

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.616 of 2016

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1. Jaldhari Sah
2. Nathan Sah sons of Late Bhumeswar Sah Residents of Village Machh Bakhra, P.S. & District Madhepura.
3. Pawitri Devi wife of Late Gango Sah daughter of Late Khushar Sah resident of Village Mirganj, P.S. Murliganj, District - Madhepura.

.... Defendant Nos.2, 3 & 5/ Petitioners
Versus

1. Most. Paro Devi wife of Late Hari Sah daughter of Late Ramjee Sah resident of Village Budhna, P.S. & District Madhepura.
2. Most. Sabitri Devi wife of Late Yogendra Sah daughter of Late Ramjee Sah resident of Village Naya Bazar, Saharsa, Near Clinic of Dr. Anil Pathak, District - Saharsa.
3. Smt. Chandrika Devi wife of Hare Ram Sah daughter of Late Ramjee Sah resident of Village Amtho, P.S. & District Supaul.
4. Shanti Devi wife of Surendra Sah daughter of Late Ramjee Sah resident of Village Lokha, P.S. & District Supaul.
5. Smt. Sakunti Devi wife of Shiv Narain Sah daughter of Late Ramjee Sah resident of Village Singheshwar, P.S. Singheshwar, District Madhepura.
6. Kari Devi wife of Mahendra Sah daughter of Late Ramjee Sah resident of Village Jeewachhpur, P.S. Sour Bazar, District - Saharsa.
7. Smt. Nirmala Devi wife of Shambhoo Sah daughter of Late Ramjee Sah resident of Village Maskhar, P.S. Bakhtiarpur, District - Saharsa.
8. Smt. Kaili Devi wife of Sukhan Sah daughter of Late Ramjee Sah resident of Village Golargadh, P.S. Sour Bazar, District Saharsa.
9. Smt. Sulekha Devi wife of Bhagwan daughter of Late Ramjee Sah resident of Village Rajni Babhangama, P.S. Bihariganj, District - Madhepura.
10. Gopal Sah son of Sri Ramjee Sah resident of village Chikni Fulkaha, P.S. Gamharia, District Madhepura.

--Plaintiffs/Respondents 1st set

11. Gajendra Sah
12. Ashok Sah Both sons of Late Babujee Sah Residents of Village Fulkaha, P.S. Gamharia, District - Madhepura.
13. Smt. Daya Devi wife of Shivrindan Sah daughter of Late Babujee Sah resident of Village & P.O. Ratanpura, P.S. Ghailadh, District - Madhepura.
14. Smt. Bhado Devi daughter of Late Babujee Sah resident of Village, P.O. & P.S. Gamharia, District - Madhepura.
15. Sanjeet Sah
16. Mona Kumar Both sons of Late Rambilash Sah resident of Village, P.O. & P.S. Pratapganj, District Supaul.
17. Meena Devi wife of Bittu Sah daughter of Rambilash Sah resident of Village, P.O. & P.S. Sourbazar, District - Saharsa.
18. Rambilash Sah son of Late Jholi Sah
19. Jyoti Devi daughter of Rambilash Sah both residents of Village & P.S. Pratapganj, District - Supaul.

--Defendants 1st set/Respondents 2nd set

20. Smt. Sita Devi wife of Sitaram Sah daughter of Bhumeswar Sah resident of Village Gamharia, P.S. Gamharia, District - Madhepura.



--Defendant No.4/Respondent 3rd set

21. Fekni Devi wife of Late Shatrughan Sah daughter of Late Khushar Sah resident of Village Hakpara (Saharsa) P.S. & District - Saharsa at present resident of Village Machchbakhra, P.S. and District - Madhepura.

22. Siya Devi wife of Late Sadanand Sah daughter of Late Khushar Sah resident of Village Gardhia, P.S. Ghailardh, District Madhepura at present resident of Village Machchbakhra, P.S. and District - Madhepura.

23. Asha Devi wife of Mahendra Sah daughter of Late Khushar Sah resident of Mouza Sapthiyahi (Saharsa), P.S. and District - Saharsa.

24. Meena Devi wife of Ganesh Sah daughter of Late Khushar Sah resident of Village Sukhpur, P.S. & District - Supaul.

--Defendants 3rd set/Respondents 4th set

25. Garib Tanti son of Chhedi Tanti resident of Village Tarabe, P.S. Gamhariya, District - Madhepura.

26. Baidyanath Sah son of Rameshwar Sah resident of Village Chikni Tola Fulkaha, P.S. Gamhariya, District - Madhepura.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Jitendra Kishore Verma

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR

JHA

ORAL ORDER

10 05-01-2018

Heard both sides.

The petitioners filed this civil miscellaneous petition invoking the supervisory jurisdiction of this court for setting aside the order dated 13.04.2016 passed by Sub Judge V, Madhepura in Title Suit No.199 of 2016.

The plaintiffs filed suit for declaration of title and possession over Schedule I property and also challenged the revisional survey entry with regard to the land of Schedule A in the name of Khushar Sah, Bhumeswar Sah and Babujee Sah as wrong and incorrect.



The case of the plaintiff is that Ramjee Sah and Babujee Sah were full brothers and they were separate. Ramjee Sah purchased the piece of land duly mentioned in Schedule A of the plaint. The name of Khushar Sah, the brother-in-law of Ramjee Sah also appeared in the sale deed as co-purchaser but Khushar Sah was only a name lender because entire consideration money was paid by Ramjee Sah. Khushar Sah had full brother, Bhumeswar Sah who got two brothers namely Jaldhari Sah and Nathan Sah who were defendants 2nd set. Khushar Sah had two wives. From the first wife, he got two daughters namely Parwati Devi @ Pavitri Devi and Sita Devi, defendant Nos.3 and 5. Plaintiffs are the legal heirs and descendants of Ramjee Sah and defendant 1st set are sons of Babujee Sah, the brother of Ramjee Sah. The defendants 2nd set-petitioners contested the suit claiming the half share in the suit lands as Khushar Sah was not only a name lender rather co-purchasers on payment of consideration money of his share. Defendants 1st set supported the case of the plaintiff that Khushar Sah was only a name lender and the legal heirs of Khushar Sah has got no interest in Schedule A property. However, the descendants of Babujee Sah full brother of Ramjee Sah stated that there was no partition between two brothers and they are entitled to get share. The plaintiff examined 9 witnesses



but the defendants 1st set who supported the case of the plaintiff in his written statement did not cross-examine any of the witnesses. When the plaintiff was examined as P.W.10, the defendants 1st set did not cross-examine and, therefore, the defendants 2nd set contesting defendants-petitioners started cross-examination of P.W.10. After completion of cross-examination by defendants 2nd set-petitioners, defendants 1st set filed petition to allow them to cross-examine P.W.10. The defendants 2nd set-petitioners filed objection that the rule or procedure as contained in Order 18 Rule 2 C.P.C. prescribes that the supporting defendants should firstly cross-examine the plaintiff witness but once the supporting defendants waived his right to cross-examine the plaintiff's witness the supporting defendants should not be allowed to cross-examine the plaintiff's witness after cross-examination of the contesting defendants because the supporting defendants may elicit some facts which works injustice to the contesting defendants but the learned Sub Judge allowed the petition of the supporting defendants 1st set to cross-examine P.W.10, the plaintiff after completion of cross-examination of P.W.10 by the contesting defendants-defendants 2nd set-petitioner and the petitioner-defendants 2nd set being aggrieved by the aforesaid order moved this court.



The learned counsel for the petitioner submits that defendant No.1 who supports the case of the plaintiff by filing his written statement did not cross-examine any of the nine witnesses examined on behalf of the plaintiff. When the plaintiff examined as P.W.10, the defendants 1st set did not turn up to cross-examine him also. The petitioner who contested the suit finished the cross-examination of P.W.10 but thereafter defendant No.1-supporting defendant filed petition to allow him to cross-examine P.W.10. The petitioners objected by filing rejoinder stating therein that according to the provisions of the Evidence Act although defendant No.1 is arrayed in the adversary column but in fact defendant No.1 fully supports the case of the plaintiff in his written statement and, therefore, he did not remain as contesting defendants. The court should have allowed him to cross-examine the witness of the plaintiff first in order before cross-examination of the contesting defendants. If the supporting defendants are allowed to cross-examine the witness of the plaintiff after completion of the cross-examination by the contesting defendants, it would work injustice and prejudice the case of the defendants. A Division Bench of this Court in the case of **Motiram Narwari v. Lalit Mohan Ghose, AIR 1920 Patna 94** has also held that according to Evidence Act, the usual practice in cases, where



some of the defendants support the plaintiff's case and others oppose it, is to order that those who support the plaintiff's case should cross-examine the plaintiff's witness first, if they desire to do so and to call their evidence and address the Court before the defendants who oppose the plaintiff's case do so. Any other practice would be inconvenient and might work an injustice to those defendants who oppose the plaintiff's case.

The learned counsel for the petitioner further submits that in a similar case, the supporting defendants were allowed to cross-examine the witnesses after cross-examination of the contesting defendants. The contesting defendants filed petition for deletion of cross-examination made by the supporting defendants after completion of the cross-examination of the contesting defendants as the supporting defendants have got no right to cross-examine since they were supporting the case of the plaintiff. The learned trial Judge considered the submission made in this behalf and ordered that the cross-examination undertaken on behalf of the supporting defendants should be deleted as such defendants had no right to cross-examine the plaintiffs since they were not adverse parties and that order was challenged before the High Court of Gujarat. A Single Bench of High Court of Gujarat reported in the case of **Hussens Hasanali Pulavwala v. Sobbirbhai Hasanali**



Pulavwala and others, AIR 1981 Guj. 190 held that the learned trial Judge has rightly ordered for deletion of cross-examination made by the supporting defendants under inherent power under Section 151 of the C.P.C. and, therefore, there is no jurisdictional error and the High Court refused to interfere in the order of the learned trial judge. Therefore, it is submitted that the order allowing the supporting defendants to cross-examine P.W.10 after completion of cross-examination by the contesting defendants is not sustainable and fit to be set aside.

On the contrary, the learned counsel appearing on behalf of the respondent-defendants 1st set submitted that in view of Section 137 of the Evidence Act, even a supporting defendant is adversary party and he cannot be restrained to cross-examine any witness of the plaintiff. If the supporting defendants did not cross-examine most of the witnesses of the plaintiff, it does not amount that the supporting defendants waived his right to cross-examine any plaintiff's witness if he wishes to do so. It is further submitted that if the learned court below has ordered and allowed the supporting witness to cross-examine P.W.10 after completion of cross-examination by the contesting defendants, the contesting defendants may further cross-examine the witness and such cross-examination by the supporting witnesses cannot be deleted. The



learned counsel for the respondents 1st set placed reliance in support of his contention on the judgment reported in 2000(1) PLJR 530(Smt. Shanti Devi & Ors. v. Ram Mohan Thakur & Ors.).

On the basis of the submission of both sides and perusal of records, the question arises for consideration “whether the supporting defendants who fully support the case of the plaintiff by filing written statement should be allowed to cross-examine the plaintiff’s witness after completion of the cross-examination by the contesting defendants?”

According to the provisions as contained in Section 137 and 138 of the Evidence Act as well as the procedure contained in Order 18 Rule 2 of the C.P.C., the usual practice is that the defendants who fully support the case of the plaintiff should be called upon to cross-examine the plaintiff’s witness first. Thereafter, the defendants who partially support the case of the plaintiff shall be called upon to cross-examine the plaintiff’s witness and lastly the contesting defendants shall be called upon to examine and address the court. Any other practice would be inconvenient and might work an injustice to those defendants who oppose the plaintiff’s case. In the first place, if the opposing defendants have cross-examined the plaintiff’s witnesses, the other



defendants who support the plaintiff's case if allowed to cross-examine such supporting defendants by leading question possibly elicit evidence from the witnesses which have not been elicited in examination-in-chief and about which the opposing defendants had no opportunity of cross-examine. It is true that if any new matter is introduced, the opposing defendants might be allowed an opportunity subsequently to cross-examine the witness but this would be a cumbersome process and would unnecessarily prolong the proceeding. It is also manifestly unjust that a witness should be allowed to give oral evidence against a party who appears at the trial when that party had no opportunity of cross-examining upon the matter depose to. Therefore, the rule requires that the plaintiff and such of the defendants either support the plaintiff's case wholly or in part should address the court and call their evidence in the first place and thereafter the other party opposes to the plaintiff's case should address the court and call their evidence.

In the case of Motiram Narwari(supra), a Division Bench of this court also held that "in my opinion in the circumstances of the present case the preponderating balance of convenience is in favour of ordering that defendants 2 to 5 who are supporting the plaintiff's case should call their evidence and address the Court before defendant 1, and in like manner should



interrogate the plaintiff's witnesses before defendant 1. This course would clearly result in a saving of time and will prevent any dispute at the trial as to the right of defendant 1 to any further cross-examination which would undoubtedly arise if the order of the Subordinate Judge were carried out. It is also, in my opinion, in the interests of justice that the course proposed should be followed. The alternative course might result in the denial of a fair trial."

In the case of Smt. Shanti Devi(supra) reported in 2000(1) PLJR 530, a Single Bench of this Court has also placed reliance on the Division Bench judgment of this Court reported in the case of Motiram Narwari(supra) and held that the correct procedure of cross-examination is to allow the plaintiff and the supporting defendants to cross-examine the supporting D.Ws. before calling upon the contesting defendant to cross-examine him. In the aforesaid case, after plaintiff finished examination of their witnesses, defendant No.3 was examined as D.W.1 on 27.11.1997. On the same day, he was cross-examined by the plaintiff and defendant No.2. Defendant No.14 declined to cross-examine. Defendant No.1 thereafter called upon to cross-examine the witness. He cross-examined the witness in part. On the next day i.e. 28.11.1997, when the cross-examination was resumed, he



filed application for deletion of the cross-examination, part of the evidence of defendant No.3(D.W.1) on the ground that defendant No.3 as well as defendant No.2 were supporting the plaintiff's case and, therefore, not being adverse to each other they could not be allowed to cross-examine in view of Section 137 and 138 of Evidence Act. By the impugned order, the prayer has been allowed. Against that order, the plaintiff moved this court and it is held that the supporting defendants was firstly called upon to cross-examine the defendant No.3(D.W.1) and only thereafter the contesting defendant(defendant No.14) was called upon to cross-examine defendant No.3 who was examined as D.W.1. Therefore, in such circumstances, it was ordered that the cross-examination made by supporting defendants first cannot be deleted and even the supporting defendants and the plaintiffs have right to cross-examine such witness first. Therefore, the fact of the case is quite different from the fact of the present case.

In the case of **Hussens Hasanali Pulavwala v. Sobbirbhai Hasanali Pulavwala and others** reported in AIR 1981 Guj. 190, the plaintiff filed an administration suit in the City Civil Court at Ahmedabad for the administration of the deceased Sugarabu Kikabhai. The plaintiff joined his step brother and step sisters as defendant Nos.1, 2 and 3. These three defendants filed



written statement contesting the suit. The plaintiff also joined his true sister, Hussaina and Nafisa as defendant Nos.4 and 5 and they filed a supporting written statement. Defendant Nos.4 and 5 accepted the averments made in the plaint as correct and prayed that the estate of the deceased may be administered as stated by the plaintiff. Defendant No.6 also filed a contesting written statement. The plaintiff thereafter entered in the witness box and he was examined in chief by his learned Advocate. At the request of defendant No.1, the learned Advocate for defendant Nos.2 and 3 was called upon to cross-examine the plaintiff but before defendant Nos.2 and 3 started to cross-examine the plaintiff, no request was made by the defendant Nos.4 and 5 who were supporting the case of the plaintiff to permit them to put the questions to the plaintiff. The defendant Nos.2 and 3 cross-examined the plaintiff at length and left the court room with the permission of the court. During the absence of defendant Nos.2 and 3, the Court permitted the learned Advocate of defendant Nos.4 and 5 to cross-examine the plaintiff. When the learned Advocate for defendant Nos.2 and 3 came and learnt that defendant Nos.4 and 5 had cross-examined the plaintiff, the defendant Nos.2 and 3 filed application for expunging the cross-examination of the plaintiff made by the learned Advocate for



defendant Nos.4 and 5 on the ground that they had no right to cross-examine since they were supporting the case of the plaintiff. The learned trial Judge considered the submissions made in this behalf and by his detailed order directed that the cross-examination undertaken on behalf of supporting defendant Nos.4 and 5 should be deleted as the defendant Nos.4 and 5 who supported the case of the plaintiff had no right to cross-examine the plaintiff since they were not adverse parties and this order of the court deleting the cross-examination made by supporting defendants came up for consideration before a Single Bench of Gujarat High Court and it is held that the order does not suffer from any jurisdictional error and the Court has rightly exercised inherent power deleted the cross-examination made by the supporting defendants after completion of cross-examination made by the contesting defendants.

Now, reverting to the facts of the present case in hand, admittedly, the petitioners are the contesting defendants. The defendant 1st set filed written statement and supported the case of the plaintiff that in fact, the land was purchased by Ramjee Sah and he paid the entire consideration amount. Khushar Sah was only name lender and no part of consideration amount was paid by Khushar Sah. The plaintiff examined 9 P.Ws. but the defendant 1st



set who supported the case of the plaintiff did not cross-examine any of the witnesses of the plaintiff. When the plaintiff himself was examined as P.W.10, the defendant 1st set-supporting defendants did not make request to the Court that defendant 1st set should be allowed to first examine the witness, P.W.10 and consequently the contesting defendants-petitioner cross-examined P.W.10 on many dates but after completion of cross-examination made by the contesting defendants-petitioners-defendant 1st set who supported the case of the plaintiff filed petition before the learned trial court to allow him to cross-examine the witness. The petitioners-contesting defendants contested the petition that after completion of cross-examination made by the contesting defendants, the supporting defendants should not be allowed to cross-examine the witness as the same would work an injustice and the supporting defendants may elicit such facts which the plaintiff might have failed to bring on record in the examination-in-chief of such witness. Of course, the contesting defendants may be allowed to further cross-examine the witness but besides the facts that such procedure shall be cumbersome it may cause irreparable prejudice to the case of the contesting defendants and such supporting defendants who waived to cross-examine any of the witness should not have been allowed to cross-examine



P.W.10, the plaintiff himself. I find that the learned Sub Judge has committed jurisdictional error by allowing the supporting defendants to cross-examine P.W.10 after completion of cross-examination of P.W.10 by the contesting defendants. The learned trial Judge should have before start of the contesting defendants to cross-examine P.W.10, called upon the supporting defendants to cross-examine P.W.10, if he so desired but the supporting defendants himself did not came forward nor examined any other witnesses P.W.1 to 9 to cross-examine them but after completion of cross-examination by the contesting defendants, supporting defendants filed petition to cross-examine the witness although, the supporting witnesses have fully supported the case of the plaintiff by filing his written statement and the supporting defendants have nothing to prove contrary to the case of the plaintiff. Therefore, he cannot be termed in practical aspects as adversary party to the plaintiff. On similar facts, in the case of Hussens Hasanali Pulavwala(supra) reported in AIR 1981 Guj. 190, Single Bench of Gujarat High Court held that when the trial Judge deleted the cross-examination of a supporting defendant after completion of cross-examination by the contesting defendant that order does not suffer from any jurisdictional error.

Therefore, I find that the order of the learned Sub



Judge allowing the supporting defendants to cross-examine P.W.10 after completion of cross-examination by the contesting defendants is illegal and not sustainable.

Accordingly, this civil miscellaneous petition is allowed. The order dated 13.04.2016 passed by Sub Judge V, Madhepura in Title Suit No.199 of 2006 is set aside.

(Prabhat Kumar Jha, J)

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