ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.1522 of 2016

ORDER WITH THE SIGNATURE OF THE JUDGE

1. For hearing of CMA No.12799/2016

Mr. Mushtaq A. Memon, Advocate for the plaintiff
Mr. Ali Asghar, Advocate holding brief for Mr. Shahab Sarki, Advocate for the Defendant No.1
Mr. Abid S. Zuberi, Advocate a/w Mr. Ayan M. Memon, Advocate for Defendant No.2

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ORDER

Muhammad Junaid Ghaffar J-. This is an application under Order XIX Rules 2&3 CPC [**CMA No.12799/2016**] filed on behalf of the plaintiff, whereby the plaintiff seeks attendance of defendant No.2 in Court for cross examination in order to ascertain veracity of his averments made in the counter affidavit and the affidavits in support of various applications.

Mr. Mushtaq A. Memon, learned Counsel for the plaintiff has contended that initially the Suit was filed only against defendant No.1, however, subsequently, it transpired that the property in question has been transferred to defendant No.2 and thereafter he was arrayed as defendant No.2 in this matter. Per learned Counsel Defendant No.2 in his affidavits as well as counter affidavits has made certain averments of which he is not privy inasmuch as he has made an attempt to controvert the facts which relate to defendant No.1 and not to him. In the circumstances, he contends that defendant No.2 be summoned to the Court so that he can be cross examined on such averments. In support of his contentions he has relied upon the cases reported as *Ata Ullah Malik V. The Custodian Evacuee Property, West Pakistan and Karachi and others (PLD 1964 SC 236), Lahore Municipal Corporation V. D.P. Edulji and 4 others (1987 SCMR 2031), Abdul Hamid V. Malik Karam Dad, P. C. S., Election Tribunal, Rawalpindi and 2 others (PLD 1966 (W.P.) Lahore 16), The President, Referring Authority V. Mr. Justice Shaukat Ali (PLD 1971 SC 585), Barkat Ali V. Muhammad Nawaz (PLD 2004 SC 489) and Messrs Barlas Bros. (Karachi) & Co. V. Messrs Yangtze (London) Ltd.(PLD 1959 (W.P.) Karachi 423).*

On the other hand, Mr. Ayan Memon, learned Counsel for defendant No.2 submits that instant application is misconceived as according to him in terms of Rule 72 (c) of the Sindh Chief Court Rules [SCCR (OS)] all

interlocutory applications are to be supported by the affidavits and the persons swearing such affidavits are not required to be cross examined. Per learned Counsel, all the averments made in the affidavits as well as counter affidavit on behalf of defendant No.2 are based on narration of facts in the plaint and he has read out the contents of the affidavits and counter affidavits to support his contention. He has further contended that the plaintiff through this application wants to have trial within a trial, whereas no special circumstances are available in this case so as to ask the defendant No.2 to appear in the witness box. He further submits that evidence is yet to be recorded and therefore, the application being misconceived be dismissed. In support of his contentions he has relied upon the cases reported as *Abdul Sattar Shah Zaidi V. University of Karachi and another (PLD 1989 Karachi 71) and Aquil Usman Dhaduk and another V. Jamil Akhtar Kiyani and 5 others (2004 YLR 122).*

I have heard both the learned counsel and perused the record.

The provisions of Order XIX Rules 2 CPC empowers the Court to order attendance of deponent for cross-examination, in case when upon any application, leading of evidence has been permitted by the Court through affidavit, but the Court may, at the instance of either party, order the attendance of the deponent of such affidavit for cross examination. The aforesaid provisions of Order XIX reflect that the Court may accept the ***evidence*** through the affidavit upon an application, but a person coming to the Court for giving his affidavit through evidence can be summoned by the Court for his cross examination. This Rule is only attracted in case where evidence is being permitted by the Court through Affidavit as against leading evidence directly by appearing in the witness box. And once such leading of evidence is permitted, then naturally, an opponent can make an application for attendance of such witness for cross examination. The present case does not, therefore, fall in this Rule.

Whereas, Rule 3 of Order XIX provides that all affidavits shall be confined to such facts as the deponent is able of his own knowledge to ***prove***, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated. In terms of this Rule there is an exception in so far as the affidavits of facts are concerned, which provides that the deponent shall only swear affidavit of his own knowledge to prove except on ***interlocutory applications.*** Here in Rule 3 even otherwise an exception has been provided insofar as affidavits

filed along with *interlocutory application*s are concerned. Therefore, I am of the view that on the face of it this application appears to be misconceived as it relates to the facts for which affidavit has been sworn in respect of interlocutory application. It is not an affidavit for giving evidence in the matter. I am fortified in arriving at such conclusion with the observations of a learned Division Bench of the Lahore High Court in the case reported as ***Abdul Hamid v. Malik Karam Dad*** (**PLD 1966 (W.P.) Lahore 16**), which in fact has been relied upon by the learned Counsel for the plaintiff. The relevant observation is as under;

> To sum up the position in law is that affidavits can be relied upon by the Courts in proof of particular facts under certain circumstances only. In proceedings which are not of interlocutory nature, their admission in proof of facts is subject to the proviso (which is an important safeguard for the truth) that in case the opposite-party controverts the allegations by filing a counter-affidavit or demands the attendance of the deponent for his cross-examination, the party relying on the affidavit must produce him in the witness-box and if the deponent fails to submit to the cross-examination, the affidavit shall loose all its force as a probative piece of evidence in the case and cannot be acted upon. This view is quite compatible with the principles of natural justice and fair play which confer a very valuable right on one party to cross-examine his adversary and his witnesses. It is also to be seen that under Order XIX, rule 1, Civil Procedure Code, evidence on affidavit in proof of particular facts is to be admitted in exceptional circumstances for sufficient reasons which should be recorded by the Court; but if either party bona fide desires the production of a witness for cross-examination and such witness can be produced an order shall not be made authorizing the evidence of such witness to be given by affidavit. We might add that normally counter-affidavit by a party controverting the allegations in the affidavit produced by his adversary is a sufficient indication of X his intention that he is riot prepared to admit the facts set out in the affidavit and would require the deponent to appear in the witness-box for his cross-examination.

Hence, the presence of defendant No.2 for cross examination is yet to arrive and is pre-mature as well. Moreover, it is for the Court to see as to whether on the basis of any affidavit a person is to be summoned for any cross examination or not.

It may further be observed that by filing of affidavits and counter affidavits, the facts in dispute are not being finally decided, which ultimately has to be done after completion of the exercise of evidence. The Qanoon-e-Shahadat Order, 1984, is a complete code itself for such purposes. Here in this matter neither it is the case of the plaintiff nor of defendant No.2, that by swearing affidavits and counter affidavits, any final adjudication of the matter is being sought or some fact is being proved finally. A learned Single Judge of this Court in the case of ***Aquil Usman***

Dhaduk v. Jamil Akhtar Kiyani (**2004 YLR 122**) has been pleased to hold as under;

> 24. The application made by the plaintiff under Order XIX, rule 2, C.P.C. is also misconceived and is dismissed as the facts narrated in the affidavit in support of the application under section 144, C.P.C. by the deponent are in substance identical to that which were stated by him in the application under section 12(2), C.P.C. or in the subsequent affidavits sworn by the applicant. The attorney of the applicant on such facts was already cross-examined. In the given circumstances the law does not authorize a party to resort to the provisions of Order XIX, rule 2, C.P.C. for cross examination, when the parties have yet to lead evidence as it amounts to trial within trial. Mr. Mir Muhammad Shaikh has already cross-examined the attorney of the applicant at length and no justifiable reason has been spelt out in the application, which requires appearance of the applicant's attorney for cross-examination. The scope of Order XIX, rule 2, C.P.C. is very limited and is not a substitute of regular trial as the applicant has to lead evidence at regular trial, therefore, on such an interlocutory application cross-examination cannot be ordered, as such, the application of the plaintiff for cross-examination is dismissed

In the case of ***Bank of Credit & Commerce International (Overseas) Ltd., v. Karachi Tank Terminal Ltd***., (**PLD 1988 Karachi 261**) a learned Single Judge of this Court had the occasion of examine the provisions of Order XIX Rule 2, wherein an application was filed on behalf of a defendant in a Suit to summon two persons who had sworn affidavits in support of plaintiff's application under Order 38 Rule 5 and Order 39 Rule 1 CPC. It was held by the Court that insofar as interlocutory applications for appointment of receiver, issuance of temporary injunction, attachment before judgment and the likes are concerned, provisions of Order XIX has no application. The learned Judge deeply appreciated the case law from Pakistani and Indian jurisdiction while arriving at this conclusion. The relevant finding reads as under;

> A perusal of Order 39, Rule 5 or Order 39, Rule 1 would show that it permits proof of the required circumstance for the grant of an attachment before judgment or for the grant of temporary injunction by affidavits. Orders 38 and 39 provides expressly than the Court is permitted to dispose of the interlocutory applications by affidavits. In view of the urgency involved in the matter, the regular procedure of examining the plaintiff and his witnesses and the defendant and his witnesses is dispensed with and a Court is given a special power to decide the matter by affidavits. The scope of enquiry in interlocutory applications is quite limited and the right sour the parties are not decided finally. That being the purpose of giving special power to the Court under Orders 38 and 39 the question of summoning the deponent for cross-examination at the instance of all party under Order 19, Rules 1 and 2 does not arise at all.
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> A perusal of Order 19, Rules 1 and 2 would show that there's a clear distinction between Rules 1 and 2. Affidavits contemplate in Rule 1 are affidavits taken by way of evidence in order to prove a particular fact or facts. Prove or proof in the sense in which that word is used in Rule 1 means final proof and not prima facie proof. It is advantageous to reproduce the observations of learned author

> Starker in his book "Law of Evidence" (13th Ed), at page 31. Prima facie evidence only means that there is ground for proceedings; it is C not the same thing as "proof" which comes later when the Court has, to find whether the accused is guilty. Because a Magistrate has found a prima facie case to issue process, it is a fallacy to say that he believes the case to be true in the sense that it is proved (Sher Singh V. Jitendra Nath Sem, (1932) 36 C.W.N. 16: (AIR 1931 Cal. 607). Prima facie evidence is evidence which, if accepted, appears to be sufficient to establish a fact unless rebutted by acceptable evidence' to the contrary. It is not conclusive.
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> Since it is final proof of a fact that is contemplated in Rule 1 it is stated that if the other side desires that the witness, whose affidavit is placed before the Court should be produced for cross-examination, the Court should not accept that evidence given in the form of affidavit. That is why the proviso to Rule 1 provides that an order shall not be made authorizing the evidence of such witness to be given by affidavit. But, that is not the case is Rule 2. In Rule 21 discretion vests in a Court both in the matter of taking evidence by way of affidavits and also in ordering the attendance of those deponents for cross-examination. The other distinction is that Rule 1 contemplates affidavits in proof of facts whereas Rule 2 contemplates affidavits in proof of or against applications. There are provisions in the Code of Civil Procedure and in several Statutes providing for filing of application claiming substantive reliefs. Any relief finally granted in such case can be said to have been given on a particular fact or set of facts proved. To such case, Rule is attracted. But Rule 2 which does not contemplate any such proof of fact or facts may be construed as one applicable only to applications claiming interim relief's like a temporary injunction, attachment before judgment, appointment of receiver, appointment of a guardian ad item and the like. Rules framed by the High Court also contemplate that an interlocutory application filed by a party should be supported by his affidavit. Averments in such an affidavit of a party is taken a prima facie proof of the fact alleged in that application. If that is so why not affidavits of his witnesses for that limited purpose in order to find out as to whether there is or there has been a prima facie proof (not final) of the fact.
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> I am of the view that Order XIX has no application to processing under order 38, 39 and 40. Interlocutory proceedings like these for attachment before judgment, for issue of temporary injunction. and application of receiver are essentially summary and the Court conceive with them snout not go into protracted procedure. E In case the Court finds after reading the affidavits and the documents on record, that no conclusion can be arrived at the Court should abstain from interfering and from passing any order pending the disposal of the suit. This position emerges from the fact that it is upon the applicant for attachment before judgment, for issue of temporary relief and for appointment of receiver that the burden lies to prove his case.

In the case of ***Abdul Sattar Shah Zaidi v. University of Karachi*** (**PLD 1989 Karachi 71**), a learned Single Judge of this Court refused to permit cross examination of deponent who had sworn affidavit in support of an application. The Court held that in appropriate cases where permission to cross-examine a deponent may give rise to delay, the Court may resolve difficulty by ordering submission of an additional affidavit of such deponent. It was further held that power under Order XIX Rule 2 being discretionary would not be exercisable unless it was to advance the

cause of justice and was not calculated to cause delay. The relevant observation is as under;

> On hearing the learned Counsel on this application I find that no case for cross-examination of Deponent-- S.Fazle Hassan, Assistant Director, I.B.A: is made out. Cross-examination of a Deponent under Order XIX, Rule 2, as per practice in the Courts of Pakistan, can be ordered if the Deponent has been ambiguous in his deposition or has indulged in willful evasions of relevant questions or has made a contradictory assertion in his deposition. In appropriate cases where permission to cross-examine a deponent may give rise to delay the Court may resolve the difficulty by ordering submission of an additional affidavit of such deponent.. Learned Counsel for the Plaintiff in this context has relied on Barlas Bros. (Karachi) & Co. v. Yangtse PLD 1959 Kar. 423 and Ataullah Malik v. Custodian Evacuee Property PLD 1964 S C 236. In the first of these cases which pertained to an Award matter Kaikaus & Wahiduddin J J. held that Order XIX, Rules 1 and 2 contained distinct provisions regarding evidence through affidavits and that the power under Rule 2 thereof being discretionary would not be exercisable unless it was to advance the cause of justice and was not calculated to cause delay. In the second case, from the Supreme Court jurisdiction, right to cross-examine was considered in relation to a main application in the hierarchy under the Custodian and an obligation to submit to cross-examination was spelled out in such proceedings. None of these cases pertain exclusively to the disposal of matters through affidavits submitted at an interlocutory level which, obviously. is different from the requirements in relation to regular disposal of cases which are contemplated by Rule 1 of Order XIX. '

Even otherwise, on merits of the case, I have gone through the counter affidavit and the affidavits sworn by defendant No.2 and after perusal of the same it does not appear that the contention of the plaintiff has any substance. The affidavits which have been sworn by defendant No.2 are based on the averments of the plaintiff as described and disclosed in the plaint, and not, on his own. Whereas, the learned Counsel for the plaintiff has been unable to point out any material portion in the counter affidavits, as apparently I do not see specific contradiction and ambiguity on which he intends to question defendant No.2. If in this manner, this application is allowed, then there will always be a mini-trial within a full-fledged trial in every Suit, resulting in delays and unnecessary proceedings which are to be always deprecated.

In view of hereinabove facts and circumstances, listed application appears to be misconceived and for such reasons on 02.02.2017 the same was dismissed through a short order and above are the reasons thereof.

J U D G E

Mushtaq ps