

HIGH COURT OF JUDICATUTE AT JABALPUR (M.P.)
SINGLE BENCH : HON'BLE JUSTICE NANDITA DUBEY

Writ Petition No. 10710/2017

Akhilesh Singh

Vs.

Krishan Bahadur Singh and ors.

Shri Abhishek Singh, learned counsel for the petitioner.

Shri D.D. Bhave, learned counsel for the respondent
No.1.

Whether approved for reporting : **Yes**
Law laid down :
Significant paragraph numbers : **8 to 12**

ORDER
(08.01.2020)

A suit was filed for specific performance of agreement dated 17.01.2017 and declaring the sale deed dated 15.03.2013 and 17.04.2013 executed in favour of defendants No.4 and 5 to be null and void to the extent of 25% share of plaintiff and permanent injunction against the defendants. The petitioner herein is the original defendant No.6. He moved an application under Order 18 Rule 17 of the Code Civil Procedure, 1908, seeking recall of D.W.-1 for

his cross-examination by defendant No.6, as according to the petitioner, defendant No.1 (D.W.1) has given the statement contrary to his affidavit and the same is against the interest of defendant No.6's claim and would have adverse effect on his case.

2. The application is opposed by respondent No.1/plaintiff.

3. The sum and substance of the objection was that one co-defendant cannot be permitted to cross-examine the other defendant. It was further objected that the provisions under Order 18 Rule 17 of the C.P.C. would not be applicable in the present case.

4. Upon hearing the parties, the trial Court declined the prayer in terms of the impugned order dated 03.07.2017 mainly for the reason that defendant No.6/petitioner was not prompt in filing the application and as the aforesaid provision of the Code is not attracted.

5. Learned counsel for the petitioner submits that the right of petitioner to cross-examine the defendant No.1 cannot be shut out specially when defendant No.1 has given statement adverse to the interest of the petitioner. Reliance is placed on **2007 AIR (Del) 105 Saroj Bala Vs. Dhanpati Devi, 2003 AIR (kar) 293 Ennen Castings Pvt. Limited (In Liquidation): Y.R. Nagabhusan Vs. M.M. Sunderaseh Ennen Castings Pvt. Limited (In Liquidation)** and **2018 (4) MPLJ 74 Shiv Pratap singh Tomar Vs. Seema Tomar and others.**

6. Per contra learned counsel appearing for respondent No.1 has contended that in law, a co-defendant has no such right to cross-examine the witness produced by other defendant. It is further argued that the provisions of Order 18 Rule 17 of the C.P.C. is not applicable. Reliance is placed on **(2009) 4 SCC 410 Vadiraj Naggappa Vernekar (dead) Through LRs. Vs. Sharadchandra Prabhakar Gogate.**

7. In order to appreciate the controversy, it is necessary to re-produce the relevant provisions, which reads as under:-

***Order XVIII Rule 17 of Code of Civil Procedure 1908
"Court may recall and examine witness"***

"The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit."

Section 137 of Evidence Act "Examination in chief"

The examination of a witness by the party who calls him shall be called his examination in-chief.

Cross-examination- The examination of a witness by the adverse party shall be called his cross-examination. Re-examination- The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Section 138 of Evidence Act "Order of examinations"

Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross- examination must relate to relevant facts but the cross - examination need not be confined to the facts to which the witness testified on his examination-in-Chief.

Direction of re-examination - The re-examination shall be directed to the explanation of matters referred to in cross-

examination ; and , if new matter is, by permission of the Court, introduced in-re-examination, the adverse party may further cross-examine upon that matter.

8. In the case of **Saroj Bala** (supra), the Court has relied on the decision in the case of **AIR 1975 Delhi 109 Mrs. Dev Raj Chopra Vs. Puran Mal and others** and **AIR 1978 Punjab and Haryana 319 Sandhu Singh Vs. Sant Narain Singh Sewadar and others**, wherein the question of rights of one of the defendants to cross-examine the witness produced by the other has been examined. It has been held that the trial Court cannot deny a party to the litigation, the basic right to cross-examine a witness and Sections 137 and 138 of the Indian Evidence Act, 1872 read together allow the right of cross-examination of a witness to an adverse party.

9. In the case of **Ennen Castings Pvt. Limited** (supra) the Single Bench of Karnataka High Court has held :

“8. The essence of cross-examination is that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions

favourable to his cause or to discredit him. Cross-examination is the most effective of all means for extracting truth and exposing falsehood. The object is to impeach the accuracy, credibility and general value of the evidence given in chief to sift the facts already stated by the witness to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examination party. The exercise of his right is justly regarded as one of the most efficacious tests, which the law has devised for the discovery of truth. It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. The right of cross-examination belongs to an adverse party and parties who do not hold that position should not be allowed to take part in the cross-examination.

9. As a general rule, evidence is not legally admissible against a party, who at the time it was given had no opportunity to cross-examine the witness or of rebutting their testimony by other evidence. When two or more persons are tried on the same indictment and are separately defended any witness called by one of them may be cross-examined on behalf of the others, if he gives any testimony to incriminate them. A defendant may cross-examine his co-defendant who gives evidence or any of his co-defendant's witnesses, if his co-defendant's interest is hostile to his own.

10. 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 passages in the law of evidence, by the learned authors on the subject.”

10. Further, in the case of **Shiv Pratap Singh Tomar** (supra) this Court has held :-

“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.”

11. In the case of **Vadiraj Naggappa Vernekar** (Supra), plaintiff's application under Order 18 Rule 17 of C.P.C. for recall of one Sadanand Shet for further examination urging that some facts necessary for proper adjudication of the suit has been left out in the affidavit was dismissed on the ground that recalling of witness to fill up the lacunae in the evidence discovered on cross-examination is not permissible. Hence, the same is not applicable in the present case.

12. In view of the aforestated legal position, it is clear 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 call by one whose case was adverse to him or who had given evidence against in the present case.

13. A perusal of deposition of D.W.-1 reveals that defendant No.1 has deposed against the interest of

defendant No.6. In his deposition, clear allegations has been made by D.W.-1 against defendant No.6. It is clear that there is conflict of interest between defendant No.1 and defendant No.6, hence an opportunity to cross-examine D.W.-1 is required to be given, so that the ultimate truth may emerge on the basis of which the Court may reach to a decision.

14. In view of the facts and circumstances, I find no substance in the contention of respondent No.1 that co-defendant has no right to cross-examine the other defendant.

15. The impugned order dated 03.07.2017 passed in C.S. No.01-A/2014 is hereby quashed. The trial Court is directed to permit the defendant No.6/petitioner to cross-examine defendant No.1.

16. Petition stands allowed. No order as to costs.

(Nandita Dubey)
Judge

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