

ORDER BELOW APPLICATION VIDE EXH.286

(Dastagir Vs. Mohan and ors)

1. The present Application is filed by the LR's of defendant no.1 to cancel the affidavit examination in chief of defendant no.3 which is filed in the capacity of plaintiffs witness.

2. It is the contention of defendants that, defendant no.3 Pakija Sameer Mulla has filed her affidavit examination in chief as plaintiffs witness. The contents in the affidavit are false and denied. From 19/2/1996 ie from the date of sale deed father of defendant Mohan Jagdale was having possession over the suit property. Defendant no.3 is not having any concern in the suit property in view of Muslim Law. The evidence of defendant no.3 is filed to fill up lacuna. In view of CPC it is not in the hands of party to decide whose evidence is to be filed but it is within the discretion of the Court to consider the evidence. Defendant no.3 cannot filed evidence as plaintiff witness. Hence, prayed to cancel her affidavit examination in chief.

3. The plaintiff has filed their say below Exh.289 and resisted the application. It is contended that, the plaintiff is leading evidence as per issues are framed. Plaintiffs have every right to examine the witnesses. Defendant no.3 has appeared and filed his written statement and has denied the sale deed of defendant no.1. Defendant no.3 is real sister of plaintiff no.3. Defendant no.1 has not pleaded that plaintiffs and defendant no.3 are having no right in the suit properties in view of order 16 rule 14 and order 16 rule 21 plaintiff can examine defendant as witness. Defendant cannot restrained to lead evidence. Hence, prayed to reject the application.

4. Heard both the Advocates. Perused the pleadings and documents on record. It is argued by the defendant that, plaintiff is trying to fill up lacuna and claiming right in the suit property as legal heir. It is further argued that there is not concept of Joint Hindu Family and ancestral property under Muslim Law. The original owner has sold suit property to defendant

no.1. the evidence of defendant no.3 could not be consider as plaintiffs witness. Hence prayed to reject the evidence. On the other hands plaintiffs have argued under order 16 rule 14 and order 16 rule 21 plaintiff can examine defendant as witness. Hence prayed to reject the application.

5. On perusal of record it can be seen that, defendant no.3 has filed his written statement which is consenting to the plaintiff. After examining plaintiff himself he has filed evidence of defendant no.3. It is pertinent to note here that, the provisions of order 16(14) and (21) are in regard of witnesses who are summoned by the Court. In the present case in hand defendant no.3 has filed her examination in chief on affidavit. So the provisions are apparently are not applicable to the present case in hand. It is settled principle of law that, in case defendant is in collusion with plaintiff, the Courts grant an opportunity to the collusive defendant first to cross examine plaintiffs witnesses and thereafter to the contesting defendant. In the present case in hand defendant no.3 is stating the same facts which are stated by the plaintiff. Certainly LR's of defendant no.1 are having opportunity to cross-examine the witness at length and put up their defence by way of cross-examination.

6. If it would be a case where after completing plaintiffs evidence defendant no.3 have filed her evidence as in the capacity of defendant no.3, certainly, defendant no.1 would have cross examined her. At present defendant no.3 deposing on behalf of plaintiff as a witness and in both the cases defendant would get an opportunity to cross examine the witness. As defendant would get an opportunity to cross examine question of filing up lacuna will certainly not arise. Moreover, there is no bar to the parties not to lead evidence of adverse party as witness. Moreover, there is no any provision to cancel the affidavit examination in chief. It is open to the party to lead evidence of any person in regard of fact in issue or evidence of person which is relevant to fact in issues. Hence I do not find any substance or

merits in the application filed by defendant. Hence, I pass the following Order.

:: ORDER ::

1. The application vide Exh.286 stands rejected.
2. Cost in Cause.

Date: 28/08/2024.

(R.B.Kulkarni)
Jt. Civil Judge Jr. Dn., Atpadi.