

HIGH COURT OF MADHYA PRADESH**BENCH AT GWALIOR****SINGLE BENCH:****{ SHRI JUSTICE ANAND PATHAK }****M.P. No.1731/2017****Shiv Pratap Singh Tomar****Vs.****Smt. Seema Tomar and Others**

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Shri Nirendra Singh Tomar, learned counsel for the petitioner.

Shri Ram Krishna Soni, learned counsel for the respondents.

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Whether approved for reporting : Yes**Law laid down:**

(I) A defendant may cross-examine a co-defendant or any other witness who has given evidence against him, and reply on such evidence though there is no issue joined between them.

(II) Once it is demonstrated by a defendant that his interest is not common and there is a conflict of interest affecting the interest of co-defendant then the defendant can cross-examine the witnesses of co-defendant for reaching to the truth.

(II) Condition precedent for giving an opportunity to a defendant to cross-examine a co-defendant is that there should exist conflict of interest *inter se* between the parties.

(IV) The right of cross-examination is the greatest legal engine ever invented for the discovery of the truth (referred through Wigmore on Evidence).

ORDER**09/01/2018**

The present petition under Article 227 of the Constitution of India has been preferred by the petitioner against the order dated 06/12/2017 and order dated 11/12/2017 passed in Civil Suit No.60-

A/2013 passed by III Civil Judge Class-II Gwalior whereby application preferred at the instance of petitioner (defendant No.1-b) under Section 151 of CPC has been rejected.

2. Precisely stated facts of the case are that plaintiff/ respondent No.1 herein has initially instituted a civil suit against defendants for declaration and permanent injunction in respect of suit house. During pendency of the suit defendant No.1-Umed Singh died and his LRs. including present petitioner were brought on record and the suit is still pending. Defendant No.3 filed written statement on his behalf as well as on behalf of defendants No.1 and 2 and made averments that original defendant No.1-Umed Singh has executed a will dated 02/04/2006 in favour of defendant No.3-Pratap Singh and on the basis of said will he became owner of the suit property. He further averred that being the owner of the suit property, he sold the suit property to one Manish Sharma vide registered sale deed dated 31/03/2012.

3. Defendant No.1(b)/ petitioner herein also filed written statement stating that the suit property was purchased by Umed Singh from the funds of Joint Hindu Family in his name and Umed Singh and Shanti Devi did not execute any will during their lifetime and therefore, the will shown by Pratap Singh-defendant No.3 was allegedly forged. Plaintiff and its witnesses were cross-examined by all the defendants. Defendant No.3/ respondent No.7 submitted his chief examination and was also cross-examined by the plaintiff.

4. Petitioner/defendant No.1-b submitted application on 06/12/2017 under Section 151 of CPC with the prayer that as the interest of the petitioner (defendant No.1[b]) and defendant No.3 are against each other and affecting interest of each other therefore, he be permitted to cross-examine defendant No.3. The said application was dismissed by the trial Court vide order dated 06/12/2017. Petitioner again submitted an application under Section 151 CPC on 11/12/2017 with the prayer that he be permitted to cross examine all the witnesses of defendant No.3-Pratap Singh Tomar and defendant No.4-Manish Sharma which was also

dismissed vide order dated 11/12/2017.

5. Learned counsel for the respondent opposed the prayer made by the petitioner and supports the impugned order and prayed for dismissal of the petition.

6. Heard learned counsel for the parties and perused the record.

7. Before advertng to the facts of the case, it is apposite to consider the scope of cross examination of the co-defendant's witnesses. Wigmore on Evidence Vol. v. Third Edition Article 1367 (page 29) has highlighted the importance of the right of cross-examination and has described it as beyond any doubt the greatest legal engine ever invented for the discovery of truth. It is also stated therein "for two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience". Cross-examination has also been described as a great and permanent contribution of Anglo-American system of law to improved methods of trial procedure. And the same must apply in India where the procedure has been borrowed from English system. Cross-examination form an element of rules of natural justice and as stated in rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. To allow any evidence to be treated admissible without giving a right of cross-examination not only perpetuates injustice but is shocking to a judicial conscience apart from being manifestly illegal and perverse. In such circumstances not only it is within the power of

this court to correct such illegality but it is incumbent on it to do so as to prevent further mischief and stop the trial from becoming a mockery.

8. Though there is no specific provision in the Indian Evidence Act providing for such an opportunity for a defendant-respondent to cross-examine a co-defendant/ co-respondent, however, having regard to the object and scope of cross-examination, it is settled law that when allegations are made against the party to the proceedings, before that evidence could be acted upon, that party should have an ample opportunity to cross-examine the person who had given the evidence against him. It is only after such an opportunity is given, and the witness is cross-examined that evidence becomes admissible. In this regard it is useful to refer to passage in the law of evidence, by the learned authors on the subject. In this regard it is useful to refer to passage in the law of evidence, by the learned authors on the subject.

Sarkar on Evidence, eight edition p.1141:

“No special provision is made in the Evidence Act for the cross-examination of the co-accused's or co-defendant's witnesses. But the procedure to be adopted may be regulated by the well-known rule that no evidence should be received against one who had no opportunity of testing it by cross-examination; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine witness called by one whose case was adverse to his, or who has given evidence against. If there is no clash of interest or if nothing has been said against the other party, there cannot be any right of cross-examination.”

Principles and Digest of the Law of Evidence by M. Monir, third edition, p.1114 :

“A defendant may cross-examine a co-defendant or any other witness who has given evidence against him, and reply on such evidence, though there is no issue joined between them.”

Phipson on Evidence, tenth edition, para.1538 :

“A defendant may cross-examine a co-defendant or any other witness who has given evidence against him, and reply on such evidence though there is no issue joined between them.”

9. Therefore, it is very clear from the aforesaid passages that it is settled law that no evidence should be received against one who had no opportunity of testing it by cross-examination ; as it would be unjust and unsafe not to allow a co-accused or co-defendant to cross-examine a witness called by one whose case was adverse to him, or who has given evidence against. If there is no conflict of interest, such an opportunity need not to given. Therefore, the condition precedent for giving an opportunity to a defendant-respondent to cross-examine a co-respondent or a defendant is either from the pleadings of the parties or in the evidence, there should exist conflict of the interest between them. Once it is demonstrated that their interests is not common and there is a conflict of interest and evidence has been adduced, affecting the interest of the co-defendant/ co-respondents, then before the Court could act on that evidence, the person against whom the evidence is given should have an opportunity to cross-examine the said witness, so that ultimately truth emerges on the basis of which the court can act.

10. In view of the above legal position, in the case in hand, it has to be seen whether petitioner (defendant No.1-b) who is seeking cross-examination of defendant No.3 are having conflicting interest in the litigation in question or not.

11. Petitioner and defendant No.3 are real brothers. As per allegations, the property in question was joint family property and defendant No.3 has sold the suit property claiming it to be of his ownership therefore, interest of petitioner is adversely affected in the present case. Initially, respondent No.1(plaintiff) instituted a civil suit against the defendants for declaration and permanent injunction in respect of the suit house. The allegations levelled in the suit were that defendant No.1-Umed Singh executed a will dated 02/04/2006 in favour of defendant No.3-Pratap Singh and on the

basis of same will he became owner of the suit property. It was further pleaded that being the owner of the suit property, he sold the suit property to one Manish Sharma vide registered sale deed dated 31/03/2012.

12. Petitioner (defendant No.1-b) filed written statement stating that the suit property was purchased by original defendant Umed Singh from the funds of the Joint Hindu Family in his name and Umed Singh and Shanti Devi did not execute any will during their life time. Therefore, the will shown by defendant No.3-Pratap Singh was allegedly forged. Petitioner has specifically pleaded in the application under Section 151 of CPC with the prayer that interest of the petitioner and defendant No.3 are conflicting and against the interest of each other therefore, he be permitted to cross-examine defendant No.3.

13. In the given fact situation of the case, petitioner (defendant No.1-b) was right in his approach to cross-examine the other co-defendant. Therefore, the order of the trial Court dismissing the application of the petitioner is illegal.

14. I may profitably refer the judgments passed by the Karnataka High Court in the case of **M/s. Ennen Castings (P) Ltd. Vs. M.M. Sundaresh & Others as reported in AIR 2003 Karnataka 293** and judgment of High Court of Delhi in the case of **Desh Raj Chopra and Ors. Vs. Pooran Mal and Others, AIR 1975 Delhi 109** which are worth consideration in this regard and this Court has no occasion to tread on different path. On this count also, case of the petitioner gains grounds.

15. Hence, in view of the above, the order dated 06/12/2017 and order dated 11/12/2017 passed in Civil Suit No.60-A/2013 by III Civil Judge Class-II Gwalior are hereby quashed and the trial Court is directed to permit defendant No.1-b to cross examine defendant No.3.

16. Petition stands allowed in above terms.

(Anand Pathak)
Judge

