IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. 1705 / 2016

Plaintiff:	**Saba Farooqui through Mr. Yawar Farooqui Advocate, Mr. Owais Sarki holding brief for Mr. Jehanzeb Awan Advocate & Mr. Ahmed Ali Hussain holding brief for Mr. Abid Zuberi Advocate.**
Defendant No. 1:	**Ghazala Aziz through Mr. Afzal Ahmed Advocate.**
Defendant No. 2:	**Asif Nusrat through Mr. Syed Noman Zahid Ali Advocate.**

1) For hearing of CMA No. 4329/2018.
2) For hearing of CMA No. 1648/2017.
3) For hearing of CMA No. 10884/2016.

Date of hearing: **16.04.2018.**
Date of order: **16.04.2018.**

O R D E R

Application at Serial No. 1 (**CMA No. 4329/2018**) has been filed by Defendant No.2 under Order XIX Rule 2 CPC seeking directions from the Court for presence of the attorney of Plaintiff for cross examination who has filed a counter affidavit in this case. Application at Serial No.2 (**CMA No. 1648/2017**) is under Order XI Rule 18 again by Defendant No.2 seeking inspection of documents annexed with the plaint as Annexures P/3, P/4A and P/8 to P/15 as well as notices dated 04.11.2015 and 06.11.2015 as referred to in Para 14 and 16 of the plaint.

Learned Counsel for Defendant No.2 submits that insofar as the application for inspection of documents is concerned, it is the case of Defendant No.2 that no such documents were signed and therefore, it is necessary for the said Defendant to inspect these documents. According to the learned Counsel, these are forged documents and in compliance of Order XI Rule 15 CPC a notice was issued on 16.11.2016, but no response was received; hence, this application. Learned Counsel submits that no prejudice would be caused if such application is allowed. Insofar as the other application under Order XIX Rule 2 CPC is concerned, learned Counsel submits that the attorney has filed counter affidavit to his application and the said attorney is to be

examined as to the knowledge of facts he has stated in the counter affidavit to the inspection application.

On the other hand, learned Counsel for the Plaintiff has opposed both these applications and submits that matter is now ripe for evidence whereas, frivolous applications have been filed to delay the proceedings. He submits that insofar as the inspection application is concerned, since proposed issues have been filed and evidence is to be recorded, the Plaintiff will produce all originals in Court or before the Commissioner at the time of evidence and therefore, this application is misconceived and will not serve any useful purpose, except delay of the proceedings. As to the application for examination of the attorney is concerned, learned Counsel submits that admittedly the Plaintiff filed counter affidavit through attorney as due to death of her husband, she could not come in Court for swearing the affidavit. He submits that even otherwise, the counter affidavit to the inspection application is only based on law point(s) and no facts have been reiterated; therefore, such application is also misconceived.

I have heard both the learned Counsel and perused the record. Insofar as application at Serial No. 1 seeking attendance of the attorney is concerned, the same has been filed under Order XIX Rule 2 CPC and on the face of it, it appears to be misconceived inasmuch as rule 2 of Order XIX deals with affidavits in evidence and not the supporting affidavits of applications.

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.

Though the application is only under Rule 2 ibid, however, it may further be observed that 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 applications* 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.

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 to 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.

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.

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.

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 JJ. 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. '

In view of such position and the facts as available on record, this application (CMA No.4329/2018) at Serial No.1 appears to be misconceived and is therefore, dismissed accordingly.

As to the application at Serial No.2, at the very outset it may be observed that admittedly the Defendant No.2 has already filed its written statement, therefore, after filing of the written statement, soliciting orders on such application for inspection of documents does not seems to be appropriate; rather by the conduct itself is barred. Moreover, it is not that in each and every case where a document relied upon by one, is

denied, the other party is entitled for its inspection, whereas, the contents of the written statement in this matter also do not support the case of Defendant No.2 as according to the Defendant's own case some documents were signed, but were done so in trust and he was betrayed. In such circumstances, no case on merits is made out. Even otherwise, provisions of Order XI CPC deals with discovery and inspection of the documents and *Rule 14* ibid deals with production of the documents and provides that it shall be lawful for the Court at any time during pendency of any Suit to order production by any Party thereto, upon Oath, of such documents, which are in possession or power relating to any matter in question in the Suit and that once such documents are produced they shall be dealt with in such a manner as it appears just and proper. *Rule 15* provides for entitlement of a party to seek inspection and production and issuance of a notice to that effect. *Rule 16* provides for issuance of notice to produce such documents. In this case such notice and requirement apparently seems to have been met by the Defendants, but documents have not been presented.

Rule 18 ibid is most important as it deals with the powers of the Court to order production and inspection on an application. It has two parts. Sub-Rule (1) deals with documents which are mentioned or detailed in the pleadings and or affidavits of the parties, whereas, Sub-Rule (2) deals with a situation when the documents of which inspection and or production is being sought, are other than those referred to in the pleadings and or affidavits. The document(s) demanded on behalf of defendant No.2 are the one coming out of the plaint, therefore, this case is covered under Order XI Rule 18(1) CPC, which deals with the situation where the party served with notice under Rule 15 ibid, omits to give such notice of a time for inspection elsewhere than at the office of his pleader, and the Court may, on the application of the party desiring it, order for inspection in such place and manner as it may think fit, whereas, it is provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for *disposing fairly* of the Suit or for *saving costs*.

Coming to the proviso to Sub Rule (1) it would suffice to observe that it vests certain discretion upon the Court that even if such document is part of the pleadings, the exercise of such power is to be done justly, fairly and only if it is expedient to do so, and not necessarily, as contended. The discretion in such matters ought to be exercised with restraint and caution. Mere summoning request is not enough to issue any directions for production and inspection. The relevancy of the document is also pivotal, whereas, the desire of one party as against the other must not be to harass or intimidate the other. Moreover, the process of discovery and inspection in a Civil Suit has been provided to bring on record documents mostly which have been avoided or are hidden. It is not that each and every document which is also a part of the pleadings already can be inspected in original by the adversary. This is definitely not the spirit of such

process. If permitted then the procedure of leading primary and secondary evidence as contemplated under The Qanoon-e-Shahadat Order, 1984, would become meaningless.

Therefore, after going through the contents of the listed application as well as the documents so desired, I am of the view that the Defendants' case does not merit consideration under the provisions of Order XI Rule 18(1) CPC inasmuch, firstly for the reason that written statement has already been filed, wherein, there is admission regarding entering into some agreement or arrangement in respect of the property, therefore, the stance that documents of which inspection is being sought were not signed or executed is not of much relevance, and secondly, this Court must exercise its discretion not to entertain this application, being an attempt to delay the expeditious disposal of the Suit at trial. Further, the matter is ripe for evidence, as proposed issues have been filed and after settlement of issues the parties are required to file documents in original on which they intend to rely and lead evidence. If the Plaintiff fails to mention such document for its evidence, then the matter would end, whereas, if any reliance is placed on any such document, then its admissibility can be questioned by Defendants, and the matter would then be decided by the Court in accordance with law. The Defendants are at liberty to contest and agitate such issue at the time of leading of evidence by the Parties and may also confront the Plaintiffs to that effect. Accordingly, application at Sr. No.2 (**CMA No.1648/2017**) is also hereby dismissed.

3. Adjourned. Interim orders passed earlier to continue. Let the matter be fixed for examination of parties and settlement of issues as well on the next date. To come up after three weeks.

J U D G E

ARSHAD/