

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Writ Petition No. 450 of 2022

Smt. Rehana Parveen wd/o Mohd. Inayat Khan,
a/a 64 years, occ. household work,
through power of attorney holder
Shri Mohd. Naukhez s/o Mohd. Inayat Khan,
a/a 32 years, occ. business,
r/o Bhagyashri Colony, Camp, Amravati,
Tq. and Distt. Amravati.

.... Petitioner

// Versus //

Syed Ishtiyak s/o Syed Muzaffar,
a/a 74 years, occ. retired,
r/o Sagar Nagar, Near Camp Masjid,
Chaprasi Pura, Amravati,
Tq. and Distt. Amravati.

.... Respondent

Mr. C. A. Joshi, Advocate for the petitioner
Mr. U. J. Deshpande, Advocate for the respondent

CORAM : ROHIT B. DEO, J.
DATED : 15-3-2022

ORAL JUDGMENT

Rule. Rule made returnable forthwith. Heard finally with
consent of learned counsel appearing for the parties.

2. The petitioner is the original plaintiff in Regular Civil Suit
967/2012, which is instituted for decree of possession.

3. The suit is decreed by the learned trial Judge vide judgment dated 10-6-2019.

4. The respondent – defendant preferred Regular Civil Appeal 118/2019.

5. The defendant preferred an application for stay of the execution of the decree which was allowed subject to condition that Rs. 15,000/- (Rupees Fifteen Thousand) per month shall be deposited towards occupation charges payable with effect from the date of the institution of the appeal. This order was challenged to the High Court and while partly allowing the petition, the High Court set aside the order and remitted the matter to the appellate Court to redetermine the quantum of occupation charges/compensation. The High Court further considered the contention that the possession of the suit premises was taken forcibly despite the undertaking of the petitioner – landlord to the effect that no coercive action shall be taken. The High Court noted that the application seeking restitution preferred by the tenant is pending and directed that the said application shall also be considered along with the application under Order XLI Rule 5 of the Code of Civil Procedure (CPC).

6. The defendant filed on record three affidavits in support of the stands in the application under Order XLI Rule 5 and that for

restitution. The landlord sought permission to cross-examine the tenant, vide application dated 6-1-2022, which is rejected by the order impugned on the premise that the “affidavits are simple” and do not constitute evidence, and therefore, deponents cannot be cross-examined.

7. Learned counsel Mr. Joshi would submit that the learned trial Judge lost sight of the provisions of Order XIX Rule 2 of the CPC which reads thus :

“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.”

8. According to Mr. Joshi, there is no bar whatsoever and it is neither a principle of law nor a proposition which can be culled out from the precedents that the deponents cannot be cross-examined. In all fairness, learned counsel Mr. Ujwal Deshpande does not join issues with Mr. Joshi as far as proposition of law is concerned.

9. The order impugned is set aside.

10. The application, Exhibit 46 to cross-examine the deponents is allowed.

11. The parties shall appear before the learned appellate Judge on 23-3-2022.

12. All deponents shall remain present and shall be cross-examined by the plaintiff preferably on the date of appearance, or any other date within the next fifteen days.

13. The trial Court shall decide the application under Order Order XLI Rule 5 of the CPC and the application seeking restitution within thirty days next from the appearance of the parties.

14. The petition is allowed in the aforestated terms.

JUDGE

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