

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3014 of 2017

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, by the 7th defendant, is directed against the intermediary order, dated 22.03.2017, passed by the learned XIV Additional Chief Judge, (Judge, Fast Track Court), City Civil Court, Hyderabad, in Memo S.R.No.824 of 2017 in O.S.No.73 of 2008.

2. I have heard the submissions of *Sri Bankatlal Mandhani*, learned counsel appearing for the petitioner, and of *Ms. Manjari S Ganu*, learned counsel for the respondents 1 and 2, *Sri G.Anandam*, learned counsel appearing for respondent no.3, *Sri Osman Shaheed*, learned counsel appearing for the 4th respondent; and of *Ms.Sheha Bhogle*, learned counsel appearing for respondent no.5. I have perused the material record.

2.1 The parties in this revision shall hereinafter be referred to as plaintiffs and defendants for convenience and clarity.

3. By the impugned order, the Court below permitted the 1st defendant, who was said to have disowned the contents of her written statement said to have been filed on her behalf to cross-examine the 7th defendant (DW4).

4. The facts borne out by the record and the facts discernable from the pleaded contentions of the parties and submissions made, in brief, are as follows:

The plaintiffs (respondents 1 and 2 herein) brought the suit against the defendants including defendants 1 and 7 for partition by

metes and bounds of the properties described in 'A' and 'B' schedule annexed to the plaint and allotment of 1/13th share to each of the plaintiffs 1 and 2 after converting joint possession into separate possession as per due process of law and to direct the defendants to render true and proper account of the income from the said properties and determine the share of the plaintiffs and pass a decree in favour of the plaintiffs in respect of their said share in the said income derived from the plaint schedule properties and for costs. The 7th defendant/revision petitioner is resisting the suit by filing a written statement.

4.1 In the written statement of the 7th defendant, while taking various pleas, it is specifically pleaded as follows: "The schedule 'A' and 'B' properties are not matruka properties and they are not liable for partition. Both the plaintiffs and defendants 1 to 6 have no right, title or interest whatsoever in the suit 'A' schedule property situated at Chelapura, Hyderabad. The plaintiffs and defendants 1 to 3 have no right, title or interest over the suit 'B' schedule property situated at Himayathnagar, Hyderabad. The mother of the parties, Quasar Begum, as owner of the suit schedule 'A' property, orally gifted the same to the 7th defendant, on 09.02.1992, in the presence of elder sister, Masrath Jehan Khan (the 1st defendant) and her husband, late Himayat Ali Khan. A memorandum of gift was also executed by the mother, on 16.02.1992. Since that date of oral gift, this 7th defendant is in exclusive possession and enjoyment of the same to the knowledge of plaintiffs and the defendants 1 to 6. The plaintiffs and the defendants 1 to 6 are excluded from enjoyment of the property from the date of oral gift as the mother divested herself of her right, title during her life time. The plaintiffs and the defendants 1 to 6 are aware of the oral gift made by the mother,

since the mother and the 1st defendant intimated the same to the plaintiffs and the defendants 1 to 6; and, they never disputed or questioned the same during the life time of the mother. The suit is filed with a *mala fide* intention by suppressing oral gift in favour of the 7th defendant to make a wrongful gain. The mother bequeathed the suit schedule 'B' mentioned property in favour of her sons, that is, defendants 4 to 7 by virtue of her last Will, dated 15.02.1991, and that the original of the same is in the custody of the 1st plaintiff since she took it after the death of the mother to be handed over to this defendant (D7)." The said contentions apart, several other contentions were also raised in the written statement of the 7th defendant.

4.2 Be that as it may. The written statement said to be of the 1st defendant is also on record of the trial Court. A perusal of the copy of the same would show that in the said written statement, she fully supported the case pleaded in the written statement filed by the 7th defendant. In the said statement of the 1st defendant, the following averments are made: "The plaintiffs had suppressed material facts which took place during the lifetime of mother, i.e., Will deed executed by mother and the oral gift of Chelapura house to defendant no.7. Thus the suit is not maintainable either in law or on facts. The suit properties are not matruka properties of late Khaisar Jahan Begum and all the parties to the suit are not having right as per personal law applicable to the parties. The plaintiffs 1 and 2 and defendants 1 to 6 including this defendant have no right to seek partition over the suit 'A' schedule property situated at Chelapura, Hyderabad. The plaintiffs and defendants 1 to 3 have no right, title or interest over the suit 'B' schedule property situated at Himayatnagar, Hyderabad. At the outset, the mother of the parties, as owner of suit 'A' schedule property orally

gifted the same to the 7th defendant, on 9.2.1992, in the presence of this defendant no.1 and her husband, late Dr.Himayat Ali Khan. A memorandum of gift was executed by mother, Smt.Quaisar Jehan Begum, on 16.02.1992, reducing the oral gift into writing and the same was also notarized. It is the defendant no.7 who is exclusive owner and possessor of the suit 'A' schedule property. The factum of oral gift made by the mother is known to all parties to suit as this defendant no.1 and mother, late Khaisar Jehan Begum, informed about the same on the same day. As she has gifted away suit 'A' schedule property in favour of defendant no.7, the Will, dated 15.02.1991, lost its relevance insofar as suit 'A' schedule property. The 7th defendant is enjoying the suit 'A' schedule property as owner since prior to the death of the mother, that is, from the date of oral gift. The Will deed, dated 15.02.1991, insofar as suit 'B' schedule property situated at Himayatnagar, Hyderabad, was acted upon. The other heirs, i.e., plaintiffs, this defendant, and defendants 2 and 3 agreed to act upon the Will. The said Will was also known to the parties since the life time of the mother. The original Will deed is in the custody of the plaintiff no.1 as she took it from this defendant. The plaintiffs cannot take advantage of custody of the same and resile at this stage by suppressing its existence. The defendants 4 to 7 have been enjoying the suit 'B' schedule property as owners after the death of the mother in pursuance of the Will, which is to the knowledge of all the parties and on the consent of all. The plaintiffs it seems got greedy and hence they are lying to their own conscience." Thus, the contents of the written statement of the 1st defendant, which is on record, fully support the defence of the 7th defendant.

5. In this backdrop, dealing with the core aspect, it is to be noted that when the 7th defendant is being examined as DW4, the 1st

defendant, sought permission of the trial Court to cross-examine the 7th defendant (DW4) on the ground that she already disowned the written statement on record, which is said to have been filed on her behalf into Court. The said request was opposed by the 7th defendant on the ground that the 1st defendant who is supporting the case of the 7th defendant cannot cross-examine the 7th defendant (DW4) as she is not an adverse party insofar as the 7th defendant in the suit is concerned. However, the trial Court accorded permission to the 1st defendant to cross-examine the 7th defendant (DW4). Hence the 7th defendant filed this present revision petition.

6. Before proceeding further, it is to be noted that the core dispute is between the 7th defendant (DW4) on one hand and the 1st defendant on the other. The other parties to the *lis* either plaintiffs or the defendants are supporting either the 7th defendant or the 1st defendant.

7. It is to be next noted that the 7th defendant on one hand contends that since the 1st defendant filed a written statement taking a defence akin to the defence taken by him, she cannot cross-examine him (DW4) as she is not an adverse party insofar as he is concerned and as her defence is totally in concord with his defence in the suit. However, on the other hand, case of the 1st defendant is that the written statement said to have been filed on her behalf is not filed by her and that she had already disowned the contents of her written statement said to have been filed by her and that she is not supporting the defence of the 7th defendant and that she already gave evidence in the suit as DW3 contrary to the pleadings in the said written statement of 1st defendant on record and that when she gave evidence, the 7th defendant cross-examined her and, therefore, she is also entitled to cross-examine the

7th defendant (DW4) as she must be given equal opportunity as was given to the 7th defendant.

8. It is also to be noted that the 1st defendant filed a memo, dated 19.09.2014, before the trial Court. The contents of the said memo read *verbatim* as under:

“It is respectfully submitted that, in the above said matter the Defendant No.7 herein has obtained my signatures on blank and printed papers and engaged one advocate on my behalf without my consent and knowledge. The said counsel also filed a Memo dated: 7-7-2014 on my behalf by making false allegations without my consent and knowledge. I have filed detailed counter in I.A.no.1018/2014 in party-in-person and the same may be read as part and parcel of this Memo. I came to know about all these things recently and I reserve my right to take appropriate steps by appointing Advocates on my behalf. Therefore, I am filing Vakalath engaging Sri Satish Chander & B.Janardhan, Advocates on my behalf to defend the case and this Hon’ble Court may please to permit me to take the services of the above said Advocates. In the above said circumstances, without obtaining ‘No Objection’ from the earlier advocate who was engaged by defendant no.7 without my consent.

Hence this memo.”

9. The counsel for the 1st defendant filed Memo, dated 07.07.2014, which reads *verbatim* as under:

“This is to submit that the Defendant No.1 is suffering from Mental infirmity and is incapable to protect her interest in the suit, due to amnesia and not incapacity to take reasonable decision. She is not following my instructions due to the aforesaid reasons, hence, I report no instructions and pray the Honourable Court to appoint her son as her next friend in the interest of justice and proceed further.

Hence, this Memo.”

In view of the said memo, the 7th defendant filed I.A.No.1018 of 2014 under Order 32 Rule 3 read with Rule 15 and Section 151 of the Code of Civil Procedure, 1908, with a request to direct the plaintiff to take steps

to seek appointment of next friends as guardians ad-litem for the defendants 6 and 1 so as to further proceed with the trial. By docket order, dated 13.10.2014, the said petition was dismissed as not pressed.

The contents of the docket order, dated 13.10.2014, read as under:

“The petitioner endorsed on the petition mentioning that the Petition against R3/ D1 is not pressed and that R8/ D6 has expired, hence, the Petition against R8/ D6 may be dismissed. Therefore, the Petition against the R3/ D1 is dismissed as not pressed by the Petitioner herein and the petition against R8/ D6 is dismissed as expired.”

10. Be that as it may. On the memo, dated 19.09.2014, filed by the 1st defendant, the trial Court passed a docket order, on 19.09.2014. The said order reads *verbatim* as under:

“The Defendant no.1 filed a Memo stating that Defendant No.7 obtained her signatures on blank and printed papers and engaged one Advocate on her behalf without her consent and knowledge. The said counsel filed a Memo dated 7-7-2014, on her behalf by making false allegations without her consent and knowledge. She came to know about all these things recently and she reserved her right to take appropriate steps to appoint Advocate on her behalf. She is engaging Sri Satish Chander, and Sri B.Janardhan Advocates on her behalf to defend her case, so she did not obtain No Objection from previous counsel as he was engaged by Defendant no.7. Hence, she prays that permit her to engaging the above said Advocates to defend her case.

Therefore, the Defendant No.1 permitted to engage the above said Advocates Satish Chander and B.Janardhan Advocates, filed Vakalat on behalf of Defendant No.1.

Call on 23.9.2014.”

Thus, having disputed the fact of filing a written statement, which is on record, and, by stating that her signatures were obtained on blank and printed papers by an Advocate engaged on her behalf without her consent and knowledge, she (1st defendant) changed her Advocates with

the permission of the Court. However, she did not file any application for substitution of her fresh written statement, if any, in place of the written statement already on record, which she is disputing. No doubt, when she gave evidence, the trial Court allowed her to depose contrary to the contents of the written statement already on record. Since she deposed totally contrary to the contents of the written statement on record, the trial Court obviously allowed the 7th defendant to cross-examine the 1st defendant (DW3). On that ground the 7th defendant cross examined the 1st defendant (DW3), the present issue cannot be decided as any error committed by a Court cannot be allowed to be perpetrated. It is stated at the hearing that the 1st defendant sailed with the 7th defendant (DW4) when the plaintiffs adduced evidence on their side and the witnesses for the plaintiffs were cross examined by the counsel for the various defendants. We are not at the stage of assessing the evidence. The only short but important question is whether the 1st defendant can be permitted to cross examine the 7th defendant when she has not taken any written defence contrary to the case of the 7th defendant. The fact of the matter is that there is no written defence of the 1st defendant on record in the form of a written statement to say that the 1st defendant is an adverse party in so far as 7th defendant.

11. What is to be noted is that a Court shall not permit a party to orally disown his/ her defence already on record on whatever grounds and shall not allow such party to give or adduce evidence without any foundation in the defence/ written statement. It is pointed out and it is also undisputed that the evidence which DW3 (the 1st defendant) gave during the trial of the suit has no foundation in her written pleading/ defence. As on today, there is no pleading of the 1st defendant

on record in line with her present stand, which is contrary to the defence of the 7th defendant and which is also contrary to the defence in the written statement of the 1st defendant on record of the trial Court. Her defence, if any, on record is the written statement said to be of the 1st defendant already on record, which she disputes. When she wants to disown her written statement by making serious allegations against others including the counsel by stating that her signatures were obtained on blank and printed papers, her requests to permit her to disown the defence in the written statement on record by way of mere filing memos are untenable and it goes without saying that the only course open to her is to file appropriate application/s supported by sworn affidavits, which the law permits, if she so desires and so advised. Mere assertions that she disowns her said written statement on record is of no avail, as long as no steps are taken by her in accordance with the procedure established by law. A party defendant cannot, in the considered view of this Court, be permitted to orally disown the defence stated in the written statement on record. If such course is permitted and parties are allowed to change their written stand in the pleadings by making oral requests to the Court it will lead to chaos during trials and the opposite parties would be at a loss to know on what basis they have to adduce their evidence because of uncertainty in the matter. Further, such a course would be contrary to the object of Rules related to pleadings. The requirement of completion of pleadings before the issues are settled and before the parties enter trial has its own significance. It is a settled proposition of law that a party has to plead his/her case and produce/ adduce sufficient evidence to substantiate the averments made in the pleadings and shall not deviate from the pleadings and or take a stand which is at variance with the pleadings. The object and purpose

of a pleading is to enable the adversary party to know the case of the opponent. In order to have a fair trial it is imperative that the parties should state the essential material facts so that the other party may not be taken by surprise. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Thus the Rules related to pleadings, amendment of pleadings and filing of additional pleadings are engrafted with avowed objectives and hence, it is impermissible for a party to make oral assertions contrary to the pleading on record and disown the pleadings/ defence by mere filing of memos or making oral assertions. The law is well settled that any amount of evidence given by a party or evidence brought on record by way of eliciting answers in the cross-examination of the other party is of no avail in the absence of a pleading. In the absence of pleading, evidence, if any, produced by the parties cannot be considered by the Court. Without a foundation in the pleading, any party cannot either give evidence or cross-examine a witness.

12. In fact, a party sailing with another party to a *lis* has to only further examine that other party in chief, if that other party appears as a witness; but, the supporting party cannot cross-examine such party witness. Thus, one party supporting another party to the *lis* can at best do further examination-in-chief of the party whom that party is supporting, in the event any omissions are there in the chief examination of that party already placed on record. If a party witness like one defendant is permitted to be cross examined by the other supporting defendant, then leading questions would conveniently be put to the supporting party and in such an event the rules of evidence governing the examination-in-chief become otiose and stand frustrated.

In this context, it is appropriate to refer to Sections 137 to 143 of the Indian Evidence Act, 1872, which read as under:

137. Examination-in-chief:- The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination:- The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination: The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

138. Order of examinations: Witness shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination: The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

139. Cross-examination of person called to produce a document:- A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

140. Witnesses to character:- Witnesses to character may be cross-examined and re-examined.

141. Leading questions: Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

142. when they must not be asked:- Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

143: When the may be asked:- Leading questions may be asked in cross-examination.”

As per the provisions of Section 137, examination of witness by the adverse party shall be called as his ‘cross-examination’. In the case on hand, there is only one written statement of the 1st defendant on record, which she disputes; and the said written statement contains averments identical to the averments in the written statement of the 7th defendant (DW4). Therefore, the defence of the 1st defendant is identical to the defence of the 7th defendant and in that view of the matter, the material record reflects that the 1st defendant is supporting, in all respects, the case of the 7th defendant, if the written statement of the 1st defendant which is already on record is to be taken into consideration at this stage. Therefore, from the facts borne out by the record, it is clear that the 1st defendant has not yet taken a written defence contrary to the defence already taken in the written statement of the 1st defendant on record; Hence, it can only be said at this stage that she is supporting the case of the 7th defendant; and, that she is not an adverse party insofar as the 7th defendant is concerned. As of now, there is no defence of the 1st defendant on record of the trial Court contrary to the defence of the 7th defendant in his written statement and hence, the 1st defendant is not an adverse party insofar as the 7th defendant is concerned. In view of the provisions of the Indian Evidence Act, right to cross-examine belongs to an adverse party; and a person, who is not an adverse party should not be allowed to intervene in the proceedings and to take part in the cross examination of the witnesses.

13. On the above analysis and for all the above reasons, this Court finds that the impugned order of the Court below permitting the 1st defendant to cross examine the 7th defendant (DW4) is erroneous and is unsustainable under facts and in law. Before parting it is apt to observe that the approach of the trial Court in allowing the parties to file memos in matters having far reaching consequences and entertaining them in such matters of significance and importance, without directing the parties concerned to file proper applications, if the parties so desired, and passing orders on such memos is not appreciable in the facts and circumstances of the case.

14. Viewed thus, this Court finds that the order impugned is liable to be set aside.

15. In the result, the Civil Revision Petition is allowed and the order, dated 22.03.2017, passed by the learned XIV Additional Chief Judge, (Judge, Fast Track Court), City Civil Court, Hyderabad, in Memo S.R.No.824 of 2017 in O.S.No.73 of 2008, is set aside.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, shall stand closed.

M. SEETHARAMA MURTI, J

3rd October, 2017
RAR