

**IN THE COURT OF CIVIL JUDGE AND JMFC
AT HOLENARASIPURA**

Present:- Sri.R.Mahesha, B.A.L, LL.B,
Civil Judge and J.M.F.C,
Holenarasipura.

Dated this the 13th day of November, 2018

O.S.No.134/2008

Smt.Rani and others : Plaintiffs

(By Sri.B.N.R., Adv.,)

V/s

Chikkamallamma & others : Defendants

**(D1 & 2 By Sri.P.D.D. Adv.,
D3, 6, 8 to 11 by Sri.H.S.A. Adv.,
D4 by Sri.J.N.Adv., D5 - exparte
D12 by Sri.R.S. Adv.
D13 to 15 by Sri.K.S.S.Adv.,)**

**ORDERS ON IA FILED BY THE DEFENDANT No.12 U/O 18 RULE 17
OF CPC AND SEC.151 OF CPC.**

The defendant No.12 filed present applications to reopen the case for recalling of DW.7 for cross examination.

2. In the annexed affidavit, the defendant No.12 submitted that, the suit filed for partition and separate possession. The present case set down for arguments. In the present case, Dw.7 did not cross examined but to prove the case on hand, cross examination of DW.7 is very necessary as he intended to cross examine the DW.7. Hence he preferred the present application and prays for allow the applications.

3. The defendant No.1 and 2 filed detailed objection by contending that the present application is not maintainable either in law or facts which is liable to be dismissed. The present suit filed in the year 2008, it is more than 10 year old case. Now case set down for arguments. The defendant No.12 preferred the application to recall of DW.7 for cross examination without mentioning proper reasons. This court provides sufficient opportunity to cross examine the DW.7 to defendant, but not utilize the same. If the cross examination is very much necessary the defendant preferred present application well in time, but at this stage filed only drag the proceedings. Hence prays for dismissal with exemplary cost.

4. Heard argument from both sides. Perused the records.

5. The points that would arise for my consideration are as follows.

1. Whether the defendant No.12 made out sufficient grounds to consider applications?

2. What order?

6. My answer the above points are as follows.

Point No.1:- In the Affirmative

Point No.2:- As per the final orders

for the following reasons.

REASONS

7. **Point No.1:-** Perused entire case papers, it discloses that the present suit filed in the year 2008, now this case is more than 10 years old case. The present application sought for recall of defendant No.1 i.e. Chikkamallamma for cross examination by defendant No.12. The plaintiff counsel already cross examined. Now defendant No.12 sought permission to recall of defendant No.1 who is examined as DW.7 for cross examination on the grounds that the plaintiff and defendant No.1/DW.7

collude with each other, in order to snatch decree. To safe guard in the interest of defendant No.12 permit him for cross examination of defendant No.1/DW.7, same was strongly opposed by defendant No.1 and 2 advocate. Now the short important question arises for consideration for is whether a co-defendant has right to cross examine the other defendants. It is undisputed that no special permission is made in the evidence act for cross examination of co-accused or co-defendants witness. The only relevant provision in Section 137 and 138 of Indian Evidence Act.

Section 137 in The Indian Evidence Act, 1872

The examination of a witness by the party who calls him shall be called his examination-in-chief. Cross-examination. The examination of a witness by the adverse party shall be called his cross-examination. Re-examination. The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Section 138: Order of examinations

Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination. The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Section 137 refers to examination in chief and cross examination of a witness by adverse party, the examination of an adverse party is the cross examination the question is who is adverse party so far as the witness concerned the very objection of cross examination is to test the evidence.

8. Further this court relied on decision reported in **Sri Mohamed Ziaulla vs Mrs. Sorgra Begum And Anr. on 31 January, 1997**

Equivalent citations: ILR 1997 KAR 1378ILR 1997 KAR 1378 in para No.6 to 8 the apex court clearly held that:

para No.6: It is undisputed that no special provision is made in the Evidence Act for cross examination of the co-accused or co-defendant's witnesses. The only relevant provision of law is Section 137 and 138 of the Evidence Act. Section 137 refers to examination-in-chief and cross examination of a witness by the adverse party. The examination of an adverse party is the cross examination. The question is who is an adverse party so far as the witness is concerned. The very object of cross-examination is to test the evidence.

Dictionary of law by Curzon 4th Edition defines 'adversary' as witness who disappoints the party calling them i.e. they are unfavourable and hostile witnesses. The new Webster Dictionary of English Language has explained the word 'adverse' as going in contrary direction; counter action; opposing, calamitous, unprosperous etc.

para No.7: Section 137 specifically explains that the examination of a witness by the adverse party is cross examination. Section 138 of the Evidence Act refers to cross examination if the adverse party so desires after the witness is first examined in chief. These two sections of the Evidence Act make it abundantly clear that a party has a right of cross examining his adversary or his witness.

para No.8: Section 137 and 138 of the Evidence Act do not specifically refer to cross examination of co-defendant's witnesses. But, the courts have to adopt a golden rule that no evidence shall be received against any co-defendant or co-accused who had no opportunity of testing it by cross examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine witness called by one whose case was adverse to his, or who has given evidence against him. If there is no dash of interest or if nothing has been said against the other party, there cannot be any right of cross-examination. A short but, interesting discussion is found in Sarkar's Evidence at Page 1342 13th Edition. Similar opinion is found in Principles and Digest of the Law of Evidence by M. Monir, Third Edition Page 1114.

9. In the present case defendant No.1 get sale deed. As per the judgement passed in OS No.170/1995 the property fallen to the share of one Somashekar S/o Mylaraiah on the basis of sale agreement

27/04/1994, but this suit filed in the year 2008. Defendant No.1 denied very sale deed and decree. They stated adverse statement against the defendant No.12. There is no partition between Mylaraiah and his sons. Therefore cross examination of defendant No.1 is very much necessary. But the defendant No.12 filed this applications at very belated stage. Even defendant No.12 active participating in the present proceedings, he could not file proper applications at the proper time. There is delay in filing application but it is settled principle of law that substantive rights of parties cannot be defeated by procedural aspects. The present case is very old suit, if permission granted its proceedings will be delayed, otherwise it will affect to defendant No.12 rights. Moreover its enable to court come to clear conclusion on actual matrix. Therefore the delay may be condoned by imposing reasonable costs and it is just proper and necessary to consider the present interlocutory applications for best interest of both parties. Accordingly I answer Point No.1 in the Affirmative.

10. **Point No.2**: For the aforesaid discussion, I proceed to pass the following.

::O R D E R::

IAS' filed by the defendant No.12 Under Order 18 Rule 17 of CPC and U/s 151 of CPC are hereby allowed on cost of Rs.500/- each.

Cost shall be payable to TLSA, Holenarasipura immediately.

Consequently case reopen, DW.7 recalled for cross examination.

Subject to payment of cost, it is hereby directed to defendant No.12 to keep DW.7

for cross examination in next date of hearing without any explanation.

Defendant No.12 counsel also directed to cross examine DW.7 in next date without any explanation. If anybody violates conditions, court will record adverse remark and proceed in accordance with law.

(Dictated to stenographer, directly typed by her to the computer, revised and corrected by me then pronounced in the open court dated this 13th day of November, 2018)

(R.Mahesha)
Civil Judge and J.M.F.C,
Holenarasipura.