Exh. 118) and denied all the avernments. According to him, defendant No. 1 has filed the present application only with the intention to prolong the matter. Already cross examination of the plaintiff is completed. Under such circumstances, if the plaintiff is again recalled, then it will cause great loss to his body and finance. The relief of defendant No. 1 is rare. In his pleading the plaintiff has pleaded that treatment of his father was going on in private hospital at Deogad. As per cross examination conducted by defendant, it also seems that he is aware about the said fact. Even from the perusal of cross examination conducted by defendant No. 4 before defendant No. 1, it also appears that the plaintiff stated that his father was admitted in the Hospital of Dr. Borfalkar. In such circumstances, defendant No. 1 can not get rare relief under Order

18 Rule 17 of C.P.C. Defendant No. 1 already conducted 43 pages lengthy cross examination of the plaintiff. Therefore, it can not said that defendant No. 1 did not get opportunity to cross examine the plaintiff. The certificate by virtue of which defendant No. 1 seeking to cross examine is not made by the plaintiff. Moreover, the witness is yet to be examined. The plaintiff is paralised patient and his half body is handicapped. Physically the plaintiff is unable to come in the court. Thus, defendant No. 1 has filed the present application only with intention to harass the plaintiff and hence, the same is liable to be rejected.

4. Heard, the learned Adv. Shri. L.L.Nathgosavi for defendant No. 1 and the learned Adv. Shri. K.K.Marathe for the plaintiff. The learned advocate Shri. Nathgosavi submitted that after cross examination, the plaintiff has produced medical certificate issued by Dr. Borafalkar. Therefore, the opportunity may kindly be given to get cross examination of the plaintiff in respect of medical certificate produced below application at Exh. 109. On this count, he has relied on **K.K.Velusamy Vs. N.Palanisamy 2011 (3) ALL MR 455 (SC) .** Wherein the hon'ble Supreme Court observed that

"We may add a word of caution. The power under section 151 or Order 18, 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 bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issue and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence"

5. Per contra, it is submitted by the learned advocate Shri. Marathe that the medical certificate is not made by the plaintiff and

witness in respect of this certificate yet to be examined. Further, he submitted that defendant No. 1 is having knowledge of treatment of the plaintiff's father in Dr. Borfalkar Hospital. Further, he submitted that defendant No. 1 is having no right to get the cross examination to fill up the lacuna in its case. On this count, he has relied on **Mishelle Rejji Cope Vs. Murlilal Benhar Cope 2019 (3) ALL MR 805.** Wherein the Hon'ble Bombay High Court held that

"But, it is for sure that even if the power under Rule 17 of Order 18 is to be invoked, it must be by the Court only and that too for doing justice between the parties and not for causing injustice to one party by enabling another party fill up the lacunae in its case while depriving the first party of the advantage it has received due to those lacunae."

6. The plaintiff has filed the present suit for partition and cancellation of will deed dt. 15/10/2011 got by defendant No. 1 from late. Sahdev. Here. if we turn towards the present matter in hand, then it appears that after completion of the cross examination of plaintiff on 15/11/2018, medical certificate below application at Exh. 109 is produced by the plaintiff on 01/07/2019. After perusal of medical certificate, it appears that on 24/06/2013 it was issued. It has not been came on record that said medical certificate is produced by Dr. K.N.Borfalkar himself. Here, lets have turn towards the cross examination of the plaintiff. Though, defendant No. 4 elicited in the cross examination of plaintiff that Sahdev died on 21/10/2011, he was suffering by blood pressure and sugar, therefore he was admitted in the hospital of Dr. Borfalkar. In cross examination conducted by defendant No. 1 the plaintiff stated that he has not produced any evidence in respect of his father who admitted in the Hospital of Dr. Borfalkar. In the present matter, issues in respect of will deed were framed. Considering these issues and the provision under Order 18 Rule 17 of C.P.C. the court is having discretionary power and which should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence laid by the parties. The said power is

not intended to be used to fill up omissions in the evidence of a witness who has already been examined. As per cross examination of the plaintiff, it appears that the plaintiff has stated he has not produced any evidence in respect of his father who admitted in the Hospital of Dr. Borfalkar and subsequently the plaintiff has produced medical certificate of his father below application at Exh. 109. Under such circumstances, in order to clarify doubts in respect of will deed it is necessary to recall the plaintiff for the ends of justice. In **Mishelle** (Supra), defendant has filed the application to recall the plaintiff on the ground that his Adv. G.B.Patil failed to put up some question and to show necessary diligence for conducting effective cross examination of the witnesses. Therefore, the Hon'ble Bombay Hight Court observed that the defendant has not stated that he has served any notice to Adv. G.B.Patil for his due diligence while conducting cross examination. The facts of this valuable authority is different from the present matter in hand. Therefore, it will not be helpful to the present plaintiff. Considering the nature of suit, it appears that opportunity is requires to be given to defendant No.1 for conducting cross-examination of the plaintiff to the extent of medical certificate below application at Exh.109. Hence, the following order.

Order

1. The application at Exh. 117 is hereby allowed.
2. The plaintiff be re called for additional cross examination to the extent of Medical certificate below application at Exh.109.
3. No order as to costs.

Deogad
Date : 12/12/2019

(B.R.Patil)
Civil Judge J.D. Deogad.

Digitally signed by Balkrishna Rajaram Patil
Date: 2019.12.13 18:05:43 +0530