

(2025) 09 OHC CK 0862

In the Orissa High Court

Case No : Civil Miscellaneous Petition No. 951 Of 2025

Ashalata Nayak

APPELLANT

Vs

Parikhita Swain And Others

RESPONDENT

Date of Decision : 23-09-2025

Acts Referred:

Code Of Civil Procedure, 1908 — Order 7 Rule 14, Order 13 Rule 1, Order 18 Rule 3A, Order 18 Rule 4

Citation : (2025) 09 OHC CK 0862

Hon'ble Judges : B. P. Routray, J

Bench : Single Bench

Advocate : A.P. Bose, A.C. Mohapatra

Final Decision : Disposed Of

Judgement

B.P. Routray, J

1. Heard Mr. A.P. Bose, learned Advocate for the Petitioner and Mr. A.C. Mohapatra, learned Advocate for Opposite Party No.1.

2. Present Petitioner is Defendant No.17 in C.S. No.265 of 2004, who has been set exparte. She challenges the order dated 17.05.2025 passed by the learned Senior Civil Judge (LR & LTV), Kendrapara, wherein the prayer of Defendant No.25 to adduce Defendant No.17 as his witness and to examine her at the first instance in terms of Rule 3-A of Order 18, C.P.C. has been refused.

3. It is submitted on behalf of the Petitioner, who is Defendant No.17 in the suit, that even if she has been set exparte, her right to be examined as a witness is not affected. Therefore, the challenge in present C.M.P. refusing her to accept as a witness at the instance of Defendant No.25 with further direction to exclude certain facts regarding execution of RSD dated 06.07.1945 is beyond the power of court.

4. On the other hand, it is submitted on behalf of Opposite Party No.1 (Plaintiff)

that when Defendant No.17 did not file the petition to examine her as a witness and it is admitted that she has been set ex-parte in the suit, no locus standi is there on her part to maintain the present C.M.P. for challenging the impugned order.

5. When a person is set ex-parte in a suit, he loses his right to participate in the suit subject to consideration of the court to set aside the order. It is not that the Defendant No.17 still remained as a party to contest the claim of the Plaintiff from the date she was set ex-parte. Since Defendant No.17 was admittedly remained ex-parte she loses her right to participate in the suit. However, this will not affect her right to be a witness on behalf of the contesting party because a contesting party has the right to choose his witness.

6. Defendant No.25 filed the petition to examine Defendant No.17 as a witness on his behalf, without describing her status as such in the petition. This Defendant No.17 has been introduced as a witness by her name. Additionally, Defendant No.25 prayed to examine said witness at the first instance withholding his right to be examined later in terms of the provisions contained under Order 18 Rule 3-A, C.P.C. However, the learned trial court exercising its discretion did not allow the prayer of Defendant No.25 in terms of Order 18 Rule 3-A, C.P.C. When Defendants 1, 8, 25 are admittedly contesting the suit by filing their WS, the reasons expressed by learned trial court that Defendant No.25 is lacking any substantial reason to examine Ashalata Nayak (Defendant No.17) at the first instance before examining Defendant No.25 cannot be faulted with.

7. It is seen that the document, i.e. RSD dated 06.07.1945, has been marked as "X" in terms of the earlier direction of this Court passed in C.M.P. No.649 of 2025. Thus, the further observation of the learned trial court to file another evidence affidavit excluding description of RSD dated 06.07.1945 cannot be held as correct at the present stage. It is important to observe here that a contesting party to a suit has his right to chose his own witnesses. It is regardless of the fact that such witness, if agrees to depose on behalf of the party, was a party in the same case and subsequently set ex-parte. In Mohd. Abdul Wahid v. Nilofer, (2024) 2 SCC 144, the Hon'ble Supreme Court have held as follows;

"10. In the above backdrop, the questions we have been called upon to adjudicate on are:

10.1. (a) Whether under the Code of Civil Procedure, there is envisaged, a difference between a party to a suit and a witness in a suit? In other words, does the phrase plaintiff's/defendant's witness exclude the plaintiff or defendant themselves, when they appear as witnesses in their own cause?

10.2. (b) Whether, under law, and more specifically, Order 7 Rule 14; Order 8 Rule 1-A; Order 13 Rule 1, etc. enjoin the party undertaking cross-examination of a party to a suit from producing documents, for the purposes thereof, by virtue of the use of the phrase(s) plaintiff/defendant's witness or witnesses of the other party, when cross-examining the opposite party?

The opinion of the Court

13. A party to the suit is one on whose behalf or against whom a proceeding in a court has been filed. A witness is a person, either on behalf of the plaintiff or the defendant, who appears before a court to substantiate a statement or claim made by either side. Neither the phrase "party to the suit" nor "witness" is defined under CPC or any other statute on the books. However on this issue, a Constitution Bench of this Court in *State of Bombay v. Kathi Kalu Oghad* [*State of Bombay v. Kathi Kalu Oghad*, 1961 SCC OnLine SC 74 : AIR 1961 SC 1808] held as under : (AIR p. 1814, para 11)

"11. ... "To be a witness" means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing, by a person who has personal knowledge of the facts to be communicated to a court or to a person holding an enquiry or investigation. A person is said "to be a witness" to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy."

A "witness" as defined by P. Ramanatha Aiyar's *Advanced Law Lexicon* is as under:

"One who sees, knows, or vouches for something (a witness to the accident). (1) in person, (2) by oral or written deposition, or (3) by affidavit (the prosecution called its next witness)."

Black's Law Dictionary, 7th Edn., 1999:

"The term "witness" [*Corpus Juris Secundum* : A Contemporary Statement of American Law as Derived from Reported Cases and Legislation. West, 1994.] , in its strict legal sense, means one who gives evidence in a cause before a Court; and in its general sense includes all persons from whose lips testimony is extracted to be used in any judicial proceeding, and so includes deponents and affiants as well as persons delivering oral testimony before a Court or jury."

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24. The thrust of the reliance was that this Act by the use of the phrase "by the parties who calls him" in the extracted provision, recognises the difference between a party to a suit and a witness called on to testify by a party. This distinction again, on the face of it, appears misconceived. It is not doubted that such a phrase or other similar phrases have been employed in these provisions, however, if the holding of the High Court is given an imprimatur, it would cause an apparent conflict between provisions of the very same Act i.e. the sections reproduced immediately hereinabove vis-à-vis Section 120, which, as hitherto reproduced states that, a party to a suit shall be, amongst others, a competent witness.

25. It may also be observed that nowhere in the Evidence Act has the party been precluded from presenting himself as a witness, and therefore this differentiation based only on the meaning as it appears, cannot be countenanced. A perusal of Sections 137, 138 and 139, in our considered view, does not favour the differences as pointed out in the impugned judgment [Mohd. Abdul Wahid v. Nilofer, 2021 SCC OnLine Bom 170] . Examination-in-chief, cross-examination and re-examination are all facets of a trial which can be availed by a party or the adversary, for both the party to a suit as a witness and also for other witnesses called by the party. Therefore, this negates the interpretation that "the party who calls him" suggests a difference between the party as also the witness called by such party for the purposes of entering evidence before the court.

26. Having arrived at the conclusion as above, that the provisions of the Code as also the Evidence Act do not differentiate between a party to the suit acting as a witness and a witness otherwise called by such a party to testify, we may now consider the next question presented by this lis.

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41. In the light of the above discussion, and the answer in the negative to the first question before this Court, meaning thereby that there is no difference between a party to a suit as a witness and a witness simpliciter—the second issue in this appeal, in view of the provisions noticed above, production of documents for both a party to the suit and a witness as the case may be, at the stage of cross-examination, is permissible within law.

8. There is no such provision in the C.P.C. to debar any party from examining any adversary as a witness on his behalf. A party can examine any witness he so likes including a stranger or a man of his team. If one Defendant choses to examine another Defendant as his witness, who has been set ex-parte, the same may be admitted because the party cannot be precluded from choosing his witness.

9. Order 18 Rule 4, C.P.C. permits the party to file his written affidavit evidence which is considered as the statement of the witness in examination-in-chief. Thus, what a witness chose to say cannot be curtailed by the court unless it is barred by the rule of pleadings or for any other valid reason as per the provisions of the Evidence Act. It is said because in the instant case the RSD dated 06.07.1945 has already been marked as "X" pursuant to the direction passed in C.M.P. No.649 of 2025. When the document is already brought on record and marked as Ext.X, the direction of the learned trial court at this stage to debar a witness from his say on said document is not found justified. Therefore, such further observation made by the learned trial court in the last part of the impugned order is set aside being found inappropriate.

10. Accordingly, the C.M.P. is disposed of while confirming the impugned order to the respect of rejecting the prayer of the Defendant No.25 under Order 18 Rule 3-A, C.P.C. regarding examination of Ashalata Nayak at the first instance, and at

the same time setting aside the further direction to exclude the description of RSD dated 06.07.1945 from the evidence affidavit of Ashalata Nayak at the later part if she has come as a witness before the court.