

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 5612 OF 2015

1. Saraswatibai Vishwanath Wagh,
Age: 65 yhears, Occ: Agri. & Household,
2. Deepak Vishwanath Wagh,
Age: 32 years, Occ: Agri.,
3. Gajanan Vishwanath Wagh,
Age: 29 years, Occ: Agri.,

All R/o. Bambrud Raniche,
Tq. Pachora, Dist. Jalgaon.

...Petitioners

versus

Vishnu Trymbak Thakare,
Age: 42 years, Occ: Agri.,
R/o. Bambrud Raniche,
Tq. Pachora, Dist. Jalgaon.

...Respondent

.....
Mr. S.V. Suryawanshi, Advocate for petitioners
Mr. A.P. Bhandari, Advocate for respondent
.....

CORAM : N.W. SAMBRE, J.

**Reserved on : 03/12/2015
Pronounced on :11/12/2015**

ORDER :

This petition is by original defendants questioning the legality and validity of the order dated 02/04/2015 passed by learned Civil Judge, Junior Division, Pachora on applications below Exhibit Nos. 48 and 50 in Regular Civil Suit No.35 of 2014. The application

Exhibit-48 was moved by the defendants-petitioners seeking permission to cross examination under Order 19 Rule 2 of Code of Civil Procedure, of such witnesses who have filed affidavits in favour of the application of the plaintiff for grant of temporary injunction. The said application seeking permission to cross examination came to be rejected by an order dated 02/04/2015. Thereafter, another application Exhibit-50 came to be moved with same relief, which application came to be rejected on 02/04/2015, as such, present writ petition.

2. Learned Counsel for the petitioners-defendants would urge that the suit was filed by respondent-plaintiff seeking decree restraining the defendants from interfering with the possession and cultivation of the plaintiff over the suit property.

3. Learned Counsel for the petitioners would urge that it is settled position of law that while deciding the application for injunction, it is open for the Civil Court to grant opportunity to place on record oral as well as documentary evidence. He would then urge that in this back ground, rejection of applications Exhibit Nos. 48 and 50 was uncalled for. Learned Counsel for the petitioners, so as to substantiate his contention, has relied upon the judgment of Rajasthan High Court in the matter of ***Ram Swaroop and others vs.***

Bholu Ram reported in **AIR 1991 Rajasthan 56**, particularly paragraph Nos. 5 and 6 thereof, and would urge that, Order 19 Rule 1 and 2 read with Section 30 of Code of Civil Procedure applies to the case in hand. Learned Counsel for the petitioner also relied upon the judgment of Madras High Court in the matter of **V. Baby vs. Sekar** delivered in C.R.P. (PD) No. 2826 of 2014 and M.P. No. 1 of 2014 and would urge that if the fact is sought to be proved as stated in the application by virtue of affidavit then the party contesting may ask for cross examination.

4. Mr. Bhandari, learned Counsel for the respondent has invited attention of this Court to the order dated 22/08/2013 passed in Writ Petition No. 6386 of 2013. He would urge that it is not in dispute that the provisions of Order 19 of Code of Civil Procedure are attracted to the provisions of Order 39 Rule 1 of Code of Civil Procedure. By directing the party to the suit, the witness swearing on affidavit be presented for recording evidence, however, the affiant has to make out case for cross examination of such witnesses. According to him, perusal of application in the present case, does not depicts any reason for such cross examination and affidavits, as such, is liable to be rejected.

5. Having bestowed my thoughts to the submissions made,

it is noted that the suit in question is filed by respondent-plaintiff for injunction. The application for grant of temporary injunction under Order 39 Rule 1 of Code of Civil Procedure was moved. In the said matter, vide application Exhibit-48, the petitioners-defendants sought cross examination of the witnesses whose affidavits were filed in support of the application for grant of temporary injunction. Said request was opposed by respondent-plaintiff. Learned trial Court rejected the said application on the ground that the petitioners are trying to prolong the matter. Second application Exhibit-50 seeking issuance of witness summons to Talathi and other persons from the said place was moved, which application was objected by the respondent-plaintiff and as such, same was rejected on 02/04/2015.

6. It is required to be taken note of the fact that it is the case of petitioners-defendants that they are enjoying the suit property being in possession thereof and according to him, Talathi has drawn panchnama to that effect and has also noted the statement of the adjoining owners. Hence, it is requested that the witnesses summons be issued to them.

7. It is to be noted here that it is for the plaintiff to prove his case including that of application for injunction. The application under Order 39 Rule 1 of Code of Civil Procedure is required

to be decided on three considerations i.e. *prima facie* case, balance of convenience and irreparable loss. While deciding the application, it is for the plaintiff to discharge his burden to establish *prima facie* case in his favour, whereas, what is noticed at the behest of the petitioners-defendants is vide Exhibit-50 sought summoning of such persons, who are not named as witnesses or whose act is yet to be brought on record in support of the case in hand by styling them to be witnesses in main proceedings.

8. The issue which falls for consideration is, whether the order below Exhibit-48 an application for ordering cross examination of witnesses whose affidavits were filed by the plaintiff-respondent, which prayer came to be rejected on 02/04/2015 is just and proper or call for any interference. It is required to be noted here that the affidavits are filed on record are not treated to be having evidentiary value, unless such affidavits are by the consent of parties are to be used and accepted as evidence under Order 19 Rule 1 and 2 of Code of Civil Procedure, which permits party to give the said document colour of proof affidavit so as to consider same in support of particular fact pleaded in temporary injunction application. However, cross examination at the stage of Order 39 Rule 1 of Code of Civil Procedure cannot be in the form of fulfilled trial. It is for the concerned party, who is seeking to establish a case before the Court within ambit of Order 19 Rule 1 or 2 of Code of Civil Procedure to

establish the necessity of same. Merely because applicants have filed affidavits cannot give right in favour of the defendants-petitioners to seek cross examination of such witnesses unless such affidavits are sought to be used as evidence in the said proceedings or the Court orders the party to prove the fact by way of an affidavit.

9. The law as is relied upon by learned Counsel for the petitioners though grant him such right, however, such right cannot be exercised merely for asking but the petitioners must establish cause to that effect and the Court must be alive of the principle that the application for grant of temporary injunction is to be decided in summary manner. While seeking invocation of provisions of Order 19 of Code of Civil Procedure in the matter of cross examination of deponents, whose affidavits are submitted by the plaintiff, it is expected of the petitioners to bring on record the existence of extraordinary circumstances, which prompt them to seek shelter under Order 19 Rule 1 and 2 of Code of Civil Procedure. The party to the suit, in my opinion, cannot be held to be as of right entitled for such relief merely for asking.

10. The plain reading of Order 19 Rule 1 of Code of Civil Procedure postulates that the Court can voluntarily direct the parties to prove by an affidavit of fact or facts by recording sufficient reasons

thereof or may also read affidavit of witness in the hearing on condition as shall be incorporated thereto which concerned Court finds reasonable.

Proviso to Rule 1 of Order 19 provides that the parties to the suit may produce a witness for cross examination by an order from the Court.

Rule 2 of the said Order provides that alongwith the application and evidence given by affidavit of a party, however, at an instance of the party, the Court may order attendance of such witness/party who has tendered to attend the proceedings for cross examination (of the defendant). The clause-2 of Rule 2 mandates such attendance of the deponent in the Court unless the Court exempt such deponent from attending the Court.

11. The object with which Rule appears to have incorporated is to permit party to place on record the evidence affidavit so as to substantiate his case as pleaded in the application during pendency of disposal of the suit. Such evidence affidavit is subject to further scrutiny in the light of provisions of Evidence Act i.e. deponent may be subjected to cross examination, provided the Court is satisfied that there exist such eventuality to be taken recourse to.

12. The guiding principle that can be considered while permitting an order under Order 19 Rule 1 and 2 of Code of Civil Procedure that such process shall not lead to fulfilled trial and be restricted only to the extent of claim made in the application which of course is required to be decided almost in a summary manner. The view expressed by Madras High Court in the matter of **V. Baby vs. Sekar** delivered in C.R.P. (PD) No. 2826 of 2014 and M.P. No. 1 of 2014 is worth referring to. The fact remains that in view of Apex Court judgment in the matter of **Sudha Devi vs. M.P. Narayanan and others reported in 1988 (3) SCC 366**, the Apex Court has ruled out consideration of an affidavit as evidence within purview of Section 3 of Evidence Act, however, the only exception carved out is Order 19 Rule 1 and 2. In general sense, always an affidavit given in support of application, much less in application for temporary injunction cannot be termed as evidence unless appropriate orders under Order 19 Rule 1 and 2 are passed by the Court. While exercising such powers under Order 19 Rule 1/2 of Code of Civil Procedure party has to make out the case for exercising such powers keeping in mind the proceedings in which such affidavit/application is filed. It is only in case if the Court directs party to the proceedings to file an affidavit pursuant thereto and in case if law prevails upon party to prove the fact by way of filing of affidavit. Such affidavit could be termed as

evidence affidavit as stated herein above if is filed pursuant to the mandate of the Court or pursuant to compliance of legal provisions.

13. The witness summons as is sought to be issued to the persons mentioned in Exhibit-50, in my opinion, was rightly rejected by learned trial Court, as same would not fulfill the requirements of Order 19 Rule 1 and 2 of Code of Civil Procedure. The judgment cited supra will hardly of any assistance in the matter. However, it is always open for the petitioners to produce such statement which they intend to rely in the form of documentary evidence before the Court below at the time of deciding injunction application.

14. In view of above, in my opinion, no case for interference is made out. The writ petition, as such, fails, stands dismissed.

[N.W. SAMBRE, J.]