

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**CMP NO. 798 OF 2022**

***Akshaya Mallik and others*** ..... ***Petitioners***  
Mr. Maheswar Mohanty, Advocate  
-versus-

***Kedar Mallik and others*** ..... ***Opp. Parties***

**CORAM:**  
**JUSTICE K.R. MOHAPATRA**

**ORDER**  
**20.09.2022**

**Order No.**

1. This matter is taken up through hybrid mode.
2. The Petitioners in this CMP seek to assail the order dated 27<sup>th</sup> July, 2022 (Annexure-9) passed in C.S. No.365 of 2018, whereby learned 5<sup>th</sup> Addl. Civil Judge (Senior Division), Cuttack permitted the Defendant Nos.1 to 5 to cross-examine P.W.1.
3. It is submitted by Mr. Mohanty, learned counsel for the Petitioners that the Defendant Nos.2 to 5 in the suit are Petitioners in this CMP. The suit has been filed by Opposite Party No.2 for partition. The Defendant No.1 filed his written statement admitting the case of the Plaintiff. Hence, he is not entitled to cross-examine the P.W.1 in view of the provisions under Section 137 of the Evidence Act, 1872, as he is not an adverse party. He also relied upon the decision in the case of ***Hussens Hasanali Pulaywala –v- Sabbirbhai Hasanali Pulaywala and others***, reported in AIR 1981 Gujarat 190, wherein it is held that the Defendant supporting Plaintiff's case is not entitled to cross-examine the Plaintiff's witnesses. Referring to Paragraph-4 of the written statement filed by Defendant No.1, Mr. Mohanty, learned

counsel for the Petitioners submits that the Defendant No.1 supported the plea of the Plaintiff for partition. As such, he is not entitled to cross-examine the P.W.1. Learned trial court without properly appreciating the same allowed all the Defendants to cross-examine the Plaintiff's witnesses.

4. Upon hearing learned counsel for the Petitioners and on perusal of the case record, more particularly the written statement filed by Defendant No.1 (Annexure-2), it appears that at paragraph-3 of the written statement, he has categorically stated that the Plaintiff had never approached him for partition. However, at paragraph-4, the Defendant No.1 stated that he does not object to the prayer made by the Plaintiff for partition. But, at the same time, he has stated to be entitled to 1/4<sup>th</sup> and 2 anna share in the suit property. Thus, the Defendant No.1 has a right to cross-examine the Plaintiff's witnesses on the averments made in his written statement. It further appears that the suit is filed for partition, which Defendant No.1 does not object, but he is an adverse party as per Section 137 of the Evidence Act.

5. In view of the above, it cannot be said that Defendant No.1 is not entitled to cross-examine the Plaintiff's witnesses, more particularly when he is an adverse party being the Defendant No.1. Thus, I find no infirmity in the impugned order. Accordingly, the CMP being devoid of any merit stands dismissed.

Urgent certified copy of this order be granted on proper application.

**(K.R. Mohapatra)**  
**Judge**