

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO. 1026 of 2022

Surendra Kumar Champati ***Petitioner***
Mr. Brahmananda Tripathy, Advocate

-versus-

Sanjukta Champati and another ***Opp. Parties***

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
31.10.2022

Order No.

1. This matter is taken up through hybrid mode.
2. IA No.1081 of 2022 filed in Court today is taken on record.
3. Petitioner in this CMP seeks to assail the order dated 17th September, 2022 (Annexure-6) passed by learned 2nd Additional Senior Civil Judge, Bhubaneswar in CS No.1157 of 2011, whereby an application filed by Defendant No.1 to restrain the Defendant No.2 from cross-examining Plaintiff-PW-1 was rejected.
4. Mr. Tripathy, learned counsel for the Petitioner submits that the suit has been filed for declaration of right, title, interest and confirmation of possession. A further prayer for cancellation of the Power of Attorney No.9 of 15th March, 2002 has been made along with permanent injunction and other consequential reliefs. Defendant No.2 filed written statement supporting the case of the Plaintiff. After examination of the Plaintiff-PW-1, the Defendant No.2, who supports the case of the Plaintiff, did not show any interest to cross-examine the Plaintiff. Hence, Defendant No.1 cross-examined the Plaintiff. After closure of

cross-examination of the Plaintiff by Defendant No.1, the Court permitted Defendant No.2 to cross-examine the Plaintiff-PW-1. At that stage, Defendant No.1 filed an application to restrain the Defendant No.2 from cross-examining the Plaintiff, as cross-examination by a supporting the Defendant is in contravention of Sections 137 and 138 of the Evidence Act, 1872 and there is every likelihood that Defendant No.2 may patch up the lacunae in the evidence of Plaintiff-PW-1. Learned trial Court, without appreciating the position of law, rejected the petition. In support of his case, Mr. Tripathy placed reliance upon the case law in the case of ***Sudam Sahoo Vs. District Judge, Cuttack and others***, reported in 2016 (I) ILR-CUT-587, wherein it is held as under:-

“Reading of Section 137 of the Indian Evidence Act, makes it clear that the first step is the examination of a witness by the party who calls him, which is called as examination-in-chief and the next step is cross-examination of a witness already put to examination-in-chief is over, there is scope for reexamination of a witness on being called for by a party subsequent to cross-examination by the party, who had called him. If we look to the provision contained in Section 138 of the Indian Evidence Act, this provision makes it clear that a witness shall be first examined in chief (then if the adverse party so desires) cross-examined, then (if a party calling him so desires) re-examined. A conjoint reading of both the above provisions make it clear that there are three stages of examination of a witness i.e. (1) examination in chief, (2) cross-examination by the adversary party and (3) re-examination by the party, who had called such a witness after the cross-examination and, therefore, there is no scope for additional cross-examination or re-examination by a party, who is not adverse to the person, who has examined any such witnesses. Therefore, not only there is no scope for the defendant no.3 to cross-examine the D.W.1 but there is also no scope for the defendant no.3 being not a adverse party to the Defendant no.1 to re-examine the D.W.1. As the provision of re-examination only entitles a person for re-examination of a witness by whom the witness has been called, this Court finds both the courts have miserably failed to appreciate the above aspect and thus arrived at the wrong and erroneous impugned orders. Both the Courts

below also failed to appreciate the decision reported in AIR 1981 Gujarat – 190.”

He also placed reliance on another decision in the case of ***Hussens Hasanali Pulavwala Vs. Sabbirbhai Hasanali***, reported in AIR 1981 Gujarat 190, in which it is held as under:-

“3. It would appear from the scheme of the aforesaid provisions of the Evidence Act that in order to cross-examine a witness, it must be shown that the party seeking cross-examination is an 'adverse party'. Merely because a party is shown as a defendant in the cause title of the plaint, that Party cannot be styled as an adverse party, unknown it is further shown that the party is a contesting party in the sense that he disputes the case out up by the plaintiff in the plaint. If a party accepts the plaintiff's case, there is no contest between the plaintiff and that party and such a defendant cannot be styled as an 'adverse party' and would therefore, not be entitled to cross-examine the plaintiff. In the instant case, it is clear from the written statement filed by defendants Nos. 4 and 5 that they wholly supported the plaintiff's case and prayed that the estate of the deceased be administered as desired by the plaintiff. Such Persons cannot be said to be adverse parties merely because they appear to be pro forma defendants in-the cause title of the plaint.”

He, therefore, submits that Defendant No.2 could not have been allowed to cross-examine PW-1 after cross-examination of Defendant No.1. Hence, he prays setting aside the impugned order and direct learned trial Court not to allow Defendant No.2 to cross-examine PW-1.

5. Considering the submission made by learned counsel for the Petitioner and on perusal of written statement filed by Defendant No.2, it appears that in certain paragraphs Defendant No.2 has admitted the case of the Plaintiff, but in addition to the same the Defendant No.2 has propounded his own case in the written statement. Thus, the Defendant No.2 is always at liberty to cross-examine the Plaintiff on his own case in the written statement.

6. It also appears from record that although Defendant No.1 alleges that Defendant No.2 supports the case of the Plaintiff, but before cross-examining PW-1, the Defendant No.1 never moved learned trial Court to permit the Defendant No.2 to cross-examine the Plaintiff, if he so desires. At this stage of the suit, it is premature to opine that Defendant No.2 is supporting the case of the Plaintiff save and except allegation of Defendant No.1. The same can only be gone into at the time of hearing of the suit. If the Defendant No.2 at this stage is prevented to cross-examine PW-1/Plaintiff on a presumption that he is supporting the case of the Plaintiff, it may be prejudicial to the case of Defendant No.2. There is no dispute to the case law relied upon by learned counsel for the Petitioner. But, the same is of no assistance to the Petitioner in the facts and circumstances of the case. Hence, I am not inclined to entertain the CMP.

6.1 It is, however, open to Defendant No.1 to raise appropriate objection at the time of argument of the suit with regard to acceptance of cross-examination of PW-1 by the Defendant No.2; and in that event, learned trial Court shall deal with the same in accordance with law.

7. With the aforesaid observation, the CMP is disposed of.

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge