

KAUP020002422022



**IN THE COURT OF ADDL.SENIOR CIVIL JUDGE AT UDUPI.**

Present: **Sri. P.R. Yogesh**, B.Com., LL.B.,  
Addl. Senior Civil Judge, Udupi.

Dated this the 11<sup>th</sup> day of March, 2024

**O.S.No.20/2022**

***Between:***

Susheela Bai and others ... Plaintiffs

AND

Bharathi Naik and others ... Defendants

***In I.A.No.III***

***Between:***

Suresh Naik ... Applicant/Plaintiff No.3

AND

Bharathi Naik and others ... Opponents/Defendants

(P - Rep. by Sri. H.R.S., Adv.)  
 (D1 to D6 – Rep.by. Sri. A.P.H., Adv.,)

|      |                                                                   |                               |
|------|-------------------------------------------------------------------|-------------------------------|
| i.   | Provision under which the application is filed                    | Sec.94 (e), 151 of C.P.C.     |
| ii.  | Relief sought for                                                 | Discard the evidence of P.W.1 |
| iii. | The date on which the application is filed                        | 03.10.2023                    |
| iv.  | Number of the application                                         | I.A.No.III                    |
| v.   | The date on which the objections are filed by different opponents | 17.11.2023                    |
| vi.  | The date on which the orders were passed on the said application  | 11.03.2024                    |

### **Orders on I.A.No. III**

Plaintiff No.3 filed the I.A.No.III under Sec.151 of C.P.C. and requested to discard the evidence of P.W.1.

Defendant No.3 filed the objection.

2. Heard. Perused the papers. Following points are taken to dispose the application.

1. Whether plaintiff No.3 has made out sufficient reason to allow the application?
2. What order?

3. Above points are answered as under:

Point No.1 : In the affirmative;

Point No.2 : As per the final order

for the following:

### **REASONS**

#### **Point No.1**

4. At the outset plaintiffs instituted this suit against the defendants and requested to declare that, they are entitled for share in the disputed properties. Plaintiff No.3 filed the present application with affidavit. He stated that, plaintiff No.2 was examined as P.W.1. P.W.1 is not in

a condition to stand in the witness box for a long time. P.W.1 has not been keeping well. He requested to discard the evidence of P.W.1 and permitted to proceed the matter through other plaintiffs. Hence, prayed to allow the application.

5. Defendant No.3 contended in the objection that, the application filed by the plaintiff No.3 is not maintainable. Plaintiff No.3 has not authorized by all the plaintiffs to file the present application. Plaintiff No.2 was examined as P.W.1. On 17.07.2023, P.W.1 was partly cross examined. P.W.1 gave so many admissions in his cross – examination. P.W.1 has not been suffering from illness and he is able to stand in the witness box. Evidence of P.W.1 can be recorded through other modes. P.W.1 is going to Cooli. Hence, prayed to reject the application.

6. Plaintiff No.2 was examined as P.W.1 is an admitted fact. P.W.1 undergone for part cross – examination is also admitted fact.

7. The contention of defendant No.3 is, plaintiff No.3 is not an authorized by all the plaintiffs. Plaintiff No.3 is not having right to file the application on behalf of the plaintiffs. This suit is filed by the plaintiffs by claiming share. All the plaintiffs are having same status. Plaintiff No.3 did not file the suit on the capacity of the representative of other plaintiffs. This suit is not filed as representative suit. Such being the case, it is not necessary to get permission from all the plaintiffs.

8. Defendant No.3 contended that, P.W.1 gave so many admissions in his cross – examination. On perusal of the deposition of P.W.1 , P.W.1 answered two to three question only in the cross – examination. P.W.1 did not answer the next question. On that occasion, P.W.1

requested to grant time to face the cross – examination for his ill health. Such being the case, the contention taken by the defendant No.3 is not accepted one.

9. The contention of plaintiff No.3 is, P.W.1 has been suffering from illness and he is not in a condition to stand for long time. The medical certificate submitted by the plaintiff No.3 did not disclose that, from which ailment, plaintiff No.2 has been suffering. What is the health status of plaintiff No.2. For that, the medical certificate and statement of plaintiff No.3 with respect to health condition of plaintiff No.2 are not acceptable one.

10. Plaintiff No.3 requested to discard the evidence of P.W.1. Defendant No.3 contended that, there is no provision in C.P.C. to discard the evidence. On perusal of the papers, on 29.08.2022 plaintiff No.2 lead evidence as P.W.1. On 17.07.2023 P.W.1 was cross – examined in part. After that, P.W.1 has not been appearing before the

court to face the cross – examination. For that reason, the matter has been keeping in the same stage. If the same stage is continued no purpose will be served.

**In CRP.(PD) No. 2182/2019 Balaji V/s. Saravanasam, The Hon'ble High Court of Madras** held that, “ *The above conduct of the Plaintiff, after having filed the proof affidavit and marked the documents, remaining absent for cross examination will amount to denial of opportunity to the opponent to disprove the claim and render the evidence as complete one. As held by this Court in Rajendran's case as well as Metilda's (supra) incomplete evidence of a witness who has failed to subject himself for cross examination shall not be retained on record. Even though there is no provision to eschew the evidence, the evidence of the Plaintiff in the above case, not tested by cross examination on account of his non appearance, does not even have the probative value, for, the incompleteness is*

*attributable to the Plaintiff himself. The further contention of the respondent that the evidence can be used at the later stage of the proceeding as per Sec.33 of Evidence Act is also not sustainable for the reason the evidence herein is not the complete evidence in the eyes of law. As contended by the learned Senior Counsel for the petitioner, if a witness is allowed to avoid the witness box for cross examination after letting in evidence in chief examination his evidence cannot be retained on record and does not merit consideration. If such an evidence of a defaulting, delaying, clever or crooked <http://www.judis.nic.in> C.R.P.(PD)No.2182 of 2019 and cunning witnesses is taken for consideration, it will run against the spirit of adversarial system of law. Thus, the plaintiff in the instant case, who could not appear before re-opening and recalling his evidence. The conduct of his clearly shows that he was and is not very keen in doing so. In such an event the incomplete evidence of the Plaintiff*



*shall not remain on record and it shall be eschewed. In that view of the matter the order of the court below in dismissing the petition for <http://www.judis.nic.in> C.R.P.(PD)No.2182 of 2019 eschewing the evidence is not sustainable”.*

*“ In view of the discussions made above the order passed in I.A.No.155 of 2019 in O.S.No.616 of 2013 dated 27.03.2019 on the file of Additional District Munsif Court, Alandur stands set aside. The incomplete evidence of P.W.1 cannot remain on record and accordingly eschewed. In the result, the Civil Revision Petition is allowed. No costs. Connected miscellaneous petition is closed”. In the above judgment the Hon'ble High Court of Madras held that, if the witness failed to appear before the court to lead evidence then the earlier evidence is to be eschewed. In the case on hand also P.W.1 has not been appearing before the court to face the cross – examination. Such being the circumstance in the opinion of this court eschewed the*

evidence of P.W.1 is necessary. For these reasons, in the opinion of court plaintiff No.3 has made out sufficient ground to allow the application. As such answered, **point No.1 in the affirmative.**

**Point No.2:**

11. In view of the above discussion, pass the following :

**ORDER**

I.A.No.III filed by the plaintiff No.3 under Sec.151 of C.P.C. is allowed on cost of Rs.500/-.

Consequently eschewed the evidence of P.W.1.

(Dictated to Stenographer, transcribed by her, corrected and then pronounced by me in open court on this the 11<sup>th</sup> Day of March, 2024)

**(P.R. Yogesh)**

Addl. Senior Civil Judge and A.C.J.M.,  
Udupi.