

**IN THE COURT OF CIVIL JUDGE AND JMFC, KITTUR.**

PRESENT: **MARUTHI.K.**

**B.A.LL.B.**

Civil Judge and JMFC, Savanur.

**O.S. No. 288/2015**

**Dated, this day of 16<sup>th</sup> day of March 2021**

**Plaintiff** : Akkamahadevi @Akkamma W/o Suresh  
Shirahatti, Age: 43 Years, Occ : Housewife,  
R/o : Ankad kana, Bankapur,  
Tq : Shiggoan, Dist : Haveri.

**V/s**

**Defendants** : Basavaraj S/o Shivappa Kundur ,  
Age : 54 Years, Occ : Agriculture,  
R/o : Nayikerur, Tq : Savanur,  
Dist : Haveri and others.

**Parties to the Application**

**Applicant/Defendant No.1** : Basavaraj S/o Shivappa  
Kundur,

**V/S**

**Opponent/Defendant No.4** : Parvatevva @ Gangavva W/o  
Shivappa Kundur.

**ORDERS ON IA-VI**

The defendant No.1, 5, 6 have filed present application U/Order XVIII Rule 17 R/w Sec.151 of CPC by seeking permission of this court to cross-examine defendant No.4 who is examined as DW-3 by setting aside the order dated : 08.04.2019.

**2.** Along with application the defendant No.1 who is contesting defendant filed affidavit in support of application. In the affidavit he has stated that on the last date of hearing he could not appear before court, as he was suffering from severe fever and cold. Therefore he could not approach his advocate and gave proper instructions so as to cross-examine DW-3. Further it is stated that in order to elicit the truth of matter and to appraise the double standard and conduct of the collusive defendants and in order to enable the court to come at just and fair conclusion on merits, it is just and necessary to recall DW-3 for cross-examination by contesting defendants. Hence, prayed to allow the application.

**3.** On the other hand counsel for defendant No.4 filed objections stating that application filed by defendant No.1 is false, frivolous and not tenable either under law and facts. There is no law as such one of the defendant has to cross-examine the another defendant in same case, in that event present application is not maintainable. The reasons assigned are all false and created one. The present application is filed after laps of many days, when the

suit is fixed for arguments on merits only with an intention to drag the matter unnecessarily. No such order had been passed on 08.04.2019. The plaintiff counsel has cross examined DW-3 fully and completely. Hence, prayed to reject the present application.

4. Heard arguments of learned counsel for defendant No.1, 5 and 6 on present application. In spite of providing sufficient opportunity defendant No.4 has not chosen to canvas oral arguments on present application. Hence, arguments of defendant No.4 is taken as nil. Perused application, affidavit and objections on record.

5. The following points have arisen for my consideration;

#### **POINTS**

1. Whether the defendant No.1 has made out sufficient grounds to allow the IA No.6?
2. What order ?

6. My findings to the above points are as under;

Point No.1 : In the Affirmative

Point No.2 : As per the final order for the following;

#### **REASONS**

7. **Point No.1** :- Plaintiff has filed present suit seeking partition and separate possession of her 1/5th share in all suit

schedule properties. Plaintiff had been examined as PW-1 after closing of plaintiff side. The defendant No.1 examined as DW.1, he has examined supporting witness as DW.2. The defendant No.4 herself examined as DW-3. Now present application has been filed seeking permission to cross-examine DW-3 by the co-defendant.

**8.** Defendant No.4 filed written statement admitting the claim of plaintiff. In turn she has claimed her legitimate share to the extent of 1/5th share in suit schedule properties. Defendant No.1 who is the contesting defendant filed written statement denying entire plaintiff averments. He has taken specific contention in para No.6, 7 and 13 of his written statement that the defendant No.4 in the present suit had filed O.S. No.34/1985 on the file of this court on behalf of present plaintiff, defendant No.1 to 3 and father of present plaintiff by name Shivappa. Present defendant No.1 was arrayed as defendant No.2 in that suit. The said suit was filed in respect of very same suit properties claimed in this suit for partition and separate possession of their 3/5th share in suit properties. The said suit was contested and thereafter it was ended in compromise on 28/01/1986 accordingly among the present suit properties, suit schedule-A serial No.1 property Sy.No.7/5 was allotted to the exclusive share of defendant No.1, that is father of plaintiff and defendant No.1 to 3 by name Shivappa. The schedule-A serial No.2 and 3 properties are allotted to the share of defendant No.1 to 3 excluding plaintiff. The said compromise decree acted upon and names of all the beneficiaries

came to be entered in the revenue records. Thereafter, there was partition in between 4 beneficiaries an extent of 2 acres 35 guntas in R.S.No.63/5 was allotted to the exclusive share of present defendant No.1 and it was evidenced by ME No.1268 dated : 31.07.1997. Thereafter, all the beneficiaries under compromise decree have sold land in RS.No.63/8 measuring 3 acre 29 guntas in favour of defendant No.5 for valuable consideration. In the said family partition the suit house property which was then open site was allotted to the share of present defendant No.1. In an family arrangement defendant No.1 entered his wife's name in respect of suit property.

**9.** It is the version of contesting defendant that, the present defendant No.4 by suppressing previous compromise decree came with present written statement claiming partition in the properties which was already a part and parcel of compromise decree in OS No.34/1985 between present parties. The present contesting defendant No.1 wanted to elicit this fact from DW.3 in her cross-examination. Hence, he prayed to allow present application in order to arrive at just and fair conclusion. During arguments counsel for applicant relied upon judgment reported in *ILR 1997 KAR 1378 between Mohamed Ziaulla Vs. Mrs. Sorgra Begum and another* and canvased argument that, where it is shown that the interest between the defendant inter-se conflict each other, the other defendant has necessarily to be treated as adversary and he is entitle to cross-examine the other defendant or his witnesses.

I have perused the citation relied by counsel for applicant. The Hon'ble High Court of Karnataka at para No.8 & 9 has held that "one defendant might cross-examine another defendant's witness. The same right exists between the respondent and co-respondent. A defendant may cross-examine his co-defendant who gives evidence or any of his co-defendant's witnesses, if his co-defendant's interest is hostile to his own. Where it is shown that the interest between defendants inter-se conflict each other, the other defendant has necessarily to be treated as an adversary and he is certainly entitled to cross-examine the other defendant or his witnesses".

**10.** When applied the above ratio to the present fact of the case on hand the defendant No.4 who was plaintiff in OS No.34/1985 on the file of this court has not stated anything about institution of that suit and compromise entered into between the parties in her written statement. This version of defendant No.4 definitely going to effect the interest of present defendant No.1 in the properties which were allotted to his share in the compromise which was entered into between present plaintiff and defendant No.1 to 4. When the defendant No.4 has claimed partition of her share by suppressing earlier proceedings the co-defendant interest is hostile to his own. When defendant No.1 shown that the interest between the defendant No.1 conflict with each other, the defendant has necessarily be treated as an adversary and he is certainly entitled to cross examine other co-defendants as per Sec.137 of Indian

evidence Act. Therefore the citation relied by counsel for applicant is applicable to the present facts of the case on hand. In turn applicant has made out sufficient grounds to allow the present application and permitting him to cross examine DW-3. Though there was no any order passed on 08.04.2019, it is just and necessary to allow the present application in order to arrive at just and fair conclusion and to elicit the real controversy between parties. As such application filed by defendant No.1 deserves to be allowed. Accordingly, I answer point No.1 **in the Affirmative.**

**11. Point No.2:-** In view of fore going reasons, I proceed to pass the following;

**ORDER**

The IA No.VI filed by the defendant No.1, 5 and 6 under Order XVIII Rule 17 R/w Sec.151 of CPC hereby allowed.

DW-3 is recalled. The defendant No.1, 5 & 6 are hereby permitted to cross-examine DW-3 to the facts narrated in the written statement of defendant No.1.

No order as to cost.

Call on : 09.04.2021

**CJ & JMFC, Savanur.**



(Order pronounced in the open court vide separate)

**ORDER**

The IA No.VI filed by the defendant No.1, 5 and 6 under Order XVIII Rule 17 R/w Sec.151 of CPC hereby allowed.

DW-3 is recalled. The defendant No.1, 5 & 6 are hereby permitted to cross-examine DW-3 to the facts narrated in the written statement of defendant No.1.

No order as to cost.

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**CJ & JMFC, Savanur.**