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OSA.No.187 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.10.2024

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE DR. JUSTICE A.D.MARIA CLETE

OSA.Nos.187 of 2024
and CMP.Nos.20346 & 22377 of 2024

1. S.Nirmala
2. Sangeetha
3. Sujatha
4. Indira

... Appellants

Vs.

1. Shanthi Harikrishnan
2. K. Kumar
3. K. Gopinath
4. K. Suresh
5. Nithyakalyani Raja
6. Banu Raj
7. P. Ponni
8. J. Sriram
9. J. Kumar
10. J. Padmavathi
11. J. Devatha
12. Uma Ramanan

... Respondents



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Prayer : Original Side Appeal filed under Order 36 Rule 1 of Original Side Rules read with Clause 15 of Letters Patent against the order and decretal order passed by the learned single Judge in A.No.1912 of 2024 in C.S.No.252 of 1996 dated 26.07.2024

For Appellants : Mr.R.Thiagarajan

For Respondents : Mr.C.Jagadish

JUDGMENT

[Judgment of the Court was delivered by DR.A.D.MARIA CLETE, J.,]

This appeal is preferred against the order dated 26.07.2024 passed in A.No.1912 of 2024 in C.S.No.252 of 1996 by the learned single Judge refusing to eschew the evidence of cross examination of DW1 by the 9th defendant in the suit.

2. The original plaintiff filed suit C.S.No.252 of 1996 for partition and mesne profits in respect of the properties left by E.K.Pattabirama Reddiar paternal grandfather of the plaintiff and great grandfather of the original 1st

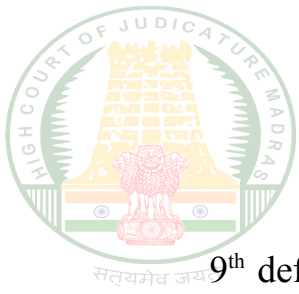


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and 2nd defendants. The first defendant is the plaintiff's deceased brother's son and 2nd defendant is the plaintiff's deceased sister's daughter. After the demise of the original plaintiff and defendants, their legal heirs are brought on record.

3. The appellants are arrayed as defendants 3, 5 to 7 in C.S.No.252 of 1996. These appellants are the legal heirs of the deceased 1st defendant. In the suit, after the completion of the examination of the plaintiff-side witnesses, the 10th defendant was examined as DW1. He was cross-examined by the learned counsel for the appellants at first, and after that DW1 was cross-examined by the learned counsel for the 9th defendant.

4. The grievance of the appellant is that witness DW1 was cross-examined by co-defendant 9th defendant, which goes against the rule of priority in cross-examining witnesses and therefore the cross examination of DW1 by the 9th defendant should be eschewed. They argue that the 9th defendant is aligning with the plaintiff and hence he is not the contesting defendant. The appellants contend that the cross-examination of DW1 by the



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9th defendant has watered down their cross-examination of DW1. However, the 9th defendant denies the contention of the appellants that she is sailing with the plaintiff and asserts that she is independently contesting the case against the plaintiff, not aligning with them as alleged by the appellants.

5. Now the question is whether cross examination of DW1 by the 9th defendant is liable to be eschewed.

6. The appellants did not raise the issue of order of priority in the cross examination of DW1 either before the commencement of the cross examination by them of DW1 or before the cross examination of DW1 by the 9th defendant. The appellants, without raising any questions regarding priority, first cross examined DW1. If they had requested the 9th defendant to begin the cross examination before they cross examined the witness DW1, it could have been resolved at that time. Instead, the appellants remained silent and fully cross examined the witness DW1. Subsequently the 9th defendant was also allowed to cross examine DW1. After the 9th defendant completed the cross examination of DW1, the appellants then preferred an application



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to eschew the cross examination done by the 9th defendant.

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7. The appellants' contention to eschew the evidence is not supported by any provision in the Evidence Act 1872, in the current Bharatiya Sakshya Adhiniyam 2023 i.e., Section 142 and 143 of BSA 2023 or the Civil Procedure Code 1908. The provisions of law referred to by the appellant's counsel, Sections 137 and 138 of the Evidence Act 1872, deal with the order of examination of witnesses and do not contemplate the eschew recorded evidence. While the Court will consider the evidentiary value or probative value of such evidence, the fact that the 9th defendant cross-examined DW1 after the appellant's cross examination is not a valid reason to eschew the already recorded evidence.

8. The appellant cited the case *Achyuntana Pitchaiah Sarma vs Gorantla Chinna Veerayya and others AIR 1961 AP 420*, which discusses the Court's power to order any party, witness, or person in the Court to leave if their presence may influence or embarrass any witnesses. It was observed in the citation that the Court must consider whether the request to exclude



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some one from the Court is well-founded and also consider objections from other party before deciding in the interest of justice. In our case, the 10th defendant was examined as DW1 on 27.02.2023 and cross-examined by the appellant/D3,5to7 on various dates from 13.03.2023 to 10.01.2024. DW1 was then cross examined by the 9th defendant on 05.02.2024. After these examinations, the appellants filed A.No.1912 of 2024 to eschew the cross examination of DW1 by the 9th defendant. It is clear from these facts that the appellants did not request the Court to have other parties to the suit cross examine DW1 before the appellants did so. The appellants did not raise any objections or request when the 9th defendant cross examined DW1 on 05.02.2024. The eschew application was filed after the completion of the cross examination of DW1 by the 9th defendant.

9. The appellants argue that there was a disparity in the cross examination procedure for the plaintiff's witness (PW1) and the defendant's witness (DW1). PW1 was indeed cross-examined through an Advocate Commissioner, the 9th defendant went first, followed by the appellants. However, this procedure was not followed for DW1. The report of the



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Advocate Commissioner makes it clear that the appellants have raised the point of priority before the Advocate Commissioner, and the 9th defendant's counsel agreed to cross-examine PW1 first before the cross-examination of DW1. However, they did not raise the same issue or request before the Court during the cross-examination of DW1. The appellants participated in the proceedings without objection and only raised the issue later, which is not permissible. The case law cited by the learned counsel for the appellants does not support their position.

10. The appellant side is relying on the Gujarat High Court Judgement *Hussens Hasanall Pulawala Vs Sabbirbhai Hasanali Pulavwala and others MANU/GJ/0115/1981*. This case involves the administration of the estate of the deceased individual. The sole plaintiff arrayed his stepbrother and sisters as D1 to D3, his true sisters as D4 and D5, and another defendant as D6. Defendants D1 to D3 and D6 filed written statements contesting the suit, while the defendants D4 and D5 filed written statements accepting the plaint averments and supporting the prayer made in the plaint. During the trial, the plaintiff (PW1) was examined in chief and cross-examined by the



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learned counsel for the defendants D2 and D3. Subsequently, the learned counsel for the defendants D2 and D3 with the leave of the Court left the Court to offer his prayer. In their absence, the learned counsel for the defendants D4 and D5 cross-examined PW1. When the learned counsel for D2 and D3 returned to the Court, they applied to expunge the cross-examination conducted by the learned counsel for D4 and D5. The trial Court allowed the application, accepting the plea of D2 and D3 that since D4 and D5 accepted the plaintiff's case, they are not adverse parties and as such not entitled to cross examine PW1. This decision was upheld by the Gujarat High Court. However, the citation does not apply to the current case because the appellants did not claim that D9's counsel cross examined DW1 in the absence of the appellants. Further on the 9th defendant's side, it was stated that she did not support the case of the plaintiff instead she also opposed the entitlement of the plaintiff's right to claim partition in the ancestral property since the plaintiff got married before the advent of Section 29A of the Hindu Succession Act 1956 introduced by the Tamil Nadu Government in the year 1989 and also claims rights/shares in the suit ancestral properties based on deemed partition as provided in Explanation 1 to Section 6 to Hindu



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Succession Act 1956 as before the 2005 Amendment since her father Chakrapani died in the year 1979. The appellants claim that E.K.Pattabirama Reddiar left a will dated 05.03.1982 and probate proceedings initiated by the deceased 1st defendant are still pending. The case of the deceased plaintiff and deceased 2nd defendant and their successors is that the said E.K.Pattabirama Reddiar died interstate. The 9th defendant also filed a separate suit for partition in C.S.No.476 of 2008 concerning properties left by E.K.Pattabirama Reddiar. These factors show that the 9th defendant is not sailing defendant with the plaintiff. Therefore, the facts of the case are different, and this citation does not apply to the current facts and circumstances.

11. The appellant side is relying on the case of ***Sudam Sahoo Vs District Judge, Cuttack and others (MANU/OR/0008/2016)***. In this case, the third defendant was examined in chief as DW1. The trial Court permitted the co-defendant i.e., the 5th defendant, who has no adverse interest to DW1 to cross examine DW1. In this situation, the plaintiff filed an application to debar the 5th defendant from cross examining DW1. The



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trial Court passed an order permitting the 5th defendant to examine the DW1 in chief and converted the already recorded cross examination as chief examination. Aggrieved by the order of the trial Court, the plaintiff preferred a Revision. The High Court, after referring to Sections 137 and 138 of the Evidence Act 1872, held that the 5th defendant, whose interest is not adverse to the person examined as DW1, has no right to either cross- examine the witness or re-examine the witness. The other citations relied on by the appellants are (i) *State of West Bengal Vs Smt.Ram Devi and others* 2002 SCC Online Cal 317: AIR 2002 Cal 235. (ii) *Ennen Castings Pvt. Ltd and Others Vs M.M.Sundaresh and others* MANU/KA/0081/2003. (iii) *Smt.Saroj Bala Vs Smt.Dhanpati Devi and others* AIR 2007 Delhi 105. (iv) *K.Jothi and others Vs D.Prema and others* MANU/TN/1989/2009 (v) *The Divisional Manager, The United India Insurance Co.Ltd Vs Premavathi and others* MANU/TN/6091/2018. These cases do not relate to the eschewing of recorded evidence from witnesses. Instead, they address the sequence of examination of witnesses and the rights of the adverse party to cross examine the witness, even if they are arrayed as co-defendants. They also discuss the disentitlement of proforma defendants who support the plaintiff

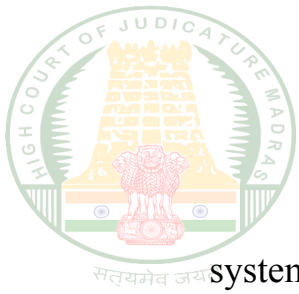


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where the interests of defendants are not adverse to the interests co-defendants. This is because there is no provision in the Evidence Act for a friendly cross-examination. These citations are also not relevant for deciding the issues involved in this appeal.

12. In the case of *D.F.Philips Vs Damayanthi Kailasam and others (2009 MLJ 6 at 677)*, the Madras High Court already held that there is no provision for eschewing the evidence that has been recorded on oath in court; instead of eschewing the evidence, the Court may consider the evidence at the appropriate stage of the case.

13. In this scenario, expunging the cross examination evidence of DW1 is more harmful than retaining it on record, and it should be considered for its admissibility and probative value at the appropriate stage of the trial. The law regarding eschewing evidence is closely tied to and entrenched in the principles aimed at ensuring fair trials and justice. Eschewing evidence in law is not only a procedural misstep but can also have profound implications for justice, fairness, and the integrity of the legal



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system and a compromise to the court's data integrity too. Justice is served through careful consideration of all relevant evidence.

14. This Court concludes that, as provided under Section 138 of the Evidence Act 1872, (Bharatiya Sakshya Adhinyam 2023 i.e., Sections 142 and 143 of BSA 2023):

- (i) Only an adverse party is entitled to cross-examine a witness.
- (ii) A person whose interests are not adverse to the witness is not entitled to conduct a formal or friendly cross-examination.
- (iii) A party with an interest adverse to the witness is entitled to cross-examine the witness, regardless of the array of parties involved; for example, a defendant can cross-examine co-defendants if their interests are adverse to the witness's testimony.
- (iv) If parties' interests are adverse in different aspects, the party whose interest is adverse in a specific aspect has priority in cross-examining the witness before the more heavily contesting party proceeds with the cross-examination of the witness.
- (v) Any objections regarding the priority of cross-examination of witness



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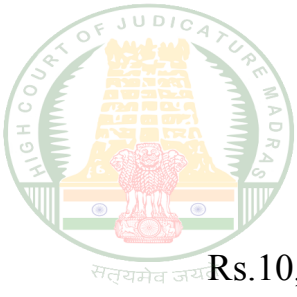
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and claims that a party should be barred from cross-examining the witness due to non-adverse interests must be raised before evidence is recorded, and the court should decide these issues immediately.

(vi) If a witness has been cross-examined under oath and an objection arises later concerning the interest of the party who cross-examined the witness, questioning its adverseness and the priority of cross-examination, the previously recorded evidence cannot be eschewed. However, the court should assess the probative value of such evidence in the final evaluation of the case.

In the facts of the case and stated position of law there is no substance or reason to interfere with the order of the learned single Judge in A.No.1912 of 2024 in C.S.No.252 of 1996 dated 26.07.2024. The suit is filed in 1996 and has reached the stage of trial after 24 years. This is a suit for partition. The learned counsel appearing for appellants has not even pointed out any serious prejudice. Hence this application, filed without bonafides to protract the proceedings is liable to be dismissed with costs.

15. In the result, the captioned OSA is dismissed with cost of



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Rs.10,000/- (Rupees Ten Thousand Only) payable to the Tamil Nadu State Legal Service Authority, High Court, Chennai. Consequently, connected miscellaneous petitions are also closed.

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[S.S.S.R., J.] [A.D.M.C., J.]
17.10.2024

Index : Yes/No
NC : Yes/No
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S.S. SUNDAR, J.,
and
Dr.A.D.MARIA CLETE, J.,

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