



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 15.07.2024

Pronounced on: 26.07.2024

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**A.No.1912 of 2024**

**in**

**C.S. No.252 of 1996**

**P.B.BALAJI, J.**

This Application has been taken out by the defendants 3, 5 to 7 seeking to eschew cross examination of DW1 by the 9<sup>th</sup> defendant.

2. I have heard Mr.R.Thiagarajan, learned counsel for the Applicants and Mr.K.V.Ananthakrushnan, learned counsel for contesting respondent, 8<sup>th</sup> respondent and Mr.P.J.Rishikesh, learned counsel for the respondents 1 to 6 and Mr.C.Jagadish, learned counsel for the respondents 9 to 12.

3. The learned counsel for the applicants would submit that the 9<sup>th</sup> defendant is supporting, rather sailing with the plaintiff in the suit for partition and it is only the defendants 3 & 5 to 7 who are contesting the suit and in such circumstances, the 9<sup>th</sup> defendant is not an adverse party and therefore, the cross examination of D.W.1, after the cross examination of the said witness by the learned counsel for D 1, D 3, 5 to 7 ought not to have



been permitted.

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4. The learned counsel would also submit that the elaborate cross examination made by the contesting defendants 3, 5 to 7 has been virtually watered down and nullified by the cross examination made subsequently by the learned counsel for the 9<sup>th</sup> defendant. He would also invite my attention to the questions put to the witness namely D.W.1 in cross examination and would submit that the questions were all leading questions and therefore, necessarily the cross examination would have to be eschewed. He would rely on the following two decisions.

4.1. *Sudam Sahoo vs District Judge, Cuttack and others*, reported in *AIR 2016, Orissa 38*, where the High Court of Orissa referring to Section 137 & 138 of the Evidence Act, 1872 held that a witness shall be first examined in Chief, then if the adverse party so desires cross examined and then if a party calling him so desires re-examined. It further held that 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.

4.2. In *Divisional Manager, United India Insurance Company Limited vs Premavati and others*, the Division Bench of this Court held that



right of cross examination is given to an adverse party and not a party who sails with the plaintiff or the defendant, whose witness is to be cross examined.

5. Per contra, Mr.K.V.Anantakrushnan, learned counsel for the contesting respondent would submit that the Application is not maintainable since there is no provision either in the Code of Civil Procedure, 1908 or in the Evidence Act, 1872 for eschewing evidence. He would therefore submit that the request is unknown to law and cannot be entertained. He would further submit that the Applicants have imagined that the 9<sup>th</sup> defendant is sailing with the plaintiff. He would take me through the written statement filed by the 9<sup>th</sup> defendant and state that the 9<sup>th</sup> defendant is not supporting or sailing with the plaintiff's case, but has independently set up a claim for her share in the property.

6. He would further submit that the present Application is only to delay and protract the proceedings and even earlier an Application was filed in TOS.No.12 of 2021 to eschew the proof affidavit of the 9<sup>th</sup> defendant, which was dismissed by this Court, as against which the Original Side



Appeal is pending in OSA.No.31 of 2023. He would further submit that the suit has been pending for more than three decades and in the light of the same, several questions had to be put to D.W.1 to elicit answers pertaining to the subsequent developments as well and in a partition suit, cross-examination of co-defendants cannot be turned down or disallowed. He would further submit that except the Applicants, none of the other parties have objected to the cross-examination of D.W.1 and merely because the evidence has emerged to be against the interest of the Applicants, the present Application has been filed.

7. I have carefully considered the rival from submissions advanced by the learned counsel on either side.

8. D.W.1 is legal heir of the 2<sup>nd</sup> defendant, who has been brought on record as the 11<sup>th</sup> defendant in the suit. It is seen from the records that on 13.03.2023, chief examination of D.W.1 was concluded and on the same day, the applicants have cross-examined D.W.1. There is no indication in the records or the adjudication by the learned Additional Master that the Applicants have submitted or contended that the other defendants who are



supporting the cause of the plaintiff should cross-examine D.W.1 before the cross-examination is done on behalf of defendants 3, 5 to 7. Moreover, it is admittedly a suit for partition. On reading of the written statement of the 9<sup>th</sup> defendant, it is very clear that the 9<sup>th</sup> defendant does not support the case of the plaintiff. The allegations in the plaint are denied and the 9<sup>th</sup> defendant sets up an independent claim in respect of her share in the suit properties. Merely because the 9<sup>th</sup> defendant also states that suitable orders are to be passed and her share is to be declared in the decree, it does not imply that the 9<sup>th</sup> defendant is sailing or supporting the cause of the plaintiff.

9. The judgments on which reliance is placed on by the learned counsel for the applicants are not in any way helpful in furtherance of their request for eschewing the cross of D.W.1 by the 9<sup>th</sup> defendant.

10. In fact, in *Sudam Sahoo's* case (referred herein supra), excepting for setting out the underlying principles of Sections 137 and 138 of the Indian Evidence Act, 1872, there is nothing stated or laid down as to requirement of eschewing the evidence in cross by a co-defendant after the cross examination of the contesting defendant. Even in the Division Bench



Judgment, ***Divisional Manager*** case (referred herein supra), the Division Bench of this Court, after referring to Section 138 of the Evidence Act, observed that right of cross examination is only to an adverse party and not to a party who sails with the plaintiff or the defendant, as the case may be, of the defendant whose witness is to be cross examined. This Court is going to decide the issues framed in the suit, which is based on the claim of the plaintiff and the denial of the same by the contesting defendants alone. Here, as already discussed from the reading of the written statement of the 9<sup>th</sup> defendant, it is very clear that the 9<sup>th</sup> Defendant is not sailing with the plaintiff and in fact, has denied the plaint allegations and clearly stated that the plaintiff would get a right only if the properties are declared to be self-acquired properties. Therefore, in a suit for partition, even a defendant is a plaintiff and it cannot be stated that the 9<sup>th</sup> Defendant is supporting the plaintiffs and the cross examination of D.W.1 by the 9<sup>th</sup> Defendant, waters down the effective cross examination done by the learned counsel for D3, D5 to 7.

11. The cross examination of first defendant D.W.1 by the learned counsel for the 9<sup>th</sup> defendant would have no adverse impact on the cross



examination by the learned counsel for the defendants 3, 5 to 7. In other words, the cross examination by the 9<sup>th</sup> defendant will have nil value insofar as the contentious issues which have to be independently established by the plaintiff or the party who claims right or share in the form of a decree from this Court. Such a party seeking right or remedy from this Court cannot rely solely on the evidence in cross examination of a co-defendant and in any event, the cross examination of D.W.1 by defendants 3, 5 to 7 would have more far reaching effects and consequences in adjudicating the issues before the Court and I see no reason for the apprehension of the Applicants that the cross examination by D9 in the form of suggestions would be counterproductive and that it would whittle down the cross examination made by the learned counsel for the Applicants. The apprehension is baseless since in a suit for partition, the overall evidence is going to be tested before adjudicating the respective rights of the parties to the *lis*. With regard to there being no provision in law for eschewing the evidence, it is a fact that neither the Code of Civil Procedure nor the Indian Evidence Act contemplate a situation where evidence which has already come on record has to be eschewed. It is an admitted position that the evidence has already been recorded and it remains in the Court records. The relevancy or



probative value always be tested while the suit is being finally disposed of after trial and arguments of the parties.

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12. In fine, I see no justifiable reasons to entertain the present Application for eschewing the cross examination of D.W.1 by the 9<sup>th</sup> defendant. Accordingly, this Application is dismissed.

**26.07.2024**

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**P.B.BALAJI,J.**

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**Pre-delivery Order in  
A.No.1912 of 2024**

**in**

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