

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.538 of 2018**

Anamika Pranav, daughter of Late Dr. Bhagwan Das Bhagat, wife of Abhishek Pranav, Resident of Mohalla- Rajendra Nagar, P.S.- Bahadurpur, Town and District- Patna. Petitioner/s

Versus

Anil Kumar Choudhary, son of Late Raghunath Prasad Choudhary, resident of Yogendra Mukherjee Road, P.S.- Town, District- Muzaffarpur. Respondent/s

Appearance :

For the Petitioner/s : Mr. Arjun Kumar, Advocate
Mr. Alok Kumar, Advocate
For the Respondent/s : Mr. Ranjan Kumar Dubey, Advocate

**CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT**

Date : 08-02-2023

Heard learned counsel for the parties.

2. The present application has been filed against the order dated 16.09.2017 passed in Title Suit No. 1482 of 2013 passed by learned Sub-Judge-VII, Muzaffarpur whereby and whereunder the learned Trial Court allowed the petition of plaintiff to expunge the evidence of P.W.-3, Padma Raman Pathak, who died after his examination-in-chief and part cross-examination.

3. The facts, in brief, are that the petitioner/plaintiff filed a suit bearing Suit No. 1482 of 2013 for declaration that the Sale Deed No. 8233 dated 19.03.2013 is void, fraudulent, illegal,



inoperative and without consideration and has not confer any title or interest to the defendant/respondent over any part of the suit property described in Schedule-1 of the plaint.

During the trial the plaintiffs brought on Padma Raman Pathak (P.W.-3) whose examination-in-chief was filed on 23.05.2017 thereafter the defendant partly cross-examined the said witness and it was deferred for further cross-examination but unfortunately the said witness died which was informed to the Court. The defendant filed a petition dated 11.07.2017 with a prayer to expunge the evidence of P.W.-3, Padma Raman Pathak, as his cross-examination could not have been made complete which was allowed vide the impugned order.

4. Learned counsel for the petitioner has submitted that the Trial Court has not assigned any reason with regard to allowing of the petition of defendant for expunging the evidence of witness P.W.-3. It is further submitted that in the event of death or serious illness of a witness between his examination-in-chief and his cross-examination the evidences previously given by him is admissible though the degree of weight to be attached to it is of course a question of fact but in the present case the Trial Court has entirely thrown the evidence of P.W.-3 which is not permissible.



5. Learned counsel appearing on behalf of the respondent, however, supported the impugned order. He has submitted that unless the witness was cross-examined, the effect of second proviso of Section 33 of Indian Evidence Act is not applicable and, therefore, the impugned order was rightly passed as it relates to expunging of evidence of P.W.-3.

6. The issue involved in this application is whether the learned Trial Court committed error in expunging the evidence (examination-in-chief and part cross-examination) of P.W.-3 who died before the completion of his further cross-examination or the same ought to have been allowed to serve for the limited purpose of Section 33 of the Evidence Act.

7. In this connection, it would be relevant to quote the provisions of Section 33 of the Evidence Act, 1872 for ready reference:

“33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated:-

Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of



the case, the court considers unreasonable:

Provided

- that the proceeding was between the same parties or their representatives in interest;
- that the adverse party in the first proceeding had the right and opportunity to cross-examine;
- that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.-A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.”

8. Section 33 of the Indian Evidence Act, 1872 deals with the relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. This section provides that the evidence given by a witness in an earlier judicial proceeding, or before any person authorized by law to take evidence is relevant in a subsequent judicial proceeding or at a later stage of the same judicial proceeding, for the purpose of proving the truth of the facts contained therein, if certain conditions mentioned in the section are satisfied. The death of witness whose evidence is admitted should first to be proved unless it is admitted on the other side.

9. The Hon'ble Supreme Court in **V.M. Mathews Vs. S. Sharma (1995) 6 SCC 122, (AIR 1996 SC 109)** held that in view of the second proviso of Section 33 of the Indian Evidence Act, evidence of a witness in a previous proceeding would be admissible under Section 33 of the Act only if the adverse party



in the first proceeding had the right and opportunity to cross-examine the witness.

10. The words “that the adverse party in the first proceeding had the right and opportunity to cross-examine” used in second proviso of Section 33 of the Evidence Act cannot be stretched to be interpreted to mean “that the adverse party had actually cross-examined such witness.”

Moreover, the second proviso of Section 33 of the Evidence Act deals with witness cross-examined in “a previous proceeding” but in the present case in hand, the opportunity to cross-examine was available in the same proceeding and not referable to any subsequent proceeding or a later stage in same proceeding, which may be a case, for example, when ex-parte decree is vacated and right and/or opportunity to cross-examine the plaintiff witness may accrue. Hence, the arguments advanced by the learned counsel for the respondent based on second proviso to Section 33 of the Evidence Act is not found to be acceptable.

11. The evidence untested by cross-examination can have no value but the evidence cannot be rejected as inadmissible. The correct rule is that the evidence is admissible but the weight to be attached to such evidence should depend on



the circumstances of each case and that though in some cases the Court may act upon it, if there is other evidence on record, its probative value may be very small and may even be disregarded. The Court should look at the evidence carefully to see whether there are indications that by a complete cross-examination the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached. If the evidence is inadmissible the Court is not entitled to consider it at all whereas if it is admissible the Court must decide on the circumstances of each case whether any weight should be attached to it or not.

12. In the judgment by Hon'ble Patna High Court in **Mt. Horil Kuer and another Versus Rajab Ali and others** reported in **AIR 1936 Pat 34 (1935 SCC Online Pat 208)**, this Court reviewed a number of authorities and was of the opinion that when a witness died after he had been examined-in-chief and before his cross-examination had been concluded, his evidence was admissible, but the degree of weight to be attached to it depends on the circumstances of the case. Similar view was also taken by this Court in **Srikishun Jhunhunwalla Versus Emperor** reported in **AIR 1946 Pat 384 (1946 SCC Online Pat. 196)** and by Hon'ble Allahabad High Court in



Ahmad Ali Vs. Joti Prasad (AIR 1944 ALL. 188).

The Allahabad High Court in the Ahmad Ali Vs. Joti Prasad (Supra) held that there is certainly no provision in the Evidence Act that the evidence of a witness who has been examined in open Court upon oath shall be excluded because it has not been possible for the other party to cross-examine him.

13. The Hon'ble Calcutta High Court in **Srikumar Mukherjee Vs. Avijit Mukherjee & Ors. (2015 SCC Online Cal. 6445)** held in Paragraph 12 that "It is, therefore, settled law that the evidence of a witness, who could not be cross-examined, cannot be expunged, but the Court shall consider its evidentiary or probative value alongwith other evidence.

14. The ratio laid down in the above noted judgments are uniform that the evidence of such witness shall remain on record and the Court shall consider its probative or evidentiary value or relevancy alongwith other evidence so available, which obviously depends upon case to case.

15. In view of the above, the impugned order dated 16.09.2017 passed in Title Suit No. 1482 of 2013 by learned Sub-Judge-VII, Muzaffarpur, is not sustainable, on account of expunging the evidence of P.W.-3 from record. The same is contrary to the principles of law well settled by the Hon'ble



Supreme Court in V.M. Mathew (Supra) and Sashi Jena (Supra). Hence, the said order is held to be vitiated by jurisdictional error, which is required to be corrected by this Court in exercise of superintending jurisdiction of this Court. Accordingly, the said impugned order dated 16.09.2017 passed by the learned Sub-Judge-III, Muzaffarpur in T.S. No. 1482 of 2013 is set aside. Resultantly, the evidence of Padma Raman Pathak (P.W.-3) is retained on record.

16. As a result, the present application stands allowed.

17. The parties are left to bear their own cost.

18. Before parting, this Court like to state that in spite of the parties represented by learned counsel, I thought it fit to request Mr. J.K. Verma, Advocate to assist the Court as *Amicus Curiae*. He responded to the call of the Court and assisted the Court bringing to the notice of the Court a volume of case law some of which I referred to here-in-above. I place on record my appreciation of the valuable assistance rendered by Mr. J.K. Verma, Advocate of this Court.

kamlesh/-

(Sunil Dutta Mishra, J)

AFR/NAFR	AFR
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