

ORDERS ON I.A.NO. II

This order arises out of an application filed on behalf of the Plaintiffs under Order XIX Rule 2(1) of the Code of Civil Procedure seeking permission to cross-examine the deponents of the affidavits filed on behalf of defendants in support of their case in respect of I.A.NO.I filed by the plaintiffs seeking temporary injunction against the defendants.

2. The said application is accompanied with an affidavit of plaintiff No.2 wherein he stated that the instant suit is filed seeking the relief of declaration of title by way of adverse possession and the plaintiffs are in possession of the suit properties. It is further stated that plaintiffs have moved an application seeking for temporary injunction restraining the defendant No.2 and 3 from alienating the suit lands in any manner and have filed the affidavits of two witnesses in support of the pleadings to show that plaintiffs are in possession since more than 40 years and defendants also have filed the affidavits of two persons in support of their pleadings. It is further stated that since the plaintiffs are in possession and cultivation of the suit schedule land since more than 40 years, there is no possibility or occasion for any other person to occupy and possess the suit properties and also there is a clear finding regarding possession of the suit lands in the judgment passed in O.S.NO.43/2010 by Addl.Civil Judge, Ankola and also in RA NO.8/22 on the file of Hon'ble Sr.Civil Judge, Ankola, as such the

affidavits of the persons filed by the defendant No.2 and 3 are false and defendants have conspired themselves with the above deponents of the affidavits with a fraudulent and malafide intention. Hence, the plaintiffs intend to disprove the averments of the affidavit by cross-examining the deponents of the said affidavit and the same will be helpful for arriving at appropriate findings on I.A.NO.1. Thus, prays to allow the said application giving permission to cross-examine the deponents.

3. Per contra, the objections came to be filed on behalf of defendants refuting the said application as not maintainable. It is stated that defendants have filed the affidavits of two persons in support of I.A.No.I and the Court has not passed an order to prove the case by way of an affidavit. The plaintiffs have filed affidavits in support of I.A.No.1, as such as a counter the defendants have also filed two affidavits of two persons, hence, question of proving the facts does not arise at this stage and the deponents cannot be called for the purpose of cross-examination and they can be examined during the trial if the Court forms an opinion but at this stage, question of cross-examination of the deponents does not arise and the defendants have not filed affidavit in lieu of examination in chief. On all these grounds, prays to dismiss the said application.

4. Heard the arguments from both the sides. Perused materials on record.

5. Upon hearing the arguments and on perusal of materials on record, the points which arises for my consideration is as follows

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1. Whether the I.A.NO.II filed by the plaintiffs seeking permission to cross-examine the deponents of affidavits filed by the defendants, deserves to be allowed ?

2. What order ?

6. My findings on the above points are -

Point No.1 – In the Negative

Point No.2 – As per the following order

REASONS

7. **POINT NO.I** – The present suit is filed by the plaintiffs seeking the relief of declaration of title by way of adverse possession and consequential relief of Permanent Injunction against the defendants.

8. The plaintiffs have also moved an application seeking temporary injunction against defendant No.2 and 3 restraining them from alienating the suit properties in any manner till the disposal of the suit. Plaintiffs have also filed the affidavits of two adjacent owners in support of his claim to show before the Court that they are in continuous possession of the suit properties since

last 30-40 years and per contra, the defendants also along with their objections have filed affidavits of two persons in support of their defence to show that they are in actual possession of the suit properties. When the stage is set for hearing on I.A.NO.I in respect of relief of temporary injunction, the present application came to be filed on behalf of plaintiffs seeking permission to cross-examine the deponents of affidavits filed by the defendants.

9. Now the only question which arises is whether at the stage of deciding the application for temporary injunction, the parties can be permitted to cross-examine the deponents as sought for. For better understanding, Order XIX Rule 2 is reproduced here under -

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 deponent.

2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the court otherwise directs.

10. On cumulative reading of the afore mentioned provision, it is clear that if any fact is required to be proved upon an interlocutory proceeding, then upon an application of either party, the evidence may be given by affidavit and the Court may at its discretion pass an order for cross-examination of deponents. That is to say, if a party intends to adduce evidence on an interlocutory application to prove the facts, then only the said provision is applicable. In the present case on hand, both the plaintiffs as well as the defendants have filed the affidavits of the persons in support of the I.A.NO.I filed for temporary injunction. Admittedly, the defendants have not filed the affidavit in lieu of his evidence but he has filed the affidavits to prima facie show that they are in possession of the suit properties. Normally no oral evidence will be adduced at an interlocutory stage. Especially, in respect of an application filed under Order XXXIX Rule 1 and 2 seeking for temporary injunction, it is well settled law that the Court cannot hold mini trial and only the prima facie case has to be looked into and the Court shall pass an order by taking into consideration the pleadings and the documents relied upon by the parties to the suit. The scope of enquiry at this stage is very limited and if the plaintiffs are permitted to cross-examine the deponents, then it amounts in conducting a mini trial which leads to giving findings on the main issue in fact which is not allowed at this stage.

11. Order 39 Rule 1 of CPC expressly provides that the court is permitted to dispose of the interlocutory application by affidavits and the regular procedure of examining the plaintiff and his witnesses and defendant and his witnesses, is dispensed with and the court is given a special power to decide the matter by affidavits. The scope of enquiry is quite limited and the rights of the parties are not decided finally. In interlocutory stage, when the courts are concerned about prima facie case, the court tries interlocutory applications on affidavits. That being the purpose of giving special power to the court under order 39 Rule 1, the question of summoning the deponent for the purpose of cross-examination at the instance of the plaintiffs under Order 19 does not arise at all. The power given to the Court under Order XXXIX Rule 1 and 2 of CPC to decide the matters by affidavits is unfettered and in my opinion, it is not subjected to the provisions of order 19 Rule 1 and 2. In short, the provisions of Order 19 Rule 1 and 2 are not applicable at all to an interlocutory applications . Hence, the instant application filed by the plaintiffs seeking permission to cross-examine the deponents of affidavits is sans merit. **With these observations, Point No.1 is answered in the 'Negative'.**

12. POINT NO.2 - For the foregoing reasons, **this Court proceeds to pass the following -**

O R D E R

The I.A.NO.II filed on behalf of the Plaintiffs under Order XIX Rule 2(1) of the Code of Civil Procedure is hereby dismissed.

Addl., Civil Judge, Ankola.