

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

6 WRIT PETITION NO. 1919 OF 2019

SAMPAT SUKHDEO JORVEKAR AND OTHERS
VERSUS
ASHOK SUDHAKAR MUNGASE AND OTHERS

...

Advocate for Petitioners : Mr. Kotkar Sanjay D.
Advocate for Respondent No.1 : Mr. A.D. Shinde

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**CORAM : P.R. BORA, J.
DATED : 04th APRIL, 2019.**

PER COURT:-

1. Heard Shri Sanjay D. Kotkar, the learned counsel appearing for the petitioners and Shri Amol D. Shinde, the learned counsel appearing for the respondent.

2. Perused the impugned order.

3. The present petitioners are defendants in the Trial Court in R.C.S. No.726/2018. In the aforesaid suit, the plaintiffs filed an application seeking injunction by invoking the provisions of Order 39 Rule 1 of the Civil Procedure Code. The present petitioners have submitted their say to the said application. Subsequently, the present petitioners filed an application at Exhibit-63 seeking cross-examination of the plaintiff, who has filed an affidavit in support of the contentions raised in the application for interim injunction.

That application has been rejected by the Trial Court. Aggrieved by, the petitioners have filed the present petition.

4. The learned counsel Shri Kotkar relying upon the division bench judgment of the Madras High Court in the case of **"Ram Swaroop and Ors Vs. Bholu Raj, AIR 1991 Rajashthan 56"**, urge that there is no bar for permitting the cross-examination of the person who has filed the affidavit in support of the contentions raised in the application filed under Order 39 Rule 1 and 2 of the Code of Civil Procedure. The learned counsel submits that it was the specific contention of the present petitioners that certain facts are incorrectly and falsely stated in the application and for that permission to cross-examine the said witness was necessary. The learned counsel submits that the Trial Court has wrongly rejected his application. The learned counsel in the circumstances, prayed for allowing the writ petition.

5. Shri Shinde, the learned counsel appearing for the respondent opposed the submissions made on behalf of the petitioners. The learned counsel relying upon the judgment of the Gujrat High Court in the case of **"Kanbi Mavji Khimji and Anr Vs. Kanbi Manjibhai Abjibhai and Ors, AIR 1968 Gujarat 198"**, submitted that at the stage

of deciding interim injunction application, the Court is not supposed to grant any permission to cross-examine the witness and as such no fault can be found in the order passed by the Trial Court. The learned counsel also placed reliance on the judgment of this Court in the case of **"Mohanlal Jugaraj Khabiya and Ors Vs. Kamlabai (Smt.) w/o Madhavrao and Ors, 1981 Bom.C.R. 872"**, to urge that the Trial Court has to dispose of the application for temporary injunction on affidavits filed by the parties.

6. I have given due consideration to the submissions advanced on behalf of the petitioners as well as respondents. I have perused the impugned order. I have also gone through the judgment relied upon by the parties. First of all, I deem it appropriate to reproduce herein-below, Order XIX Rule 1 and 2 of the Code of Civil Procedure which read thus:

"1. Power to order any point to be proved by affidavit

Any Court may at any time for sufficient reason 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, on such conditions as the Court thinks reasonable :

Provided that where it appears to the Court that either party bona fide desires the production

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of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. Power to order attendance of deponent for cross-examination

(1) 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 of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs."

7. Reading of the aforesaid provision makes it clear that the Court possesses power to call the deponent for cross-examination when an affidavit has been filed in support of an application under Order 39 Rule 1 of the Code of Civil Procedure. "Whether the provisions of Order XIX of the Civil Procedure Code apply for deciding the application for grant of temporary injunction under Order 39 of the Civil Procedure Code?" was the question referred to be decided by a larger bench of the Rajasthan High Court since, the single bench decision of the said Court in the case of "**Kusum Kumar Choudhary Vs. Supra Films (1971 RLW 282)**" and the single bench decision of the Andhra Pradesh High Court in the case of

"Ali Bin Aifan (AIR 1983 AP 114)" were conflicting. The Division Bench of the Rajasthan High Court after having considered the aforesaid two judgments of the single bench and considering the other judgments on the issue held that the provision of Order XIX of the Civil Procedure Code apply for deciding the application for grant of temporary injunction under Order 39 of the Code. In the said judgment, the Division Bench of the Rajasthan High Court has also referred to Division Bench judgment of the Nagpur High Court in the case of **"Kanhaiyalal S. Dadlani Vs. Meghraj Ramkaranji, AIR 1954 NAGPUR 260"**. I deem it appropriate to reproduce herein-below para-17 of the said judgment which reads thus:

"17. Similarly, in AIR 1942 Oudh 350(K)', we have the high authority of Ghulam Hasan, J. (as he then was). In that ruling the ambit of the two rules was elaborately considered. After quoting the first rule of O.19, the learned Judge observed as follows:

"A perusal of the rule leaves no doubt that it is open to a Court on sufficient grounds to allow proof of facts by means of affidavits, but if the production of the declarant of the affidavit is required in good faith for cross-examination by any party, the court shall not use such affidavit in support of the facts alleged therein without the production of the declarant. Rule 2 of O.19, Civil P.C., puts the matter further beyond doubt. This

rule is to the effect that 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 of the deponent.

It was perfectly open to the lower Court to have ordered the production of the witness either of its own motion or at the instance of the defendant, for cross-examination in order to satisfy itself about the truth of the allegations in the affidavit. It does not appear from the record that the defendant's counsel asked the Court to order the attendance of the plaintiff so as to give him an opportunity to cross-examine him, nor did the Court 'suo motu' think it necessary to order the plaintiff's attendance. There was no counter-affidavit filed by the defendant in answer to the allegations contained in the affidavit. Under the circumstances, it cannot be said that there was no evidence before the Court in support of the allegations contained in the plaintiff's application for restoration of the suit.

The view of law taken by the lower Court that the affidavit was no evidence of the facts alleged therein merely because there had been a verbal denial by the defendant without any attempt to controvert it by a counter-affidavit or without asking for the attendance of the plaintiff for the purpose of cross-examination, is not supported by the provisions of O.19, Rr. 1 and 2, Civil P.C., referred to above. I have no doubt whatever that had the attention of the learned Judge been drawn to the provisions of O.19 Rr.1 and 2, he would not have expressed the opinion which he did, that the

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affidavit was no evidence of the facts alleged therein."

8. In view of the judgments of the two divisions benches, the impugned order cannot be sustained and deserves to be set aside. Hence, the following order:

ORDER

- i) The order passed by the Trial Court impugned in the present petition stands set aside. Consequently, the application below Exhibit-63 stands allowed.
- ii) The writ petition is allowed in the aforesaid terms.

(P.R. BORA, J.)

Mujaheed//