

**(2020) 12 KL CK 0021**

**In the High Court Of Kerala**

**Case No :** Original Petition (Civil) No. 2749 Of 2019

Mary Ronald @ Sobha And Ors

APPELLANT

Vs

C.A. Paul @ Baby And Ors

RESPONDENT

**Date of Decision :** 01-12-2020

**Acts Referred:**

Code of Civil Procedure, 1908 — Section 151, Order 18 Rule 17  
Constitution Of India, 1950 — Article 227

**Citation :** (2020) 12 KL CK 0021

**Hon'ble Judges :** R. Narayana Pisharadi, J

**Bench :** Single Bench

**Advocate :** A.T. Anilkumar, V. Shylaja, C.S. Manu

**Final Decision :** Disposed Of

## Judgement

1. The petitioners are the defendants and the respondents are the plaintiffs in the suit O.S.No.3/2018 on the file of the Additional Sub Court, North

Paravur.

2. The suit is for partition of properties. On 06.08.2019, on the date on which the cross-examination of PW1 was scheduled to be conducted, the

counsel for the defendants did not cross-examine the witness and the trial court recorded that fact.

3. Subsequently, on 29.08.2019, the defendants filed an application as I.A.No.1586/2019 (Ext.P4) for receiving documents. On 05.09.2019, the

defendants filed another application as I.A.No.1633/2019 (Ext.P3) for recalling the witness (PW1) for cross-examination.

4. As per Ext.P5 order, the trial court allowed Ext.P4 application but dismissed Ext.P3 application.

5. The defendants have filed this original petition under Article 227 of the

Constitution of India, challenging the legality and propriety of Ext.P5 order passed by the trial court, dismissing Ext.P3 application.

6. Heard learned counsel for the petitioners and also the respondents.

7. Learned counsel for the petitioners submitted that, due to an inadvertent omission on the part of the junior counsel who appeared for the defendants,

it was submitted before the trial court that there was no cross-examination of the witness to be conducted. Learned counsel would also submit that the

finding of the trial court in Ext.P5 order that it is a fit case in which a judgment on admission can be passed is not correct.

8. Learned counsel for the respondents submitted that the application filed by the defendants for recalling the witness is the result of afterthought and

the defendants have admitted in the written statement that the properties are partible.

9. The main reason stated by the trial court in Ext.P5 order, for dismissing Ext.P3 application, is that it is a fit case in which a judgment on admission

could certainly be passed. True, there is a recital in the written statement that the defendants are ready to partition, whatever extent of property

available, into equal shares. But, the trial court should have considered the entire averments in the written statement as a whole, instead of picking out

a sentence from it, to reach a finding that a judgment on admission can be passed in the suit. The trial court has omitted to note that the defendants

have not only disputed the extent of the property available for partition but also the survey numbers of the property sought to be partitioned.

10. However, the contention of the learned counsel for the petitioners that, the submission before the trial court that there was no cross-examination of

the witness to be conducted was an inadvertent omission on the part of the junior counsel, is not at all convincing. When the counsel had specifically

made a statement before the trial court that there was no cross-examination of the witness to be made, it cannot be treated as an "inadvertent

omission".

11. But, considering the facts of the case, the trial court should have taken a reasonable view of the matter and allowed Ext.P3 application on payment

of reasonable amount of costs by the defendants to the plaintiffs.

12. Order XVIII Rule 17 of the Code of Civil Procedure, 1908 (for short 'the Code') states that, 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.

13. The ambit and scope of the provision contained in Order XVIII Rule 17 of the Code have been considered by this Court in *Savithri v. Sreenivasan*

: 1987 (2) KLT 388 and by the Supreme Court in *Vadraj Naggappa Vernekar v. Sharad Chand Prabhakar Gogate*: AIR 2009 SC 1604, *Velusamy v.*

*Palanisamy* : (2011) 11 SCC 275, *Bagai Construction v. M/s Gupta Building Material Store* : AIR 2013 SC 1849 and *Ram Rati v. Mange Ram* : AIR

2016 SC 1343.

14. After a survey of the aforesaid decisions, in *Mathew Lawrence v. Rocky C. Neroth* [2020 SCC OnLine Ker 3849 : 2020 (5) KLT OnLine 1016],

this Court has stated as follows:

“The following principles can be culled out from the decisions referred to above. The power of the Court to invoke the provision under Order

XVIII Rule 17 is discretionary and ought to be exercised very sparingly. The discretion shall be exercised judicially and on well accepted principles

and not arbitrarily or capriciously. The power can be exercised by the Court at any stage of the suit, that is, before pronouncing judgment. The 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 the evidence led by the parties. It

is not a provision intended to be used to fill up omissions or lacunae in the evidence of a witness who has already been examined. The power under

Order XVIII Rule 17 of the Code can be exercised by the Court either on its own motion or on an application filed by any of the parties to the suit. It

will not be proper to invoke the power under this provision merely for the reason that recalling a witness at the instance of a party will not cause any

prejudice to the opposite party. But, the inherent power of the court under Section 151 of the Code, subject to its limitations, can be invoked in

appropriate cases to re-open the evidence and/or recall witnesses for further examination and it is not a power which is affected by the express power

conferred upon the court under Order XVIII Rule 17 of the Code. The power under Section 151 of the Code shall be sparingly exercised when the

Court feels that it is absolutely necessary to do so. 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 of such evidence earlier was for valid and sufficient

reasons, the court may exercise its discretion to recall the witnesses or permit such additional evidence. But, in such cases, the Court shall ensure that

delay in the proceedings in the suit is avoided and that the party affected is compensated by payment of costs. Deletion of the provision contained in

Order XVIII Rule 17A from the Code does not mean that no evidence can be received at all, after a party closes his evidence. But, an application

under Order XVIII Rule 17 of the Code, for recalling a witness for further cross-examination on points left out earlier, cannot be entertained by the

Court.â??

15. Ext.P3 application was filed by the defendants under Order XVIII Rule 17 of the Code. Even if that provision cannot be invoked, in appropriate

cases, the power under Section 151 of the Code can be invoked by the trial court. The trial court did not consider any of the relevant aspects and it

dismissed Ext.P3 application on a wrong understanding of the recitals in the written statement filed by the defendants. It is not a case where the

witness is sought to be recalled for further cross-examination. It is a case where there was no cross-examination of the witness conducted by the

defendants when opportunity was granted to them and they filed an application for granting a further opportunity for cross-examination of the witness.

16. In my view, the order of the trial court, dismissing Ext.P3 application, has resulted in manifest injustice. Therefore, I am inclined to interfere with

that order but certainly on the condition that the defendants shall pay reasonable amount of costs to the plaintiffs to compensate the hardship that

would be caused to them by allowing Ext.P3 application.

17. Consequently, the original petition is disposed of as follows: Ext.P5 order, as far as it relates to the dismissal of Ext.P3 application, is set aside.

Ext.P3 application filed by the petitioners/defendants in the trial court shall stand allowed on the condition that the petitioners/defendants shall deposit

an amount of Rs.5,000/- (Rupees five thousand only) in the trial court towards costs to be paid to the respondents/plaintiffs. The parties shall appear

before the trial court on 15.12.2020. The petitioners/defendants shall deposit the amount of Rs.5,000/- (Rupees five thousand only) in the trial court on

or before that date. If the petitioners/defendants fail to deposit the amount within that period, Ext.P3 application filed by them shall stand dismissed.

The trial court shall dispose of the suit as expeditiously as possible.