

IN THE HIGH COURT OF KARNATAKA  
DHARWAD BENCH

DATED THIS THE 22<sup>ND</sup> DAY OF JANUARY, 2021

PRESENT

THE HON'BLE MR.JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR.JUSTICE P.N.DESAI

R.F.A. NO.100309 OF 2017 (PAR/PO)  
C/W  
R.F.A.NO.100234 OF 2018

**IN RFA NO.100309/2017**

**BETWEEN**

1. SHRI. NIJAMUDDIN  
S/O. AMINSAB PEERJADE  
AGE:68 YEARS, OCC:BUSINESS  
R/O. SHREE NAGAR,  
NEAR AMBEDKAR HALL  
NEAR WATER TANK, BELAGAVI-590001
2. SHRI BADRUDDIN  
S/O. AMINSAB PEERJADE  
AGE:59 YEARS, OCC:AGRICULTURE  
R/O. PATAGUNDI  
TAL:GOKAK, DIST:BELAGAVI-591312

...APPELLANTS

(BY SRI SHARAD V MAGADUM, ADVOCATE.)

**AND**

1. SMT. AKHTARBEGAM  
W/O. MOHAMMADIQBAL KHAJI  
AGE:53 YEARS, OCC:HOUSEHOLD WORK  
AND AGRICULTURE,

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R/O. CTS NO.4685, MOMIN GALLI  
GURUWAR PETH, GOKAK,  
DIST:BELAGAVI-591307

2. SMT ABEDA W/O. JAILANI GILAGINCHI  
AGE:51 YEARS, OCC:HOUSEHOLD WORK  
R/O. CTS NO. 4685, MOMIN GALLI  
GURUWAR PETH  
GOKAK, DIST:BELAGAVI-591307
3. SMT JAYIDA W/O. ABDULREHMAN KHAJI  
AGE:49 YEARS,OCC:HOUSEHOLD WORK  
AND AGRICULTURE,  
R/O. CTS NO. 4685,  
MOMIN GALLI, GURUWAR PETH  
GOKAK, DIST:BELAGAVI-591307

...RESPONDENTS

(BY SRI DINESH M KULKARNI, ADVOCATE. FOR R1-R3)

THIS RFA IS FILED UNDER SECTION 96 OF CPC  
AGAINST THE JUDGMENT AND DECREE DATED 30.11.2016  
PASSED IN O.S.NO.83/2015 ON THE FILE OF THE I-  
ADDITIONAL SENIOR CIVIL JUDGE, GOKAK, DECREERING THE  
SUIT FILED FOR PARTITION AND SEPARATE POSSESSION.

**IN RFA NO.100234/2018**

**BETWEEN**

1. SHRI NIJAMUDDIN  
S/O AMINSAB PEERJADE  
AGE: 68 YEARS, OCC: BUISNESS,  
R/O: SHREE NAGAR,  
NEAR AMBEKAR HALL  
NEAR WATER TANK,  
BELAGAVI-590001.
2. SHRI BADRUDDIN  
S/O AMINSAB PEERJADE  
AGE: 59 YEARS,OCC: AGRICULTURE,

: 3 :

R/O: PATAGUNDI-591312,  
TQ: GOKAK, DIST: BELAGAVI.

...APPELLANTS

(BY SRI SHARAD V MAGADUM, ADVOCATE.)

**AND**

1. SMT. AKHTARBEGUM  
W/O MOHAMMADIQBAL KHAJI  
AGE: 53 YEARS,  
OCC: H/W AND AGRICULTURE,  
R/O: CTS NO.4685, MOMIN GALLI,  
GURUWAR PETH, GOKAK,  
DIST: BELAGAVI-591307.
2. SMT.ABEDA W/O JAILANI GILAGINCHI  
AGE: 51 YEARS, OCC: H/W,  
R/O: CTS NO.4685, MOMIN GALLI,  
GURUWAR PETH, GOKAK,  
DIST: BELAGAVI-591307.
3. SMT.JAYIDA  
W/O ABDULREHMAN KHAJI  
AGE: 49 YEARS,  
OCC: H/W AND AGRICULTURE,  
R/O: CTS NO.4685, MOMIN GALLI,  
GURUWAR PETH, GOKAK,  
DIST: BELAGAVI-591307.

...RESPONDENTS

(BY SRI DINESH M KULKARNI, ADVOCATE.)

THIS RFA IS FILED UNDER SECTION 96 OF CPC AGAINST THE JUDGMENT AND DECREE DATED 23.03.2018 PASSED IN FDP NO.09/2017 ON THE FILE OF THE 1<sup>ST</sup> ADDITIONAL SENIOR CIVIL JUDGE, GOKAK, ACCEPTING THE COMMISSIONER REPORT AND DIRECTING THE OFICE TO DRAW FINAL DECREE IN TERMS OF COMMISSIONER'S REPORT, ETC.,.

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THESE APPEALS COMING ON FOR ADMISSION THIS DAY, **P.N.DESAI, J**, DELIVERED THE FOLLOWING:

JUDGMENT

RFA No.100309/2017 is filed assailing the judgment and decree passed in O.S.No.83/2015 dated 30.11.2016, by the I Addl. Senior Civil Judge, Gokak.

2. RFA No.100234/2018 is filed challenging the final decree dated 23.3.2018, passed in FDP No.9/2017.

3. At the stage of admission itself, by consent of both the sides, we have heard the learned counsel appearing for both the parties.

4. The appellants in both appeals were defendants No.1 and 2 before the trial Court and respondents were the plaintiffs No.1 to 3. For the sake of convenience, they will be referred as per their respective ranks before the trial Court.

5. The brief plea of the plaintiffs before the trial Court is that, the plaintiffs and the defendants are brothers and sisters, they belong to Muslim caste and governed by Mohammedan Law. It is stated that, the

propositus of plaintiffs and defendants died on 17.6.1995 leaving behind his wife and children as legal heirs. The defendants without the consent and knowledge of the plaintiffs got mutated their names to the suit schedule properties. The plaintiffs demanded their legitimate share but as the defendants denied, this suit for partition and separate possession came to be filed.

6. The defendants, though appeared through counsel, did not file their written statement. Thereafter plaintiff No.1 got herself examined as PW.1 and one more witness was examined on behalf of the plaintiffs as PW.2. Six documents were marked as Exs.P.1 to P.6. After hearing the arguments of plaintiffs' counsel, the suit was decreed.

7. The learned counsel for the defendants argued that the defendants were not given sufficient opportunity to contest the suit. The main ground urged by the learned counsel for the defendants is, the trial Court committed illegality by denying right of the defendants to cross examine the plaintiffs' witnesses,

only on the ground that defendants had not filed written statement. The trial Court decreed the suit without hearing the defendants. The learned counsel argued that the suit was barred by law of limitation, and the defendants have got evidence to show that the plaintiffs are not entitle to any relief.

8. On the other hand, learned counsel for the respondents supported the trial Court judgment and submits that interference of this Court is not required.

9. We have perused the copy of the order sheet of the trial Court. It is evident that on 13.7.2015, defendant No.2 appeared and on 18.9.2015 defendant No.1 filed appearance voluntarily through counsel and on that day itself the written statement of defendant No.2 was taken as not filed. Then, on 17.10.2015, written statement of defendant No.1 was also taken as not filed. The plaintiffs took time more than three times to lead evidence and examine a witness as PW.1. On 13.4.2016, one more witness was examined as PW.2. The further proceeding was deferred for hearing on question of law. The learned counsel for the appellants

submits that the said question of law is to ascertain whether defendants can cross examine plaintiffs' witnesses without filing the written statement. Then in the afternoon session, the case was called and prayer of defendants for cross examination was rejected as no grounds were made out; the plaintiffs side evidence was closed. It is further stated that since the defendants have not filed the written statement, there is no scope for defendants' evidence and the case was posted for arguments or for settlement. Then after hearing the arguments of plaintiffs side, the impugned judgment and decree came to be passed.

10. From the above, the point that arises for our consideration is, "Whether the defendants who have not filed the written statement, have a right to cross-examine the plaintiff and their witness?"

11. Order VIII of Civil Procedure Code deals with the provisions regarding written statement, set off and counter claim. Order VIII Rule 5 of CPC empowers the Court to pronounce the judgment based on the facts stated in the plaint when the defendant does not file

the pleading. But the Court may, in its discretion, require any such facts to be proved. Proviso to Rule 1 also provides that simply because the allegations of facts in the plaint, if not denied specifically or by necessary application, it shall be taken to be admitted except as against a person under disability. Provided the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission. Order VIII Rule 10 of CPC substituted by Act 22 of 2002 states the procedure, when the party fails to present the written statement and it empowers the Court to pronounce judgment against him or make such order in relation to suit as it thinks fit.

12. It is useful to refer certain provisions in the Indian Evidence Act, 1872, which deals with burden of proof.

a) **Section 101 - Burden of proof**

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.



When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

b) **Section 102 - On whom burden of proof lies**

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

13. In the light of above referred provisions in the Civil Procedure Code, 1908 and the Indian Evidence Act, 1872, it is evident that, simply because defendant has not denied the plaint averments and the evidence of the plaintiffs, the Court cannot straight away accept the case of the plaintiff and decree the suit. On the other hand, the Court should be satisfied about the existence of right of the plaintiffs, proof of their entitlement and interference of such right by the defendant.

14. Therefore in view of the above, it is evident that an adverse party is not debarred from cross examining the plaintiff and plaintiff's witness for the

simple reason that written statement is not filed. The defendant only loses his right to put forth his defence. But the defendant can show to Court by cross examining the plaintiff's witness that plaintiff's evidence cannot be accepted straight away. If the Court is satisfied, suit cannot be decreed.

15. A question regarding right of the adverse party to cross examine the petitioner when defence is struck off came for consideration before Hon'ble Supreme Court of India in an appeal which arose from the judgment in an eviction suit between landlord and tenant. It is held that simply because there is no defence, the adverse party is not debarred from cross examining the petitioner and can show to the Court the merits or demerits of the petitioner's case. The said case is reported in *AIR 1989 SC 162, Modula India vs. Kamakshya Singh Deo*. At paragraph No.12 of the said judgment it is held as under:

Xxxxxxx

Xxxxxxx

*We agree that full effect should be given to the words that defence against ejection is struck off. But does this really deprive the defendant tenant of further participation in the case in any manner? While it is true that, in a broad sense, the right of defence takes in, within its canvass, all aspects including the demolition of the plaintiffs case by the cross-examination of his witnesses, it would be equally correct to say that the cross-examination of the plaintiff's witnesses really constitutes a finishing touch which completes the plaintiff's case. It is a well established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross-examination. The mere statement of the plaintiffs witnesses cannot constitute the plaintiffs evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross-examine the plaintiffs witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiffs evidence cannot be acted upon. Looked at from this point of view it should be possible to take the view that, though the defence of the tenant has been struck out, there is*

*nothing in law to preclude him from demonstrating to the Court that the plaintiff's witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfill the terms of the statute.*

*To us it appears that the basic principle that where a plaintiff comes to the Court he must prove his case should not be whittled down even in a case where no defendant appears. It will at once be clear that to say that the Court can only do this by looking the plaintiff's evidence and pleadings supplemented by such questions as the Court may consider necessary and to completely eliminate any type of assistance from the defendant in this task will place the Court under a great handicap in discovering the truth or otherwise of the plaintiff's statements. For after all, the Court on its own motion, can do very little to ascertain the truth or otherwise of the plaintiff's averments and it is only the opposite party that will be more familiar with the detailed facts of a particular case and that can assist the Court in pointing out defects, weaknesses, errors and inconsistencies of the plaintiff's case.*

16. In view of the principles stated in the above referred decision, and the provisions of law referred above, it is evident that by not filing the written statement, the defendant loses his right to put forth his defence, but he is not debarred from cross examining the plaintiff's witness and demolish the plaintiff's case, and in that event, the Court will not pass any decree in plaintiff's favour. The defendant is also entitled to make such arguments and submission on question of law as the plaintiff may not have brought to the notice of the Court. In our view such valuable rights under the Code are not taken away by any of the rules, law or procedure.

17. It is submitted by the learned counsel for the appellants that the defendants have got documents which they could not produce before the trial Court and they were not able to file their written statement before the trial Court due to unavoidable conditions beyond their control. The learned counsel for appellants submits that defendants are interested in contesting the suit and an opportunity may be given to the appellants

to contest the matter and prays for remand of the matter.

18. It is settled principle of law that rules of procedure are hand made for administration of justice. The Hon'ble Supreme Court in the case of *Sangram Singh vs. Election Tribunal Kotah and another*, reported in AIR 1955 SC 425, held as under:

*16. Now a code of procedure must be regarded as such. It is 'procedure', something, designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.*

*17. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should*

*not be reached behind their backs, that proceedings that affect their lives and should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.*

19. In the light of these principles if the present judgment and decree of the trial Court is considered, it is evident that it is like an ex-parte decree and even an opportunity to cross examine the plaintiff's witness was denied. In the above circumstances we are of the opinion that an opportunity may be given to the defendants to contest the suit on merits.

20. In RFA No.100309/2017, the defendants have filed I.A.No.1/2019 under Order 41 rule 27 of Code of Civil Procedure, 1908, seeking to produce additional evidence. Along with the application, the defendants have produced certain documents. As we have come to

a conclusion to give an opportunity to the defendants to contest the suit on merits, they can produce those documents before the trial Court. The trial Court is at liberty to accept the said documents subject to their admissibility and filing of written statement as a condition precedent for consideration of those documents.

21. In view of the above discussion, we hold that the judgment of the trial Court needs interference by us as trial Court judge has committed illegality and erred in not giving reasonable opportunity to the defendants. Therefore, the matter requires to be remitted back to the trial Court for fresh consideration by setting aside the impugned judgment and decree. Accordingly both appeals deserve to be allowed. Hence, we pass the following Order.

**ORDER**

i) RFA No.100309/2017 and RFA No.100234/2018 are allowed. The judgment and decree dated 30.11.2016 passed in O.S.No.83/2015 on the file



of I Addl. Senior Civil Judge, Gokak and the final decree passed on 23.3.2018 in FDP No.9/2017 are set aside. The matter is remanded to the Trial Court for disposal afresh on merits.

ii) The appellants/defendants are permitted to contest the suit. They shall file the written statement within 30 days from the date fixed for appearance of the parties subject payment of cost of Rs.10,000/- to the respondents/plaintiffs. If the defendants fail to file their written statement, the trial Court is at liberty to proceed further and decide the suit in accordance with law.

iii) The plaintiffs and the defendants shall appear before the Court on 2.3.2021 without further notice.

iv) The trial Court shall dispose of the matter at the earliest. Both the parties and their respective counsel shall assist the Court for early disposal of the suit.

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v) In view of disposal of both the appeals, I.A.No.1/2019 in RFA No.100309/2017 does not survive for consideration.

vi) Send back the trial Court records forthwith.

Costs made easy.

Sd/-  
JUDGE

Sd/-  
JUDGE

HMB