

CNR No.MHST-0500-0444-2007

**IN THE COURT OF CIVIL JUDGE SENIOR DIVISION, KARAD****ORDER BELOW EXH.157 IN R.C.S. NO. 83 OF 2007**

Shri. Mahesh Krushnrao Nikam	...Plaintiff.
<i>Versus</i>	
1. Smt. Akkatai Sopan Hadgire & Ors.	...Defendants.

Advocate Shri. S. M. Salunkhe for the plaintiff.

AGP Shri. N. B. Bamane for defendant Nos.5 and 6.

Coram : S. B. Todkar,  
C.J.S.D. Karad.  
Date : 07/08/2025

**ORAL ORDER :**

This is an application filed by the defendant Nos.5 and 6 to discard the affidavit filed by plaintiff on record on the grounds specifically mentioned in the application.

2. Perused the application and detailed say given by plaintiff's advocate at Exh.159. Heard Ld. advocate for both the sides.

3. The Ld. advocate for defendants placed his reliance on the following decisions.

a) **Gulshan Ahuja Vs. Shiv Shakti International**, 2019 (1) Law Herald 753, wherein it is held by Hon'ble Punjab and Haryana High Court that,

“In absence of rebuttal issue, the plaintiff cannot be permitted to lead the evidence in rebuttal despite the fact that he had reserved the right to rebut the evidence.”

b) **Charan Indra Singh alias Singh Charan Indra Vs. Balawant Singh and Ors.**, 2017 (3) Law Herald 2600, wherein it is held by Hon'ble Punjab and Haryana High Court that,

“In absence of rebuttal issue, the party cannot be permitted to lead the evidence in rebuttal to take the assistance of the Court.”

c) **K. K. Velusamy Vs. N. Palanisamy**, 2011 (4) JT 38 wherein it is held by Hon'ble Apex Court that,

“Section 151 is not a substantive provision which creates or confers any power to jurisdiction on Courts. It just, spells out the discretion of Court. Provisions of the Code are not exhaustive. Section 151 is an attempt to cover those peculiar procedural aspects, which have not been covered, otherwise in the Code – There is no specific provision in the Code enabling parties to reopen evidence for purposes of further examination-in-chief or cross-examination.”

4. On the other hand, the Ld. advocate for plaintiff placed his reliance on the decisions of

a) **Smt. Kalyani Borkotaky Vs. Kamakhya Borthakur & Anr.**, AIR 2012 Gauhati 46, wherein it is mentioned in paragraph Nos.13 and 14 that,

“13. It is well settled law that the party, on whom the burden to prove an issue is given, has to prove the issue. It has to first lead evidence to prove the issue and the other party contesting the said issue leads evidence to discredit or disprove the evidence of the party on whom the onus to prove the issue lay. The party on whom the onus was initially laid to prove the issue cannot be permitted to lead rebuttal evidence as a matter of right. However, rebuttal evidence by the Plaintiff cannot be denied on those issues, which are required to be proved by the Defendant. Accordingly, in a counter claim, where the onus to prove the issues are on the defendant by adducing evidence, the plaintiff would have a right to adduce rebuttal evidence.”

“14. The right of rebuttal is provided under Order 8 Rule 3 CPC and the Order does not specify that a choice or option is to be exercised by the plaintiff after its evidence is over. This right has been given irrespective of exercise of the option at that stage. It is only after defendant's evidence in the counter claim the plaintiff can decide whether there is necessity of leading evidence in rebuttal or not. Therefore, at that stage also, plaintiff can exercise his right of leading evidence in rebuttal.”

b) **Bhagirath Shankar Somani And Smt.... Vs. Rameshchandra Daulal Soni And....** 2007(4) BomCR 87, wherein Hon'ble Bombay High Court, in paragraph No.16 it is mentioned that,

“...Thus, the consistent view taken by this Court is that a direction against the Defendant to lead evidence before the Plaintiff leads his evidence cannot be issued under sub rule 1 of Order XVIII of the said Code. The scheme of Rule 1 appears to be that as a normal Rule it is the privilege of the Plaintiff to lead his evidence first. However, it enables the Defendant to exercise the right in the contingency mentioned in the Rule. The Plaintiff in a given case can make a statement before the trial Court stating that as the case is covered by exception in Rule 1 of Order XVIII of the said Code, he is reserving his right to lead evidence in rebuttal after the Defendant leads his evidence. The said option can be exercised in mofussil courts by the Plaintiff by filing a pursis to that effect. In a Court in which there is no practice of filing pursis, the Plaintiff can make oral statement to that effect which will be normally recorded in the roznama of the case. After the Plaintiff exercises option it is for the Defendant to decide whether he wants to lead the evidence. If the Defendant decides to lead the evidence, the Plaintiff can always lead evidence in rebuttal.”

5. As per the contents of present application, the plaintiff has filed suit. The defendants have filed counter-claim. The Court has framed common issues. The parties have to lead common evidence. The hearing of the suit and counter-claim is jointly going on. Therefore, it is expected from both parties to produce their evidence at once. The plaintiff has adduced his evidence in suit alongwith his witnesses and completed his side of evidence. The evidence side plaintiff is closed. At present the evidence side of defendant is going on. After completion of his evidence side plaintiff had not obtained permission of Court for adduce the evidence and directly filed his new affidavit of evidence in the counter-claim for the purpose of to fill up lacuna occurred in his evidence. Therefore, it cannot be considered as evidence as plaintiff is getting double opportunity of evidence. As per the Code of Civil Procedure once side of evidence of party is closed that party cannot

reopen his side of evidence again without obtaining permission of the Court. As per the Code of Civil Procedure, the party of the counter-claim can file evidence once only. If he has filed new evidence thereafter, on jointly framed issues that evidence is prohibited. Plaintiff has filed his new affidavit of evidence only to fill up lacuna's occurred in his evidence therefore, it is violation of law. Hence, the present application.

6. The Ld. advocate for plaintiff filed his detailed say at Exh.159 and resisted the application on various grounds including application is not maintainable. Application is abuse of process of law. Court has framed issues at Exh.48 and casted burden to prove issue Nos.4 and 5 on the defendants. The plaintiff has filed pursis at Exh.98 on record stating that, if he needs it necessary he will file his rebuttal evidence after the evidence of defendants. After the evidence of defendants plaintiff feels it necessary to give his rebuttal evidence therefore, he has filed his affidavit of examination in chief at Exh.132. As the plaintiff already filed conditional evidence closed pursis at Exh.132 reserving his right to file new rebuttal evidence if require, therefore it is not necessary to obtain the permission of Court for filing additional evidence of plaintiff on record. The defendants have filed present application at belated stage without having provisions in law. He finally prayed for rejection of application with costs.

7. Order 18 Rule 3 of the Code of Civil Procedure (CPC), 1908, deals with the right to begin and the order of producing evidence, particularly when multiple issues with different burdens of proof are involved in a case. It grants the party who begins the trial (the "party beginning") the discretion to either present their evidence on all issues at the outset or to reserve some evidence to be presented later, after the other party has presented their evidence. This allows the party

beginning to tailor their presentation strategically, potentially rebutting the opposing party's evidence.

8. I have gone through the record, it appears from record that, plaintiff has filed suit against the defendants for perpetual injunction. After service of writ of summons defendants appeared and filed their counter-claim at Exh.55 against the original plaintiffs for the declaration of deed of conveyance dt.04/07/2006 and agreement to sale dt.04/07/2006 are not binding on them and filed their written statement of the plaint at Exh.57. Plaintiff has filed his written statement to the counter-claim at Exh.67. Court has framed issues at Exh.58. Court has casted duty to prove issue No.1 and 2 on the plaintiff and issue Nos.3 and 4 on the defendants. Thereafter plaintiff has filed affidavit of examination in chief at P.W.1 Mahesh at Exh.60, his cross-examination is completed. Thereafter he has examined P.W.2 Mandar at Exh.80, his cross-examination is completed. Plaintiff has filed evidence closed pursis at Exh.97 and has also filed one another pursis at Exh.98 reserving his right to file rebuttal evidence after the completion of defendants side evidence. Thereafter, on behalf of defendants Nos.1 to 4 have filed affidavit of D.W.1 Gajanan at Exh.100, his cross-examination is completed. Thereafter, defendants have examined D.W.2 Sambhaji Nikam at Exh.77, his cross-examination is completed and thereafter they have filed applications for issuance of witness summonses, which were allowed by the Court time to time. Thereafter, the plaintiff has filed affidavit of examination in chief of Jaywant Thorat at Exh.132 as P.W.2 On 24/10/2024. Thereafter, in spite of getting opportunities to the defendants they failed to take cross-examination of the plaintiff's witness therefore, Court has passed no cross order on 06/01/2025. Thereafter, on behalf of plaintiff an application below Exh.163 filed for temporary injunction against the defendants on

02/03/2025, which is rejected by this Court on 02/05/2025. Prior to that defendants have file application below Exh.147 for setting aside no cross order passed against them at Exh.132 on 06/01/2025, which is allowed by this Court on 02/05/2025. Thereafter, when the matter was pending for cross-examination of the P.W.2 at Exh.132 at that time, defendants have filed adjournment application at Exh.156 which is granted by this Court as a last chance subject to cost of Rs.750/- payable to the plaintiff's witness. Thereafter, instead of conducting cross-examination of the plaintiff's witness which is pending since 24/10/2024 defendant's side neither complying order passed below Exh.156 nor conducting cross-examination of the plaintiff's witness filed present application to discard the evidence of plaintiff's witness evidence.

9. It is admitted fact on record that, by filing pursis below Exh.98 plaintiff has already reserved his right to adduce rebuttal evidence on record after the evidence of defendants' side. Initially plaintiff has filed his affidavit of examination in chief on record for the purpose of proving his case on the issues on which burden is cast on him. Thereafter, defendants have examined their two witnesses. Number of chances taken by the defendants for the issuance of witness summonses. But they are neither closing their evidence nor conducting the cross-examination of their witnesses. As per Order 8 Rule 3 of Code of Civil Procedure, 1908, the "party beginning" can either : Present their evidence on all issues at the start of the trial. Present evidence on some issues initially and reserve evidence on other issues to be presented later, as a rebuttal to the opposing party's evidence. If the "party beginning" chooses to reserve some evidence, they can present it after the opposing party has presented their evidence. The opposing party then has the right to reply specifically on the evidence presented by the

"party beginning" in rebuttal. After the opposing party's reply, the "party beginning" is entitled to a general reply on the whole case. In the present matter in hand, plaintiff has already reserved his right to adduce rebuttal evidence on record after the evidence of defendants' side. Therefore, I do not find any substance in the present application and argument of the Ld. advocate for the defendants. Moreover, there is no specific provision in the Code of Civil Procedure or Evidence Act to discard or to reject the already recorded evidence of the parties. Present application is devoid of merit therefore it is liable to be rejected with costs. Hence, I proceed to pass following order.

**ORDER**

1. Application below Exh.157 is rejected with costs.
2. Defendants are hereby directed if they want to take the cross-examination of P.W. 2, comply the order passed by Court at Exh.156. Otherwise, matter will be kept for further evidence of the plaintiff if any.

Date : 07/08/2025.

[S. B. Todkar]  
Civil Judge, Senior Division, Karad.