

(2016) 09 GAU CK 0016

GAUHATI HIGH COURT

Case No: CRP No. 144 of 2015.

Sri Kandarpa Pathak, son of Late
Rashadhar Pathak, resident of
village- North Guwahati,
Madhyam Khanda, North
Guwahati, District Kamrup (R),
Assam - Petitioner @HASH Sri
Mono Kanta Baruah

APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 23, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 19 Rule 2

Citation: (2016) 6 GauLJ 191 : (2017) 2 GauLR 417 : (2016) 4 GauLT 1124

Hon'ble Judges: Suman Shyam, J.

Bench: Single Bench

Advocate: Mr. A. Das, Advocate, for the Petitioners; Mr. P.K. Deka, Advocate, for the Respondents

Final Decision: Dismissed

Judgement

Suman Shyam, J.(Oral) - Heard Mr. A. Das, learned counsel for the petitioners. Also heard Mr. P.K. Deka, learned counsel representing the respondents.

2. This revision petition has been preferred against the order dated 03/03/2015 passed by the Court of learned Munsiff, Amingaon in Misc. (J) Case No. 196/2014 arising out of T.S. No. 64/2014, whereby, the petition filed by the petitioners/defendants under Order XIX Rule 2 of the CPC seeking leave to cross examine the respondent no. 1 was rejected.

3. The brief factual matrix of the case is that the respondent nos. 1 and 2, as plaintiffs, had earlier instituted T.S. No. 434/2013 in the Court of Munisff No. 1,

Kamrup at Guwahati against the present petitioners and 4 others seeking a decree of declaration of their right, title and interest over the suit land and also for recovery of khas possession in respect thereof. During the pendency of the suit, the plaintiffs had filed an application under Order 6, Rule 17 CPC seeking leave to amend the plaint, inter-alia, on the ground that it was only from the written statement filed by the defendant nos. 1 and 3 that the plaintiffs had come to know for the first time that the plaintiffs and their deceased brother had sold the suit land to the father-in-law and father of the defendant nos. 1 and 3 respectively by registered sale deed bearing no. 5390 on 17/11/1964. By way of the proposed amendment, the plaintiffs, therefore, wanted to seek relief in respect of sale deed no. 5390 declaring the same to be void and inoperative in the eye of law. The said application was supported by an affidavit sworn by the respondent No. 1.

4. On receipt of the copy of the application filed under Order 6, Rule 17 CPC, the petitioners herein, who were the defendants no. 1 and 3 in the aforementioned Title Suit, had filed an application under Order XIX Rule 2 CPC on 05/01/2015 with a prayer to cross-examine the deponent i.e. the respondent No 1. It appears that the respondents/plaintiffs did not file any objection against the application filed under Order XIX Rule 2 CPC which had prompted the petitioners to file a separate application dated 03/03/2015 bearing no. 384/2015 praying before the Court to allow the aforesaid application filed under Order XIX Rule 2 of the CPC, on the ground that the plaintiffs did not file any objection nor sought time to file any objection in respect thereof. By the impugned order dated 03/03/2015, the learned Court below had disposed of both the applications by rejecting the prayer made by the petitioners/defendants. Hence, this revision petition.

5. Mr. Das, submits that the date on which the trial Court had passed the order dated 03/03/2015 was not fixed for hearing on the application filed under Order XIX Rule 2 of the CPC nor does the impugned order disclose any ground for rejecting the prayer made by the petitioners. As such, it was evident that the impugned order dated 03/03/2015 has been passed without hearing the petitioners on the main application filed on 05/01/2015 seeking leave to cross examine the plaintiff no.1 nor is there any valid reason cited by the Court below for rejecting the prayer.

6. By referring to the provisions of Section 30 as well as Order 6, Rule 15 of the PC, Mr. Das submits that the Civil Court has ample powers to direct a party to prove any fact by way of affidavit and it is also the mandate of law that every pleading is required to be verified and the person verifying the pleading shall also have to file an affidavit in support of his pleadings. Referring to the grounds taken in the application filed under Order 6, Rule 17 CPC, Mr. Das submits that the entire basis of the application is founded on utter falsehood inasmuch as the plaintiffs being the neighbours of the defendants, it cannot be believed that they were unaware of the registered deed of sale executed way back in the year 1964 and that is the reason why it had become necessary for the petitioners to cross examine the deponent of

the said application so as to expose the falsehood. Mr. Das further submits that since the Court has the power to direct any party to prove a fact based on affidavit, hence, the learned trial Court was not justified in holding that the application filed under Order XIX Rule 2 of CPC was untenable in the eye of law. In support of his aforesaid argument, Mr. Das has relied upon the following decisions :-

1. **1992 (1) GLR 334 (Rajeswar Rabha v. Khagen Chandra Kalita and others).**
2. **1988(1) RCJ 671 (Ashfaq Ahmed v. Prescribed Authority and another).**
3. **AIR 1983 Andhra Pradesh 114 (Ali Bin Aifan - petitioner).**
4. **AIR 1954 Nag 260 (Kanhaiyalal S. Dadlani, Supdt. Central Excise v. Meghraj Ramkaranji).**
5. **AIR 1933 Mad 164 (Srinivasa Ayyangar v. Pichumani Ayyangar).**
6. **AIR 1992 Oudh 350 (Shib Sahai v. Tika).**

7. Opposing the aforesaid arguments, Mr. Deka, learned counsel for the respondents has submitted that the truth of the averments sought to be incorporated by way of amendment is not required to be ascertained by the Court at the stage of considering the application under Order 6, Rule 17 CPC. Therefore, the submission of Mr. Das that cross examination of the deponent was necessary so as to unearth the truth is wholly untenable. Mr. Deka further submits that the application filed under Order VI Rule 17 CPC did not bring on record any evidence nor was the said application filed for the purpose of proving any fact. As such, Order XIX Rule 2 CPC would not have any application in the facts and circumstances of the present case and the prayer of the petitioners has been rightly rejected by the learned trial Court.

8. I have considered the submissions made by the learned counsel for the parties and have also gone through the materials available on records.

9. At the very outset, it would be pertinent to mention herein that Order XIX of the CPC deals with affidavits. Rule 1 of Order XIX envisages that the Court may order any particular fact or facts to be proved by affidavit. Rule 2 of Order XIX confers power upon the Court to secure attendance of deponent for cross examination. Order XIX Rule 2 CPC reads as follows :-

"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."

10. A bare reading of Order XIX Rule 2 leaves no manner of doubt that the said provision can be invoked when the Court requires any particular fact or facts to be proved by affidavit and such evidence is tendered by way of affidavit, than the Court can order, at the instance of either party, the presence of the deponent for cross examination. What, therefore, follows is that in order to invoke the jurisdiction under Order XIX Rule 2, there must be a proceeding where any fact or facts are being sought to be proved by affidavit and in deference to the said purpose, evidence is given by either party, by affidavit.

11. The word "Evidence" is not defined in the CPC but the said expression is defined under section 3 of the Evidence Act, 1872, which reads as follows :-

"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. From a conjoint reading of Order XIX Rule 2 CPC and the definition of evidence as contained in the Evidence Act, 1872, it is clear that the provisions of Order XIX Rule 2 can be invoked only when evidence within the meaning of Act of 1872 is adduced by affidavit with the object of proving any particular fact or facts.

13. In the present case, the plaintiffs/respondents had merely filed an application under Order 6, Rule 17 CPC seeking amendment of the plaint. Such application is required to be supported by an affidavit. The purpose of the affidavit is to verify the statements made therein, disclosing the source of information, and is aimed at establishing the bona fide of the party seeking to rely upon the same. At the stage of considering the prayer for amendment of the plaint, the court is merely required to adhere to the principles stated in Order 6, Rule 17 CPC and the veracity or falsity of the averments in the proposed amendments need not be established at that stage since the same would be the subject matter of trial .

14. In the case of *Rajeswar Rabha* (supra), by interpreting the provision of Order 39, Rule 1 , this Court had merely held that the Court would have the power to dispose of the application praying for temporary injunction on affidavits and would also have the jurisdiction to summon the deponent of the affidavit for cross examination. The said decision has to be read and understood in the context of the plain language employed in Rule 1 Order 39 CPC, which confers jurisdiction upon the Court to accept proof of a fact by affidavit, meaning thereby that the Court was empowered to dispose of a prayer for temporary injunction by recording satisfaction of a fact based on evidence brought on record by affidavit, which, however, is not the case under Order 6, Rule 17 CPC. As such, the decision in the

case of Rajeswar Rabha (Supra) would not have any application in the facts of the present case.

15. In the case of Kanhaiyalal S. Dadlani (Supra), the issue before the Nagpur High Court was as to whether the provision of Order XIX Rule 2 would bear any distinction in its application in respect of "Substantive Application" and "Interlocutory Application", and the Nagpur High Court has held that the provisions of Order XIX would be applicable to any application which is made before the Court irrespective of its nature. In the said decision, it was further observed that the Court would have sufficient powers to allow proof of facts by means of affidavits but if 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.

16. Again in the case of Shib Sahai (Supra), the Oudh High Court had held that it would be open to the Court on sufficient ground to allow proof of facts by means of affidavits, but if the production of the declarant of the affidavits is required in good faith for cross examination by another party, the Court shall not use such affidavit in support of the facts alleged therein without the production of the declarant.

17. In the case of Ashfaq Ahmed (Supra), the Allahabad High Court has observed that the dispute between the parties can be decided on the basis of affidavits and that if either party wants to cross examine the deponent of the affidavits filed by opposite party, that the prayer should not be refused without due regard to the provisions of the CPC. But the issue involved in the present case is quite different. Therefore, the decisions cited by Mr. Das would not have any application in the facts of the present case.

18. From an analysis of the various rules of Order XIX CPC it is apparent that Rule 2 of Order XIX adumbrates power of the court to permit cross- examination of the deponent/declarant only when the court requires a party to the proceeding to prove any fact(s) by means of evidence tendered on affidavit and pursuant thereto, some evidence is brought on record by means of affidavit to prove such fact. The underlying object of the provision is to permit the opposite side an opportunity to impeach such evidence introduced on affidavit and the same is in conformity with the principle underlying section 138 of the Evidence Act, 1872. Order XIX Rule 2, therefore, cannot be invoked in a routine manner to cross-examine the deponent of each and every affidavit furnished in support of an application filed under the code. What must also be borne in mind is that if a request under order XIX Rule 2 CPC for cross-examination of the deponent of the affidavit is made by a party, the court will also have to arrive at a satisfaction as regards the bona fide of such prayer before allowing the same.

19. In the present case, as noted above, the court had not directed the plaintiffs to prove any fact(s) by affidavit nor did the plaintiffs adduce any evidence on affidavit.

The statements made in the application under Order 6, Rule 17 CPC cannot be treated as evidence merely because the application was supported by an affidavit. Therefore, Order XIX Rule 2 of the CPC was not at all attracted in facts of this case. Such being the position, I am of the considered opinion that the learned trial court had rightly rejected the applications filed by the petitioners by holding them as untenable and no prejudice had been caused to the petitioners on such count.

20. For the reasons stated above, it is held that there is no merit in this revisions petition and the same is accordingly dismissed.

No order as to cost.