

(1999) 08 PAT CK 0074

Patna High Court

Case No: C.R. No. 1296 of 1998

Smt. Shanti Devi and Others

APPELLANT

Vs

Ram Mohan Thakur and Others

RESPONDENT

Date of Decision: Aug. 26, 1999

Acts Referred:

- Evidence Act, 1872 - Section 137, 138

Citation: (2000) 1 BLJR 162 : (2000) 1 PLJR 530

Hon'ble Judges: S.N. Jha, J

Bench: Single Bench

Final Decision: Allowed

Judgement

S.N. Jha, J.

This civil revision by the plaintiffs is directed against the order dated 18-4-98 in Partition Suit No. 54/85 by which the Court below namely, 1st Subordinate Judge, Gaya, directed the cross-examination of D.W. 1 by the plaintiff-petitioners and defendant No. 2 to be deleted.

2. In order to appreciate the point, the relationship between the parties may first be maintained. One Kishori Mohan Lal had two daughters-Shanti Devi and Shakuntala Devi. While Shanti Devi is plaintiff-petitioner No. 1, Shakuntala is dead and her estate is represented by her husband and two sons, who are petitioner Nos. 2 to 4 in this case. Kishori Mohan Lal had also three sons, there are opposite party Nos. 1 to 3. Their sons are opposite party Nos. 4 to 13.

3. The plaintiff-petitioners filed aforementioned suit for decree of partition to the extent of 16.02 share in the suit property against the defendants. The defendants filed written statement. Except defendant No. 1 Ram Mohan Thakur, other defendants accepted the plaintiffs' case. Thus, defendant-opposite party No. 1 alone is contesting the suit.

4. After the plaintiffs finished examining their witnesses, Defendant No. 3 was examined as D.W. 1 on 27-11-97. On the same day, he was cross-examined by the plaintiffs and defendant No. 2. Defendant No. 14 declined to cross-examine. Defendant No. 1 was thereafter called upon to cross-examine the witness. He cross-examined the witness in part. On the next day i.e. on 28-11-97 when the cross-examination was resumed, he filed application for deletion of the cross-examination part of the evidence of defendant No. 3 (D.W. 1) on the ground that defendant No. 3 as well as defendant No. 2 were supporting the plaintiffs' case and, therefore, not being adverse to each other they could not be allowed to cross-examine in view of Sections 137 and 138 of the Indian Evidence Act. By the impugned order, the prayer has been allowed and the plaintiffs have come in this civil revision.

5. Shri I.T. Gaur, learned Counsel for the petitioners, submitted that the impugned order has been passed under complete misapprehension of law that only a party pleading an adverse case is entitled to cross-examine in view of provisions of Sections 137 and 138 of the Evidence Act. He submitted that as far back as in 1920, this Court had laid down the law on the point in the case of *Motiram Narwari v. Lalit Mohan Ghose* AIR 1920 Patna 94, and the impugned order of the Court below cannot be said to be in accordance with law.

6. I have gone through the aforesaid decision and I find that the point at issue is squarely covered by it. The observations of the Court at page 96 of the report may straightaway be quoted as hereunder:

The usual practice in cases, where some of the defendants support the plaintiffs case and others oppose it, is to order that those who support the plaintiff's case should cross-examine plaintiffs witnesses first if they desire to do so, and to call their evidence and address the Court before the defendants who oppose the plaintiff's case do so. Any other practice would be inconvenient and might work an injustice to those defendants who oppose the plaintiffs case. In the first place, after the opposing defendants have cross-examined the plaintiffs witnesses, the other defendants who support the plaintiffs case would be entitled to cross-examine and by leading questions possible elicit evidence from, the witnesses which had not been elicited in examination-in-chief and about which the opposing defendants had no opportunity of cross-examining. It is true that if any new matter should be introduced, the opposing defendants might be allowed an opportunity subsequently of cross-examining about it but this would be a cumbrous process and would unnecessarily prolong the proceedings. It is also manifestly unjust that a witness should be allowed to give oral evidence against a party who appears at the trial, when that party has no opportunity of cross-examining upon the matters deposed to. ...In my opinion, in the circumstances of the present case the preponderating balance of convenience is in favour of ordering that defendants 2 to 5 who are supporting the plaintiffs case should call their evidence and address the

Court before defendant 1, and in like manner should interrogate the plaintiffs witnesses before defendant 1. This course would clearly result in a saving of time and will prevent any dispute at the trial as to the right of defendant 1 to any further cross-examination which would undoubtedly arise if the order of the Subordinate Judge were carried out. It is also, in my opinion in the interests of justice that the course proposed should be followed.

7. It is obvious that in view of the above laid down dictum the cross-examination of defendant No. 3 (D.W. 1) D.W. 3 at the hands of either the plaintiffs or defendant No. 2 could not be deleted. In fact, it appears that allowing the plaintiffs and supporting the defendants to cross-examine D.W. 1 before calling upon the contesting defendant to cross-examine him, was the correct procedure. In view of the law laid down by this Court what was required is that defendant No. 3 and supporting witnesses should have finished their cross-examination of the plaintiffs' witnesses and, likewise, if they wished to examine their own witnesses, the plaintiffs and other supporting witnesses to finish their cross-examination of those witnesses before the contesting defendant i.e. D.W. 1 is allowed to interrogate them. It is not known as to in what order and manner the plaintiffs' witnesses were cross-examined before the defendants started examining their witnesses on 27-11-97. Whether the supporting defendants cross-examined them first, as should have been done, or the contesting defendant cross-examined them first is not known. Be that as it may, that stage has passed. Now, it is the defendants turn to examine the witnesses. At this stage, at least the Court should follow the procedure indicated in Motiram's case (supra).

8. In the above view of the matter, the impugned order of the Court below deleting the cross-examination part of the evidence of D.W. 1 cannot be said to be in accordance with law.

9. Before I conclude, I would like to observe that the expression "adverse party" occurring in Section 138 of the Evidence Act does not mean or refer to a party who has pleaded an adverse case. Read together with Section 137, which lays down the procedure in which the witnesses are to be examined, cross-examined and re-examined, the expression merely refers to the "other party". After a witness of a party is examined, the other party, if he so desires, should be called upon to cross-examine. It is significant that in terms of the provisions of Order XVIII, Rule 1 of CPC the right or privilege to begin first and, thus, to examine the witnesses first depends on the pleadings to the parties. While ordinarily, it is the plaintiff who begins first, in an appropriate case the defendant may claim such privilege or may be directed by the Court to do so. Where, thus, the plaintiff examines his witnesses first, in terms of Section 138 of the Evidence Act, the defendant is to cross-examine them, where the defendant examines his witnesses first, it is the plaintiff who has to cross-examine them. The expression "adverse party" occurring in Section 188 of the Evidence Act has to be understood accordingly.

10. In the result, the impugned order dated 18-4-98 is set aside and this civil revision is allowed.