

**IN THE COURT OF XV ADDITIONAL CITY CIVIL &
SESSIONS: JUDGE AT BENGALURU (CCH.NO.3)**

Dated this 2nd day of February 2023

O.S. No. 25874/2010

C/W

O.S.No. 6800/2011 AND O.S.No. 6468/2013

Present :- **Sri. S.R.Dindalkoppa,B.Sc, LLB(Spl)**
XV Additional City Civil & Sessions
Judge, Bengaluru.

Plaintiffs :- **Smt. Radhika Vasudevan**
and another
V/s

Defendants :- **G. Parthasarathy**
Since dead by LR's
and others

Applicants /
Defendant No.3 :- **Smt. Radhika Vasudevan and others**

ORDER ON I.A. No.2/22 FILED BY THE DEFENDANT No.3
UNDER SECTION 151 OF CPC

The defendant No.3 filed this application for taking the evidence of defendant Nos.4 and 5 as it is taken as nil on 09.11.2022.

2. In the affidavit the defendant No.3 contend that he is the contesting defendant in the case, other defendants are supporting the plaintiffs. As such, the evidence of defendant No.3 must be the last evidence. After leading the evidence of contesting defendant the other defendants who are supporting the plaintiff cannot be permitted to lead their evidence.

3. The defendant No.3 further contend that there are no facts pleaded in the written statement of defendant No.5. Similarly, there is no issues framed by fixing burden on the defendant No.5.

4. It is further contend that this suit is clubbed with O.S.No.6468/2013 and common evidence has been lead in these suits. The defendant No.5 herein is the plaintiff in O.S.No.6468/2013. The plaintiff in O.S.No.6468/2013 already lead evidence in both the suits and closed their evidence. Permitting the defendant No.5 to lead evidence would amount to reopening the plaintiff's evidence. If the defendant No.5 had any intentions to lead evidence, she should have lead evidence immediately after the plaintiffs. Permitting the supporting defendant to lead evidence after the contesting defendant would be permitting the plaintiffs to fill up any gap or lacuna in their evidence which is not permissible in law.

5. On the contrary, defendant No.5 filed objection by denying the contention taken by the defendant No.3 in the application. According to defendant No.5, the application filed by the defendant No.3 is at a belated stage. At the time, when the cross examination of defendant No.3 is taken as nil or at the fag end of his cross examination having no objection for the defendant No.3 to lead his evidence and without taking recourse to the relief sought in the application all this while.

6. It is further contend that suit is for partition, this defendant is also claiming her share in the schedule properties. So the defendant has also treated on par with plaintiff to strengthen their case. The rights of the defendants cannot be snatched away. This defendant

also privy to certain facts which are intrinsic to the disposal of the subject of suit on merits. The pendency of other suit before this Hon'ble Court and leading evidence in the other suit is of no consequence to the lis on hand with respect to the partition of the suit schedule properties. The application filed by the applicant defendant is accompanied by memorandum of facts which is not maintainable. Hence, prayed to dismiss the same.

7. On the basis of the above facts and circumstances the following points that arise for my consideration are as follows:-

1. Whether the defendant No.3 has made out a ground to take the evidence of defendant Nos.4 and 5 as null ?
2. What order ?

8 Heard arguments of both sides and perused the written argument of defendant No.3 and I answer the above points as here under :-

Point No.1 :- In the Affirmative

Point No.2 :- See for the following :

REASONS

9. **Point No.1** :- On perusal of the contention of applicant as well as opponent it shows that, plaintiff filed the suit for seeking partition of their share in the suit schedule properties. Among the defendants only the defendant No.3 is a contesting party, other

defendants are also claiming share in the schedule properties. The plaintiffs have already lead their evidence and the contesting party defendant No.3 also lead their evidence. After the evidence of contesting defendant, defendant Nos.4 and 5 intends to lead their evidence which was objected by defendant No.3. According to defendant No.3, when the contesting defendant has lead evidence, then the defendants who are supporting the plaintiff cannot permitted to lead their evidence. Because, they intend to lead evidence in order to fill up the lacuna.

10. In support of their contention, defendant No.3 relied various decisions as per the Judgment of Hon'ble High Court of Andhra Pradesh dated 06.11.1987. In which it is observed that "when the contesting defendant lead their evidence, then naturally other defendants who are supporting the case of plaintiffs have no right to lead their evidence. Moreover, this amounts to fill up the locuna in the plaintiff evidence"

11. Similarly, in another citation of Andhra Pradesh in Civil Revision Petition No.2743 of 2013 also held the same thing. Similarly, in one more decided case in CRP No.6419 of 2004 dated 14.07.2006 it is held that petitioners wanted play a role to fill up gaps in evidence of plaintiff, after evidence of contesting defendants was closed. It could not be said that defendants who were supporting plaintiff could also lead evidence after closure of evidence of contesting defendants. This was nothing but abuse of process of law".

12. One more reported Judgment of Hon'ble High Court of Punjab and Hariyana in which case also the written statement admitted the claim of the plaintiff in entirety and took up the additional plea limited to the extent that the passage was being used by him and the plaintiff to the exclusion of others". In which also it is observed that after contesting defendant, the other defendants have no right to lead evidence. Similarly, this applicant also relied on the judgment of Hon'ble High Court of Gujarat in Civil Revision Application No.744 of 1961 dated 01.04.1963.

13. Another Judgment of Hon'ble Supreme Court of India observed in Civil Appeal No.3829-3830 of 2000 dated 16.09.2003. Which is also similar to the principle involved in the other citations. One more Judgment of Hon'ble Apex Court observed in Civil Appeal Nos.7085-7086 of 2011 in which also it is held that case set forth in written statement by defendants was completely different from case made out in evidence of their witnesses. Case set forth in written statement and case made out in oral evidence were completely different from what was stated in documentary evidence. No amount of evidence contrary to pleading could be relied on or accepted". It is also observed that "It is well settled that no amount of evidence contrary to the pleading can be relied on or accepted".

14. One more citation relied by the applicant is the Judgment of Hon'ble High Court of Mysore in Civil Revision Petition No.27 of 1970 dated 10.07.1970. In which also it is observed that " the petitioner cannot avail, himself of the provision of Order 18, Rule 3 of CPC. Power of the Court to be exercised in the interest of justice and was not a right conferred to any party – Lower Court – No interference

with the order- Hence revision dismissed.

15. On perusal of all these above citations relied by the applicant defendant No.3 it clearly shows that once the contesting defendants have lead their evidence. Then the other defendants who are supporting the plaintiff have no right to lead their evidence. Even it is permitted it may amounts to fill up the lacuna. Moreover, the defendant No.5 already lead their evidence in the suit filed by them which is also clubbed in this case. Considering all these aspects, I am of the opinion that as it is a partition suit. The plaintiff already lead evidence contesting defendant also lead evidence. Under such circumstances, there is no material to permit the defendant Nos.4 and 5 to lead their evidence. Accordingly, I answer point No.1 in the Affirmative.

16. Point No.2 :- In view of the above discussion on point No.1, I proceed to pass following :-

ORDER

I.A No.2/22 filed by the defendant No.3 under Section 151 of CPC is hereby allowed.

It is hereby, the evidence of defendant Nos.4 and 5 is taken as nil.

(Dictated to the Stenographer, transcribed and typed by her, corrected and then pronounced by me in the open court on this the 2nd day of February 2023.)

(S.R. Dindalkoppa)
XV Addl.City Civil & Sessions
Judge, Bengaluru.