

IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE
HON'BLE SHRI JUSTICE ANAND PATHAK

MISC. PETITION No. 6745 of 2023

BETWEEN:-

**RAMJI RAI S/O LATE SHRI BHAG
IRATH, AGED ABOUT 58 YEARS,
OCCUPATION: BUSINESS PAUWALE
BABA KE PASS, BYE PASS KE SAMNEL
MOTIJHEEL, GWALIOR (MADHYA
PRADESH)**

.....PETITIONER

(BY SHRI P.C. CHANDIL - ADVOCATE)

AND

- 1. SMT. CHAMPA RAI W/O LATE SHRI
HARIKISHAN RAI, AGED ABOUT 70
YEARS, 429, BABA GAON GATE BAHAR
MASTER COLONY, JHANSI (UTTAR
PRADESH)**
- 2. SADHURAM S/O LATE SHRI GYASIRAM,
AGED ABOUT 78 YEARS, MOTIJHEEL
RAILWAY FATAK KE PASS, GWALIOR
(MADHYA PRADESH)**
- 3. KAILASH S/O LATE SHRI LALARAM,
AGED ABOUT 75 YEARS, GHASMANDI
RAI COLONY SARKARI SCHOOL KE
PASS GWALIOR (MADHYA PRADESH)**
- 4. BABULAL RAI S/O LATE SHRI
LALARAM, AGED ABOUT 80 YEARS,
ANAND NAGAR ROAD CHHOTI
DARGAH KE PASS GWALIOR (MADHYA
PRADESH)**
- JAGDISH RAI S/O LATE SHRI GIRDHARI,
5. AGED ABOUT 73 YEARS, R/O
MOTIJHEEL PAUWALE BABA KE
MANDIR KE PASS (ASJPL DHABA KE
SAMNE GWALIOR (MADHYA PRADESH)**
- 6. MEWARAM S/O LATE SHRI GIRDHARI,**

AGED ABOUT 70 YEARS, GHASMANDI
RAI COLONY SARKARI SCHOOL KE
PASS (MADHYA PRADESH)

7. CHANDRABHAN S/O LATE SHRI
GIRDHARI, AGED ABOUT 57 YEARS,
GHASMANDI RAI COLONY SARKARI
SCHOOL KE PASS GWALIOR (MADHYA
PRADESH)
8. RAGHUVeer RAI S/O LATE SHRI
GIRDHARI, AGED ABOUT 63 YEARS,
P.H.E. COLONY MOTIJHEEL GWALIOR
(MADHYA PRADESH)
9. SHRIBAI D/O LATE SHRI GIRDHARI,
AGED ABOUT 67 YEARS, GHASMANDI RAI
COLONY KUNWARAN KI THAAN KE PASS
(MADHYA PRADESH)
10. BHAJANLAL S/O LATE SHRI
BHAGIRATH, AGED ABOUT 63 YEARS,
PAUWALE BABA KE PASS BYE PASS KE
SAMNE MOTIJHEEL (MADHYA
PRADESH)
11. RAJKUMAR S/O HRI BHAGIRTH, AGED
ABOUT 60 YEARS, PAUWALA BABA KE
PASS BYE PASS KE SAMNE MOTIJHEEL
(MADHYA PRADESH)
12. GAURA RAI S/O LATE SHRI BHAGIRATH
OCCUPATION: AGED 65 YEARS
GHASMANDI RAI COLONY SARKARI
SCHOOL KE PASS GWALIOR (MADHYA
PRADESH)
13. NAVEEN RAI S/O LATE SHRI TIKARAM
RAI, AGED ABOUT 43 YEARS,
SATYANARAYAN MOHALLA HAWELI
PICHHWADA (MADHYA PRADESH)
14. PRABHA RAI D/O LATE SHRI TIKRAM
RAI, AGED ABOUT 53 YEARS,
SATYANARAYAN MOHALLA HAWELI
PICHHWADA (MADHYA PRADESH)
15. VIJAY RAI S/O LATE SHRI RAJARAM RAI,
AGED ABOUT 48 YEARS, GHASMANDI
RAIL COLONY SARKARI SCHOOL KE
PASS (MADHYA PRADESH)
16. AJAY RAI S/O LATE SHRI RAJARAM RAI,
AGED ABOUT 40 YEARS, GHASMANDI
RAIL COLONY SARKARI SCHOOL KE PASS
(MADHYA PRADESH)

17. LAXMI RAI S/O LATE SHRI RAJARAM RAI, AGED ABOUT 50 YEARS, GHASMANDI RAIL COLONY SARKARI SCHOOL KE PASS (MADHYA PRADESH)
18. MANOJ RAI S/O LATE SHRI TIKARAM RAI, AGED ABOUT 51 YEARS, JAMUNA BAI MANDIR KE SAMNE RAI COLONY GHASMANDI (MADHYA PRADESH)
19. VINOD RAI S/O LATE SHRI TIKARAM RAI, AGED ABOUT 48 YEARS, JAMUNA BAI MANDIR KE SAMNE RAI COLONY GHASMANDI (MADHYA PRADESH)
20. SURENDRA RAI S/O LATE SHRI TIKARAM RAI, AGED ABOUT 45 YEARS, JAMUNA BAI MANDIR KE SAMNE RAI COLONY GHASMANDI (MADHYA PRADESH)
21. SMT. IMARTI DEVI W/O LATE SHRI NEKIRAM RAI, AGED ABOUT 66 YEARS, JAMUNA BAI MANDIR KE SAMNE RAI COLONY GHASMANDI (MADHYA PRADESH)
22. SMT. CHHAYA RAI W/O LATE SHRI NEKIRAM RAI, AGED ABOUT 66 YEARS, JAMUNA BAI MANDIR KE SAMNE RAI COLONY GHASMANDI (MADHYA PRADESH)
23. COLLECTOR THE STATE OF MADHYA PRADESH GWALIOR (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI KAMAL MANGAL - ADVOCATE FOR CONTESTING RESPONDENT NO.1/PLAINTIFF)

(BY SHRI G.S. CHAUHAN – GOVT. ADVOCATE FOR RESPONDENT NO.23/STATE)

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Reserved on : 22.01.2024

Delivered on : 22.04.2024

This petition having been heard and reserved for orders coming on for pronouncement this day, delivered the following:-

ORDER

With consent heard finally.

1. The present petition is preferred under Article 227 of the Constitution at the instance of defendant taking exception to the order dated 17.10.2023 passed by the trial Court whereby application preferred by defendant under Order XIX Rule 1 and 2 CPC is rejected.

2. Precisely stated facts of the case are that a suit for declaration and permanent injunction has been filed by the plaintiff (respondent No.1 herein) against the petitioner and respondents No. 2 to 23 with respect to the agriculture land at village Ranipura, Bahodapur, District Gwalior with the pleadings that the suit land is the ancestral property of the petitioner and respondents No. 1 to 22. Plaintiff is having 1/20th share therein. By filing the suit plaintiff sought declaration that the suit land is joint property of plaintiff and other defendants with a further relief to restrain petitioner and other defendants from creating third party right in the suit land without partition of the same.

3. An application under Order XXXIX Rule 1 and 2 CPC for temporary injunction is also filed with the same averments. In support of application, plaintiff/respondent No.1 filed the affidavit of her own.

4. In rebuttal, petitioner/defendant filed reply to the said application for temporary injunction and submitted that before the revenue authority i.e. Tehsildar, Gwalior on dt. 11.01.2014, the plaintiff and her sister Gaura Rai (respondent No. 12 herein) jointly filed an affidavit that they have no concern with the suit land, they have relinquished their share in favour of their brothers and they would never claim their share in future. In response

thereof, petitioner filed an application under Order XIX Rule 1 and 2 CPC and prayed for cross-examination of plaintiff/respondent No.1 with respect to the affidavit filed by the plaintiff in support of her application under Order XXXIX Rule 1 and 2 CPC. The court below rejected the petitioner's application vide impugned order dated 17.10.2023 with the reason that affidavit has not been filed by the plaintiff/respondent by the order of court, therefore, plaintiff cannot be called in the dock as witness. Therefore, against the said order, petitioner as defendant is before this Court.

5. It is the submission of learned counsel for petitioner that trial Court erred in passing the impugned order and caused illegality. When an application under Order XXXIX Rule 1 and 2 CPC is preferred at the instance of plaintiff and if any particular fact is required to be clarified in the interest of justice, then invoking provisions as contained in **Order XIX (Affidavits)** would further the cause of justice to the extent that any particular fact or facts may be proved by calling the deponent for cross-examination on that particular fact. There is no bar as such in calling the witness for cross-examination at the stage of deciding application for temporary injunction under Order XXXIX Rule 1 and 2 CPC. According to him, Rule 2 of Order XIX specifically provides the mechanism to ensure attendance of deponent for cross-examination.

6. Learned counsel refers the contents of application filed in this regard by the petitioner before trial Court to submit that petitioner intends to cross-examine the plaintiff only in respect of

her earlier undertaking given before Tehsildar. Therefore, trial Court erred in passing the impugned order.

7. In support of his submissions, he relied upon the judgment of this Court in the case of **Sudhir Kumar and another vs. Smt. Asha, 1995 J LJ 635**. Learned counsel for petitioner further refers Rule 2 of Order XIX to say that Rule 2 is very exhaustive in nature and both parties can move appropriate application in this regard. Even otherwise, Rule 1 of Order XIX gives power to the court to take *suo moto* cognizance but it does not bar the parties to move application. It does not bar the court to consider that application.

8. Shri Kamal Mangal, learned counsel appearing for contesting respondent No.1 opposed the prayer. According to him, as per Section 1 and Section 3 of Indian Evidence Act affidavit cannot be permitted for bringing evidence on record in a manner where at the stage of consideration over application for temporary injunction oral evidence of a witness may be taken. Same is barred as per Section 1 and 3 of Evidence Act. Order XIX nowhere postulates calling of plaintiff/deponent as witness in the dock. He raised the point if the witness is produced and countered with certain documents which are being exhibited then what would be the status of those documents and the testimony of witness in further course of trial. Said documents and testimony may further create confusion and contradictions for the parties. He further refers the fact that affidavit of plaintiff which was filed before the Court of Tehsildar cannot be exhibited in evidence because petitioner has obtained certified copy of that affidavit and while

relying upon the judgment of Apex Court in the case of **Sneh Gupta vs. Devi Sarup and others, (2009) 6 SCC 194**, he submits that if a party relinquishes his or her right in the property, the same must be done by a registered instrument in terms of the provisions of Indian Registration Act. Therefore, that alleged relinquishment has no meaning.

9. Learned counsel also relied upon the judgment of Apex Court in the case of **Smt. Sudha Devi vs. M.P. Narayan and others, (1988) 3 SCC 366** to submit that affidavits are not included in the definition of 'evidence' and can be used as evidence only if, for sufficient reason court passes order. He also relied upon a Single Bench judgment of this Court in the case of **Kalusingh and another vs. Nirmala and another, 2015 (3) MPLJ 564** to submit that affidavit as document cannot be used in evidence. He further relied upon contents of judgment rendered by Single Bench of this Court in the case of **Shehzad vs. Sohrab & Ors, M.P. No.3468/2018 decided on 24.07.2018 (I.L.R. 2018 M.P.2181)** to submit that cross-examination of witness at the stage of Order XXXIX Rule 1 and 2 CPC cannot be held invoking the powers under Order XIX Rule 1 and 2 CPC. He prayed for dismissal of petition.

10. Heard the learned counsel for the parties at length and perused the documents appended thereto.

11. The instant petition under Article 227 of the Constitution is preferred at the instance of defendant, taking exception to the order dated 17.10.2023 passed by the trial Court whereby application preferred by defendant under Order XIX Rule 1 and 2

CPC stand rejected.

12. The said application was preferred by petitioner/defendant with the intention to call Smt. Champa Rai (respondent No.1 herein) who happens to be plaintiff in the *lis* for cross-examination on affidavit filed by plaintiff in support of application under Order XXXIX Rule 1 and 2 CPC. Reason for calling the plaintiff for cross-examination is that in instant suit, plaintiff claimed her right, title and interest in the suit property whereas in earlier proceedings held before Tehsil/Revenue Court, Gwalior in her affidavit filed on 11.01.2014, she mentioned the fact that she has relinquished her right, title and interest over the disputed property in favour of brothers. Therefore, according to petitioner/defendant, in the present *lis*, plaintiff has taken contradictory stand, therefore, she is required to appear in the dock as witness for the purpose of consideration of application under Order XXXIX Rule 1 and 2 CPC.

13. That contradiction is required to be reconciled only when witness is called for limited purpose of application for temporary injunction and not beyond. Learned Division Bench of this Court in the case of **Mithailal vs. Inland Auto Finance & Ors. 1967 JLJ 864** held in following words:-

“10. Rule 2 of the 19th Order of the Code of Civil Procedure enables evidence to be given by affidavit upon an interlocutory application. **An affidavit must be confined to the particular facts to be proved and such facts as the witness is able from his own knowledge to prove.** An affidavit differs from a deposition inasmuch as, in the latter, the opposite party has always an opportunity to cross-examine the deponent but an affidavit is taken

Exparte. Where the adverse party desires production of the deponent for cross-examination, the Court should ordinarily order attendance of the deponent for cross-examination.”

14. Beside that, Order XIX of CPC is to be seen in juxtaposition to Order XXXIX Rule 1 and 2 CPC. For better understanding of dispute, Order XIX Rule 1 and 2 CPC are reproduced for ready reference:-

ORDER XIX - AFFIDAVITS:

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 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.

Similarly, Order XXXIX Rule 1 and 2 CPC are reproduced for ready reference:-

ORDER XXXIX – TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

“1. Cases in which temporary injunction

may be granted. - Where in any suit it is proved by affidavit or otherwise -

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors,

(c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit, until the disposal of the suit or until further orders.

2. Injunction to restrain repetition or continuance of breach. - (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

15. Perusal of Order XIX indicates that any court may at any time for sufficient reason may order that either facts may be proved by affidavit or that affidavit of witness may be read at the hearing on such conditions as the court thinks reasonable. Such conditions may include calling of deponent for cross-examination (for limited purpose). Apparently, proviso appears to be independent than the main provision but it further gives liberty to the court once court is satisfied about the bonafide desires of either party about production of a witness for cross-examination then instead of taking evidence by way of affidavit, court can direct the witness to be produced by the party. Therefore, any fact or facts including the facts about temporary injunction can also be proved through examination of deponent who filed affidavit in support of certain facts.

16. Rule 2 of Order XIX give discretion to the parties to move appropriate application for giving evidence by affidavit. In that manner, this provision is affirmative in nature because it gives liberty or chance to a party to lead evidence whereas Rule 1 appears to be enabling because under Rule 1, court directs the party to prove particular facts by affidavit or by cross-examination of witness or on such conditions as the court thinks reasonable. Therefore, Rule 1 and 2 infact support each other to reach to the analogy that evidence on affidavit and cross-examination of deponent can bring the truth about any particular fact.

17. One more aspect deserves consideration is Rule 1 of Order XXXIX which starts with the expression “Where in any suit it is proved by affidavit or **otherwise**”. It indicates the legislative

intent that any fact can be proved by affidavit or any other method other than it. That method can be by way of calling deponent/witness. Therefore, word **otherwise** also leads to proposition that deponent (of affidavit) can be called for cross-examination to prove particular facts. In the present case, facts as surfaced in affidavit and in support of application under Order XXXIX Rule 1 and 2 CPC are to be verified. That can be done by resorting to the provisions as contained in Order XIX of CPC.

18. However, it is to be kept in mind that said cross-examination would be limited for the purpose for which deponent is called. Documents exhibited in this regard would serve that purpose only,

19. In the case of **Gulabchand Jain and Ors. vs Khushal Chand and Ors., 1992 J LJ 57** while relying upon the learned Division Bench order in the case of **Mithailal (supra)** held in similar fashion. Relevant discussion is reproduced hereinbelow for ready reference:-

“1. This revision petition has been preferred by the defendant, aggrieved by the order of refusal to the cross-examination of the respondent-plaintiff No.1, on the affidavit filed by him in support of his application under Order 39, Rule 1 and 2 of the Civil Procedure Code (for short “the Code”).

9. In the facts and circumstances of the given case, since the petitioner-defendants have alleged that the statement of deponent Khushanchand in his affidavit filed in the suit, is contradictory to the version given by him in his affidavit filed in the ceiling proceedings, the petitioner's demand of opportunity of cross-examination of the deponent could not be said to be unjustified and if the trial court felt that allowing cross-examination may result in delaying the proceedings, the learned trial Court

in such circumstances could put a rider and pass the conditional order fixing a particular date on which cross-examination, only on the limited point could be completed and on failure of defendant, could close the right of cross-examination.”

20. In the case of **Sudhir Kumar and another vs. Smt. Asha, 1995 J LJ 635**, this Court again reiterated in same spirit.

21. Certain provisions in CPC like **Order X (Examination of Parties by the Court), Order XIX (Affidavits) and Order XXVI (Commissions)** are some of the methods/tools by which court can check the authenticity/veracity of claims made by the parties and even can cutshort the course of litigation if those provisions are handled cautiously and diligently.

22. In adjudication, **Truth** should be the **ultimate Victor** and **Justice** should be the **ultimate Goal**.

23. Therefore, in the conspectus of facts and circumstances of the case, this petition stands **allowed** and impugned order dated 17.10.2023 is hereby set aside. Parties are directed to appear before the trial Court and proceed further in accordance with law for cross-examination of plaintiff for the purpose of temporary injunction.

(ANAND PATHAK)
JUDGE

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