HIGH COURT OF MADHYA PRADESH; BENCH AT INDORE

Misc. Petition No.3468 of 2018.

(Shehzad s/o Abdul Karim v/s Sohrab s/o Gulji and others)

Indore, Dated : 24.07.2018:-

Shri B.S.Gandhi, learned counsel for the petitioner.

Heard on the question of admission.

O R D E R

THE petitioner/defendant has filed the present petition being aggrieved by the order dated 12.07.2018 passed by Additional District Judge, Badnagar, District Ujjain by which application under Order XIX Rule 1 and 2 of the CPC filed by the petitioner seeking presence of Respondent No.1/plaintiff for cross-examination over the affidavit filed by him in support of the plaint and application for temporary injunction has been rejected.

[2] The Respondent No.1/plaintiff filed the suit for specific performance of contract and permanent injunction against the petitioner and other defendants. As per the pleading in the plaint, the present petitioner had agreed to sell agricultural land ad-measuring 1 hectare out of land bearing Survey No.16 situated at Village Bhomalvas, Tehsil Badnagar, District Ujjain on 08.06.2016 @ Rs.16,40,000-00 per bigha. At the time of agreement, plaintiff paid Rs.5,51,000-00 towards earnest money and the remaining amount was agreed to be paid on or before 07.11.2016 to him. According to the plaintiff he was always ready and willing to perform his part of contract. Thereafter he send legal notice and filed the suit along with an application under Order XXXIX Rule 1 and 2 of the CPC for temporary injunction seeking injunction against the petitioner/ defendant in respect of creating any third party right over

the land in question.

[3] The petitioner filed the reply to the aforesaid application and opposed the prayer of temporary injunction. The Respondent No.1 filed his own affidavit stating therein on oath about his possession over the land in question. According to the present petitioner he averred false fact and contradict to the statement of his claim, therefore, cross-examination is necessary, hence he filed an application under Order XIX Rule 1 and 2 of the CPC seeking permission from the Court to cross-examine the Respondent No.1. The Trial Court vide order dated 12.07.2018 had dismissed the application on the ground that he is adopting delaying tactis. Hence, the present petition before this Court.

[4] Shri B.S.Gandhi, learned counsel for the petitioner submits that Order XIX Rule 1 of the CPC specifically provides that any person can be called upon before the Court who submitted an affidavit. The Respondent No.1/plaintiff has stated some incorrect fact in his application, therefore, the cross-examination is necessary before deciding the application under Order XXXIX Rule 1 and 2 of the CPC.

[5] According to Order XIX Rule 1 of the CPC, any Court may at any time for sufficient reason order that any particular facts be proved by affidavit. According to this provision, the Court allowing adducing the evidence by affidavit must apply its mind before such permission granted to the party to the suit. That under sub-rule (2) the Court may at the instance of either party, order the attendance of deponent for cross-examination. The provisions of Order XIX Rule (1) of the CPC is applicable where the Court suo

motu after recording sufficient reasons order the party to a suit to file an affidavit in order to prove particular fact or facts and if an affidavit is filed as per the proviso the party may give either party desires the production of a witness for cross-examination, produce the witness for cross-examination. Under sub-rule (2) upon any application evidence may be given by affidavit, but the Court may at the instance of either party, order the attendance for cross-examination. The discretion is given to the Court to exercise such power looking to the particular facts of the case.

[6] Rule 1 enables a Court to order that any particular fact may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such conditions as the Court thinks reasonable. Where the Code permits the Court to decide certain matters on affidavit in general injunction matters under Order XXXIX Rule 1 and 2, the provisions of Order XIX Rule 1 and 2 do not apply and the either party cannot lay any claim or urge that it has got right to cross-examine the deponent. The Andhra Pradesh High Court in the case of ***Sakalabhaktula Vykunta Rao*** v/s ***Made Appalaswamy***, reported in AIR 1978 AP 103, has held as under :-

> **"6. As stated above, the respondent plaintiff filed the above cited interlocutory application requesting the court to grant temporary injunction against the petitioners and also filed some affidavits in support of his contentions. Order 39, R. 1 C.P.C. provides expressly that the Court is permitted to dispose of the interlocutory application of affidavits. In view of the urgency involved in the matter, the regular procedure of examining the petitioner and his witnesses and respondent and his witnesses is dispensed with and the Court is given a special power to decide the matter by affidavits. Further, the scope of enquiry is quite limited and the rights of**

parties are not decided finally. That being the purpose of giving special power to the Court under O. 39, R. 1, the question of summoning the deponent for the purpose of cross-examination at the instance of a party under O. 19, Rules 1 and 2 does not arise at all. The power given to the Court under O. 39, R. 1 to decide the matters by affidavits is unfettered and is not subjected to the provisions of O. 19, Rules 1 and 2. In short, the provisions of O. 19, Rules 1 and 2 have no application at all to interlocutory matters governed by O. 39, R. 1. I am supported in this view by the decision of Gujarat High Court in Mavji Khimji v. Manjibhai, AIR1968Guj198 . Before the learned single Judge, it was contended that deponent who gave affidavit in support of the interlocutory application filed for the grant of temporary injunction, should be summoned for the purpose of cross-examination. Repelling this contention, J. M. Seth, J., held that when the court was given special power to decide certain interlocutory matters by affidavit, that power is not subject to limitations and conditions prescribed by the provisions of Rules 1 and 2 of O. 19. If really the legislature intended to place any conditions, and limitations in exercise of that special power also, the Legislature could have used those words in O, 39, R. 1 of the Code. The object underlying it may be that right of the parties in such interlocutory applications are not decided finally. The parties are not going to suffer as only for certain limited purposes, these I. As. were being decided and the rights of the parties were not being finally decided and that appears to be the reason why no such conditions and limitations have been prescribed in exercise of that special power.

7. But Sri Ranganatham relies upon the decision of a single Judge of the Allahabad High Court in Abdul Hameed v. Mujee-Ul-Hasan, AIR1975All398 and the decision of Madhava Rao, J. of this Court in C. R. P. No. 990/1975 dated 2-11-1976 (Andh Pra) in which, he followed the above cited decision of Allahabad High Court.

8. The decision of the Allahabad High Court in Abdul Hameed v. Majeed-Ul-Hasan, AIR1975All398 and the decision of Madhava Rao, J., in C. R. P. No. 990/75 dealt with the question that if the Court itself finds it essential for arriving at the truth of the matter and require the deponent to be examined, then the opposite party should be given an opportunity to cross-examine the deponent even in an interlocutory matter like the one under O. 39 R. 1 C.P.C Hence these rulings cannot be

said to have dealt with the same point which is the subject-matter of the case on hand. They are of no assistance to the petitioners. 'It is, therefore, clear that the petitioners are, as of rights, not entitled to any claim to call for the deponent for cross-examination with reference to the averments made in his affidavit. Hence, the contention of Sri Ranganatham that the Court below has committed an error in not exercising the right vested with it, is unsustainable. Though the reasons given by the learned District Munsif are unsustainable, yet the relief prayed for by the petitioners cannot be granted in view of the clear legal position discussed above. Thus I find no merits in the revision petition. It is therefore dismissed, but without costs."

[7] The Supreme Court in the case of ***Smt. Sudha Devi*** v/s ***M. P. Narayanan*** [(1988) 3 SCC 366] has held that affidavit are not included in the definition of "evidence" in Section 3 of the Evidence Act and cannot be used as evidence only if for sufficient reasons court passes an order under Order XIX Rule 1 and 2 of the CPC.

[8] This Court in the case of ***Kalusingh*** v/s ***Nirmala*** [2015 (3) MPLJ 564] has held that under Order XIX Rule 1 of the CPC the Court has power to order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, therefore, unless the Court passes an order under Order XIX Rule 1 of the CPC, the affidavit cannot be taken as evidence. Even under Order XIX Rule 2 the cross-examination is permitted but confined to the specified facts. Under Order XXXIX Rule 1 and 2 of the CPC the Court has been given special power to decide the application on affidavit. The affidavit filed in support of the application under Order XXXIX Rule 1 and 2 of the CPC cannot be an affidavit filed under Order XIX Rule 1 and 2 of the CPC because under these provisions the

Courts direct the parties to disclose certain facts on affidavit. Therefore, the Trial Court in the present case has rightly rejected the application seeking cross-examination of the plaintiff who filed the affidavit and the witness who filed their affidavits in support of the application under Order XXXIX Rule 1 and 2 of the CPC.

[9] In the present case the plaintiff filed an affidavit and in rebuttal the defendant No.1 i.e. the present petitioner has also filed the affidavit. Now the Court is required to decide the affidavit of which party is more reliable and creditworthy but the Court has found that the application filed by the defendant/petitioner is not *bona-fide* and the Court can decide the application under Order XXXIX Rule 1 and 2 of the CPC on the basis of material on record because the plaintiff is required to prove his case for temporary injunction. When the question of discretion of a Trial Court is there, then the High Court should not interfere in the writ petition filed under Article 227 of the Constitution of India.

[10] Even, the scope of Article 227 of the Constitution of India in exercising jurisdiction is very limited in respect of interfering with the order of subordinate Court. Hon'ble Supreme Court in the case of ***Shalini Shyam Shetty and another*** v/s ***Rajendra Shankar Patil***, reported in (2010) 8 SCC 329, wherein it has been held that :-

> **"The scope of interference under Article 227 of the Constitution is limited. If order is shown to be passed by a Court having no jurisdiction, it suffers from manifest procedural impropriety or perversity, interference can be made. Interference is made to ensure that Courts below act within the bounds of their authority. Another view is possible, is not a ground for interference. Interference can be made sparingly for the said purpose and not for correcting error of facts and law in a routine manner."**

[11] In view of the aforesaid observations, I do not find any infirmity or illegality in the order. The Trial Court has rightly exercised his discretion. Hence, the petition is fails and is hereby **dismissed**.

[VIVEK RUSIA]
JUDGE

(AKS)