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HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.132 of 2007**

1. Premlal S/o Puranik Verma, Aged at present 50 years, R/o.Village Maldi, P.S. Bhatapara, District Raipur (CG)
2. Dinesh Kumar Verma, S/o. Premlal Verma, Aged at present 26 years, R/o.Village Maldi, P.S. Bhatapara, District Raipur (CG)
3. Girish Kumar S/o. Premlal Verma, Aged at present 22 years, R/o. Village Maldi, P.S. Bhatapara, District Raipur (CG)

---- Appellants/Defendants**Versus**

1. Kunti Bai W/o Ramnarayan Verma, Aged about 45 years, R/o Village Alda, Police Station Nevra, District Raipur (CG)
2. Urmila Bai W/o. Pilaram Verma, Aged about 36 years, R/o. Village Navapara, Police Station Nevra, District Raipur (CG)
3. Premwati W/o. Shankarlal Verma, Aged about 32 years, R/o. Village Jheepan, Police Station Nevra, District Raipur (CG)
4. Saraswati Bai, W/o. Deenanath, Aged about 28 years, R/o. Village Khorsi, Police Station Palari, District Raipur (CG)
5. Preru Ram S/o. Jethuram Verma, Aged about 22 years
6. Roshanlal S/o. Jethuram Verma, Aged about 4 years
7. Meena Bai S/o. Jethuram Verma, Aged about 15 years

Resp. No.5, 6 & 7 through their guardian brother (Bhai) Preuram Verma, S/o. Jethuram Verma, Present Address – Tilda, Police Station Nevra, District Raipur (CG)

---- Respondents/Plaintiffs**And****Second Appeal No.137 of 2007**

1. Premlal S/o Puranik Verma, Aged at present 50 years, R/o.Village Maldi, P.S. Bhatapara, District Raipur (CG)
2. Dinesh Kumar Verma, S/o. Premlal Verma, Aged at present 26 years, R/o.Village Maldi, P.S. Bhatapara, District Raipur (CG)
3. Girish Kumar S/o. Premlal Verma, Aged at present 22 years, R/o. Village Maldi, P.S. Bhatapara, District Raipur (CG)

---- Appellants/Defendants**Versus**

1. Kunti Bai W/o Ramnarayan Verma, Aged about 45 years, R/o Village Alda, Police Station Nevra, District Raipur (CG)
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5. Preru Ram S/o. Jethuram Verma, Aged about 22 years
6. Roshanlal S/o. Jethuram Verma, Aged about 4 years
7. Meena Bai S/o. Jethuram Verma, Aged about 15 years

Resp. No.5, 6 & 7 through their guardian brother Bhai Feruram Verma, S/o. Jethuram Verma, Present Address – Tilda, Police Station Nevra, District Raipur (CG)

8. State of Chhattisgarh, Through Collector, Raipur, Distt. Raipur (CG)

---- Respondents

For Appellants/Defendants	:	Mr.Manoj Paranjape, Advocate
For Respondents/Plaintiffs	:	Mr.Ram Kumar Tiwari, Advocate
For Respondent No.8/State in S.A. No.137/2007	:	Mr.Sanjeev Kumar Agrawal, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

11.09.2019

1. This judgment will govern the disposal of Second Appeal Nos.132/2007 and 137/2007.
2. Since both the second appeals have arisen out of one civil suit and common substantial question of law has been framed in both the appeals, therefore, they are being disposed of by this common judgment.
3. The substantial question of law involved, formulated and to be answered in these second appeals preferred by the

appellants/defendants is as under:-

“Whether both the Courts were not justified in granting relief in favour of the respondent-Kunti Bai in view of the fact that she did not subject herself to cross-examination, and therefore, the sole evidence led by the plaintiff, i.e., the testimony of Kunti Bai could not form the basis for granting relief in favour of the respondents/plaintiffs ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court].

4. The plaintiffs' suit for declaration of title, permanent injunction, partition and possession was decreed by the trial Court on 18.7.2006, against which the plaintiffs and the defendants both preferred first appeals before the first appellate Court. First appeal preferred by the plaintiffs was allowed, however, first appeal preferred by the defendants was dismissed. Feeling aggrieved and dissatisfied with the judgment and decree of the first appellate Court, now the defendants have preferred these two second appeals questioning the judgment and decree of the first appellate Court.
5. It is appropriate to notice that during the pendency of the suit, on behalf of the plaintiffs, affidavit-evidence under Order 18 Rule 4 of the CPC of plaintiff-Kunti Bai (PW-1), Shankarlal (PW-2) and one Kashiram Verma (PW-3) were filed. On 11.7.2002 plaintiff-Kunti Bai was partly cross-examined and again on 26.8.2002 she was further partly cross-examined, but since the Court time was over, her cross-examination was postponed for 9.10.2002 and on 9.10.2002 the Presiding Officer was on leave and again the matter was adjourned for

8.11.2002, but it appears from the record that thereafter plaintiff-Kunti Bai did not appear before the trial Court though matter was fixed for evidence time to time and ultimately, her opportunity to lead evidence was closed on 23.1.2004 and thereafter the suit was decreed in favour of the plaintiffs, which has been upheld by the first appellate Court. Questioning the judgment and decree of the first appellate Court, these second appeals under Section 100 of the CPC have been filed by the appellants/defendants, in which common substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.

6. Mr.Manoj Paranjape, learned counsel for the appellants/defendants, would submit that both the Courts below are absolutely unjustified in decreeing the suit without there being any evidence within the meaning of Section 3 of the Indian Evidence Act, 1872 as plaintiff-Kunti Bai has not been subjected to full cross-examination on behalf of the defendants, as such, the judgment and decree of both the Courts below deserve to be set aside.
7. Mr.Ram Kumar Tiwari, learned counsel for the respondents/plaintiffs, would support the impugned judgment and decree.
8. I have heard learned counsel for the parties and considered their rival submissions thoughtfully and also went through the records with utmost circumscription.
9. It is apparent from the record that examination of plaintiff-Kunti Bai commenced on 11.7.2002, but adjourned for 26.8.2002, on 26.8.2002 she was partly cross-examined, but thereafter she could not appear and the plaintiff's opportunity to lead evidence was closed on

23.1.2004.

10. The question for consideration would be, whether the affidavit evidence of the plaintiff, which was not subjected to cross-examination, can be said to be evidence within the meaning of Section 3 of the Evidence Act.

11. Section 3 of the Evidence Act provides as under:-

“3. Interpretation clause.-In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

“Evidence” .— “Evidence” means and includes—

(1) 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;

(2) all documents including electronic records produced for the inspection of the Court;

such documents are called documentary evidence.

12. A careful perusal of the aforesaid provision would show that affidavit is not included in the definition of 'evidence' under Section 3 of the Evidence Act and can be used, only if the Court permits it to be used for sufficient reasons. An affidavit can be termed to be an evidence within the ambit of Section 3 of the Evidence Act only in those cases where the same is filed at the instance or under the direction of the Court or law specifically permits for proof of anything by affidavit. Thus, the filing of affidavit of one's own statement, in one's own favour, cannot be regarded as sufficient evidence for any Court.

13. Their Lordships of the Supreme Court in the matter of Ayaubkhan Noorkhan Pathan v. State of Maharashtra and Ors.¹

¹ AIR 2013 SC 58

have considered the importance of cross-examination and held that cross-examination is an integral part and parcel of principles of natural justice and observed as under:-

“23. A Constitution Bench of this Court in *State of M.P. v. Chintaman Sadashiva Vaishampayan*, AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. (See also: *Union of India v. T.R. Varma*, AIR 1957 SC 882; *Meenglas Tea Estate v. Workmen*, AIR 1963 SC 1719; *M/s. Kesoram Cotton Mills Ltd. v. Gangadhar & Ors.*, AIR 1964 SC 708; *New India Assurance Company Ltd. v. Nusli Neville Wadia and Anr.*, AIR 2008 SC 876 : (2008 AIR SCW 208); *Rachpal Singh & Ors. v. Gurmit Singh & Ors.*, AIR 2009 SC 2448 : (2009 AIR SCW 4567); *Biecco Lawrie & Anr. v. State of West Bengal & Anr.*, AIR 2010 SC 142 (2009 AIR SCW 5779); and *State of Uttar Pradesh v. Saroj Kumar Sinha*, AIR 2010 SC 3131: (2010 AIR SCW 1077).

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.

31. Affidavit - whether evidence within the meaning of Section 3 of the Evidence Act, 1872:

It is a settled legal proposition that an affidavit is not evidence within the meaning of Section 3 of the Indian Evidence Act, 1872 (hereinafter referred to as the ‘Evidence Act’).

Affidavits are therefore, not included within the purview of the definition of "evidence" as has been given in Section 3 of the Evidence Act, and the same can be used as "evidence" only if, for sufficient reasons, the Court passes an order under Order XIX of the Code of

Civil Procedure, 1908 (hereinafter referred to as the 'CPC'). Thus, the filing of an affidavit of one's own statement, in one's own favour, cannot be regarded as sufficient evidence for any Court or Tribunal, on the basis of which it can come to a conclusion as regards a particular fact-situation. (Vide: *Sudha Devi v. M.P. Narayanan & Ors.*, AIR 1988 SC 1381; and *Range Forest Officer v. S.T. Hadimani*, AIR 2002 SC 1147: (2002 AIR SCW 909)."

14. Their Lordships further held that affidavit can be relied upon when the deponent is available for cross-examination in terms of Order 18 Rule 4 of the CPC and observed as under:-

"36. Therefore, affidavits in the light of the aforesaid discussion are not considered to be evidence, within the meaning of Section 3 of the Evidence Act. However, in a case where the deponent is available for cross-examination, and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such view stands fully affirmed particularly, in view of the amended provisions of Order XVIII, Rules 4 & 5 CPC....."

15. The principle of law laid down in Ayaaubkhan Noorkhan Pathan (supra) was followed with approval by Their Lordships of the Supreme Court in the matter of Nirmala J. Jhala v. State of Gujarat and another².

16. Thus, it is now well settled that affidavit is not evidence within the meaning of Section 3 of the Evidence Act unless an opportunity to effectively cross-examine to the person(s) examined is given to other side as provided in Order 18 Rule 4 (2) of the CPC.

17. Reverting to the facts of the present case, in light of principle of law laid down by the Supreme Court in Ayaaubkhan Noorkhan Pathan (supra), it is quite vivid that plaintiff-Kunti Bai filed an affidavit evidence under Order 18 Rule 4 of the CPC, but the defendants were

² (2013) 4 SCC 301

not given opportunity to cross-examine her fully as after 26.8.2002 she failed to appear before the trial Court and consequently, the plaintiff's opportunity to lead evidence was closed on 23.1.2004 and thereby, affidavit evidence of plaintiff-Kunti Bai filed under Order 18 Rule 4 of the CPC remained affidavit, as she was not subjected to full cross-examination on behalf of the defendants. So, it would not be evidence within the meaning of Section 3 of the Evidence Act and using such evidence would be violative of principles of natural justice as right of cross-examination is an integral part of principle of natural justice and consequently, statement of Kunti Bai/plaintiff could not have been read as evidence by the trial Court as well as by the first appellate Court by granting decree in favour of the plaintiffs on the basis of said affidavit-evidence as no other evidence was led by the plaintiffs. Both the Courts below were unjustified in granting decree relying upon affidavit statement of plaintiff-Kunti Bai, as such, decree passed by the trial Court as affirmed by the first appellate Court are liable to be set aside and hereby set aside and substantial question of law is answered accordingly.

18. The next question would be what is the course available to this Court, whether the suit be dismissed or it be remitted to the trial Court by permitting the defendants to cross-examine the plaintiff-Kunti Bai and two other witnesses cited on behalf of the plaintiffs ?

19. It is evident from the record that parties are related to each other closely and the suit was for partition and separate possession. After filing of affidavit under Order 18 Rule 4 of the CPC, plaintiff-Kunti Bai appeared before the trial Court on 11.7.2002, but on that day, the case

was adjourned on objection raised by the defendants and that too by imposition of cost upon the defendants. Again on 26.8.2002, she appeared but on account that Court's time was over, she was not cross-examined fully. On 11.7.2002 age of plaintiff-Kunti Bai was 60 years, despite she appeared thrice, but she could not be cross-examined on objection being raised by the defendants or the Court's time was over and for that, the plaintiff cannot be held responsible. The matter is remitted to the concerned trial Court to give an opportunity to the defendants to cross-examine plaintiff-Kunti Bai and two other witnesses. The defendants will also be entitled to lead evidence/further, if any, in rebuttal. Considering the long pendency, the trial Court is directed to conclude the trial within three months from the date of receipt of copy of this order.

20. The second appeals are allowed to the extent indicated hereinabove. Records of the Courts below be sent to the concerned trial Court forthwith.

21. A decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No.132 of 2007****Appellants**

Premlal and others

Versus**Respondents**

Kunti Bai and others

(Head-note)

(English)

Affidavit filed under Order 18 Rule 4 of the Code of Civil Procedure, 1908 is not evidence within the meaning of Section 3 of the Indian Evidence Act, 1872 unless the deponent is subjected to cross-examination.

(हिन्दी)

सिविल प्रक्रिया संहिता, 1908 के आदेश 18 नियम 4 के अंतर्गत प्रस्तुत शपथ पत्र, भारतीय साक्ष्य अधिनियम, 1872 की धारा के अर्थ में तब तक साक्ष्य नहीं है जब तक कि शपथकर्ता का प्रतिपरीक्षण नहीं हो जाता है।