

HON'BLE SRI JUSTICE S.V. BHATT

C.R.P.No.3150 of 2012

ORDER:

The defendant in O.S.No.22 of 1998 is the revision petitioner. The revision is directed against the order in I.A.No.409 of 2012 dated 11.06.2012. I.A.No.409 of 2012 was filed by the plaintiffs/respondents herein under Order XVI Rule 2(i) of the Civil Procedure Code, 1908 to summon the deponent of I.A.No.1288 of 2010 for cross-examining by the respondents herein. I.A.No.1288 of 2010 is filed by the revision petitioner to set aside the ex parte decree in O.S.No.22 of 1998. The respondents seek the presence of deponent of the affidavit in I.A.No.1288 of 2010 to cross-examine him on the veracity of submissions made in the affidavit. The petitioner opposed the application. The trial Court, through the order impugned in the revision, allowed I.A.No.409 of 2012. Hence the present civil revision petition.

2. Sri Subodh, learned counsel for the petitioner, contends that the trial Court committed an illegality by summoning the deponent of the affidavit in I.A.No.1288 of 2010 inasmuch as order XVI Rule 2(i) of CPC has no application to the affidavits filed in interlocutory applications and cross-examination of the deponent arises if the affidavit is filed as evidence in the suit. He further contends that I.As. are decided by referring to averments in the affidavit and it is always open to the respondents herein to contradict the stand, if any, taken

earlier by the deponent in I.A.No.1288 of 2010. He placed reliance on **Shetty Chandra Shekar v. Neeti Ramulu**¹.

3. I have perused the reasons assigned by the learned trial Judge and prima facie, this Court is of the view that, treating the affidavit as evidence, the deponent is summoned for cross-examination. This Court in **Shetty Chandra Shekar** (supra) has held as follows:

“A bare perusal of the provisions of Order XIX, Rule 2, would make it clear that the question of ordering attendance for cross-examination of the deponent arises only in cases where the third party affidavits are filed in support of the cases of the respective parties. The language employed in the provision would not indicate conferring of any power on the Court to call a person swearing the affidavit filed in support of the petition, for cross-examination. The affidavit filed in support of the petition shall not be treated, as an affidavit filed by way of evidence, and in this context, it would be relevant, if a reference is made to the provisions of Section 3 of the Indian Evidence Act, 1872, which defines "evidence" to mean and include all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence. In the present case, the respondents-defendants filed the petition under Order XIX, Rule 2 C.P.C. to direct the petitioner-plaintiff No. 1 to come to the Court for the purpose of cross-examination. The question of applicability of the provisions of Order XIX, Rule 2 C.P.C. would arise only in cases where an affidavit was filed in support of the cases of the respective parties i.e. either on behalf of the plaintiff or on behalf of the defendant, by way of evidence, but certainly not an affidavit filed in support of a petition. Since the affidavit filed in support of a petition cannot be treated as evidence, the present petition filed by the

¹ 2008 (2) ALT 463

respondents-defendants under Order XIX, Rule 2 C.P.C. seeking to summon the deponent of the affidavit filed in support of the petition for temporary injunction, was not maintainable, and more so when it is not the case of the respondents-defendants that they intended to summon petitioner-plaintiff No. 1 because he had sworn to the affidavit by way of evidence to support the case of the plaintiffs. The law is well settled that when affidavits are filed in a proceeding under Order XXXIX, Rule 1 C.P.C. or any other proceedings, and in case the Court entertains a doubt, with regard to the identity of the person or persons who gave the affidavit, then it has the power and discretion to order the attendance of the deponent of the affidavit, for cross-examination so as to come to a just conclusion, to determine such petition. In such situations, the order passed by the Court below to summon the deponent for cross-examination cannot be faulted and such orders, can neither be said to be illegal nor beyond the competence of the Court.”

4. By following the decision referred to above, the order under revision is set aside. The trial Court considers and disposes of I.A.No.1288 of 2010 if circumstances warrant and subject to the outcome of I.A.No.1288 of 2010, the suit as well, as expeditiously as possible preferably within a period of six weeks from the date of receipt of a copy of this order.

5. Civil revision petition is allowed. No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed.

S.V. BHATT, J

November 27, 2018

MRR