

Order Below Exh.60 In R.C.S NO.41/2013**CNR NO. MHSN 14000158- 2013**

By virtue of this application, defendant No. 1 is hereby seeking to discard evidence of witness Shamrao Dnyanu Chougule, examining on behalf of the plaintiffs by way of affidavit (Exh.59).

2. It is contention of defendant No.1 that the plaintiffs have instituted this suit for partition. In the present matter, cross-examination of plaintiff is completed and thereafter, plaintiff has filed evidence affidavit of defendant No.1. According to defendant No.1, already ex-parte order is passed against defendant No.9 on 02/09/2013. Further, the plaintiffs ought to have file list of witnesses, so defendant No. 1 could conduct cross-examination of plaintiff and defendant No.9 at the same time. The plaintiffs have filed affidavit of defendant No.9 only with the intention to vanish admissions given by plaintiff No.1 in his cross-examination. Defendant No.1 has opportunity to file written statement and lead his evidence. Further, contents of plaintiff No.1 affidavit and defendant No.9 affidavit are same. Defendant No.1 can admit the plaintiff's suit in his written statement. Therefore, plaintiffs have no opportunity to examine defendant No.9, hence, evidence of defendant No.9 may kindly be discard.

3. *Per contra*, the plaintiffs by filing their say (Exh.62) denied all the contentions of the plaintiffs. According to them, merely defendant No.9 has not filed written statement, there is no bar under the law to examine defendant on behalf of plaintiff,. Further, there is no bar under Indian Evidence Act to discard evidence of plaintiffs, merely they have not filed witnesses list. The plaintiffs have right to examine witnesses though list of witnesses is not filed. Hence, prayed to reject this application.

4. Heard both the parties at length. It is submitted by the learned Adv. Smt. Pednekar for defendant No.1 that the plaintiffs have duty to file witnesses list. Further, she submitted that contents of affidavits of plaintiff No.1 and defendant No.9 are same. Further more, she submitted that the plaintiffs have filed affidavit of defendant No.9 only to vanish admissions of plaintiff No.1 given in cross-examination. On this count, she relied on **Pirgonda Hongonda Vs. Vishwanath Ganesh AIR 1956 Bom 251**. *Per contra*, it is urged by the learned Adv. Shri. Patil for the plaintiffs that the present application is not maintainable, the plaintiffs have right to examine any witnesses.

5. In the background of these controversy, lets have turn towards matter in hand. In the present matter plaintiff No. 1 has been examined by way of affidavit and thereafter, they have lead evidence of defendant No.9 by way of affidavit (Exh.59). According to defendant No.1, the plaintiffs have no right to examine defendant No.1 without filing list of witnesses. According to Order. 16 rule 1 of the CPC, after settlement of issues the parties shall present in Court a list of witnesses on whom they propose to call either to give evidence or to produce documents. In the present matter, the plaintiffs have not presented their list of witnesses. Order 16 rule 1 is merely prescribes procedure of trial. Though, the plaintiffs have not presented their list of witnesses, their right to examine witnesses cannot be barred. Provision under Order 16 is just a procedural aspect. Order 16 rule 1-A provides that subject to the provision of sub rule 3 of rule 1, any party to the suit may, without applying for summons under rule 1 bring any witness to give evidence or to produce documents.

6. These two rules read together clearly indicate that it is open to a

party to summon the witnesses to the Court or may, without applying for summons, bring the witnesses to give evidence or to produce documents. Sub-rule 3 of rule 1 provides that although the name of a witness may not find place in the list of witnesses filed by party in the Court, it may allow the party to produce a witness though he may not have been summoned through the Court. Rule 1-A which was introduced by the CPC has placed the matter beyond doubt by providing in clear and specific terms that any party to the suit may bring any witnesses to give evidence or to produce documents. Merely, the plaintiffs have not filed their list of witnesses, their right to examine witnesses would not be barred.

7. So far as, examination of defendant No.9 by the plaintiffs is concerned, it is contention of defendant No.1 that the plaintiffs may kindly be debarred from examining defendant No.9 as a witness on their behalf, as no written statement is on record of defendant No.9. No provision could be brought to notice on behalf of any of the parties to show that a party is debarred from examining its adversary as a witness on his behalf. A plaintiff can examine any witness he so like, the witness may be stranger, may be a man of his own party or may be a defendant. Gone through Pirgonda(Supra), in this matter the plaintiff instituted suit for damages and applied to issue summons to the defendants as his witness. Therefore, the Hon'ble Bombay High Court observed in para No.2 that *“Normally a party to the suit is expected to step in to the witness box in support of his own case and if a party does not appear in the witness box it would be open to the trial Court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open his opponent to compel his presence by the issue of a witness summons.”*

8. As far as this valuable case law and present matter is concerned,

in Pirgonda(Supra) plaintiff has not step in to witness box, therefore it is barred to the plaintiff for compel his opponent to present in Court by the issue of witness summons. On the other hand, plaintiff No.1 has examined himself and thereafter filed affidavit of defendant No.9. Here, defendant No.9 himself wants to take part in the proceeding. Further, coming to the towards contents of the affidavits, it is a matter of appreciation. Any witness can state any fact which is in his knowledge. Therefore, if a plaintiffs want to examine a defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that defendant No.9 has neither appeared nor filed written statement or list of witnesses is not filed. Therefore, I am inclined to allow this application and pass the following order.

ORDER

The application at Exh. 60 is rejected.

Shirala

Date: 25/10/2018

**Sd/-
(B.R.Patil)**

Jt. Civil Judge, J.D.,Shirala