

Plaintiffs under Order XVIII Rule 4(3) and (4) of the CPC. Remuneration of the Commissioner was not fixed under Order XVIII Rule 4(7) of the CPC under my order dated 13.4.2010.

2. It may be mentioned that the Defendants refused to pay the fees of the Court Commissioner equally with the Plaintiffs. Consequently, in the interest of justice, for the sake of expedition and to ascertain the real case of the parties, the Plaintiffs Advocate agreed to and was directed to pay the entire costs of the cross-examination of the Plaintiffs before the Commissioner, including fees of the Commissioner for the first five dates of the Commission.
3. The Commission has proceeded. The Plaintiffs have been cross-examined on two dates of hearing before the Commissioner. The Plaintiffs have paid the entire costs, including the fees of the Commissioner. The fees of the Commissioner are paid to the Commissioner directly. The direction with regard to the payment of such fees and the payment of such fees has been under Order XVIII Rule 4(7) of the CPC, which has been complied. The Plaintiffs cross-examination is over.
4. The Plaintiffs have closed their case. The order relating to the fixation of the amount of remuneration

for the services of the Commissioner has been complied.

5. It is now for Defendant No.1 to lead his evidence. The Defendant No.1 has filed his Affidavit of examination-in-chief. That Affidavit of examination-in-chief could be considered only if Defendant No.1 submits himself to cross-examination. Such cross-examination would be before the Court Commissioner appointed under Order XVIII Rule 4(2) and the proviso thereto.

6. Defendant No.1 is resident in Nagpur. Counsel on behalf of Defendant No.1 states that Defendant No.1 refuses to come to Mumbai for his cross-examination, if his charges by air are not paid by the Plaintiffs and a further cost of the Commissioner is not borne by the Plaintiffs under the provisions of Order XVI Rule 19 of the CPC. Order XVI Rule 19 runs thus:-

19. No witness to be ordered to attend in person unless resident within certain limits.- No one shall be ordered to attend in person to give evidence unless he resides-

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than one hundred or where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate less than five hundred kilometres

distance from the Court house:

[Provided that where transport by air is available between the two places mentioned in this rule and the witness is paid the fare by air, he may be ordered to attend in person.]

Order XVI Rule 19 is not applicable to Defendant No.1. Defendant No.1 is a party to the proceedings. Defendant No.1 has to defend the case made out against him. To that end, Defendant No.1 has to lead his own evidence. Defendant No.1 in this case has raised the preliminary issue relating to the territorial jurisdiction of this Court. It is for Defendant No.1 to satisfy the Court that it has no territorial jurisdiction. It is for that purpose that if required by Defendant No.1, he must lead such evidence. Of course, even in the absence of such evidence, Defendant No.1 would be entitled to defend the Suit with regard to that issue and agitate the lack of territorial jurisdiction of this Court. However, if Defendant No.1 files his Affidavit of examination-in-chief and desires the Court to consider the same, it cannot be unless Defendant No.1 submits himself for cross-examination. For that purpose, Defendant No.1 is not a witness who would be ordered to attend in person from wherever he resides. Defendant No.1 himself must come to Court and challenge the jurisdiction of the Court by his oral evidence, if that is desired. Order XVI Rule 19 of the CPC is, therefore, inapplicable to Defendant No.1 and reliance by the Counsel

on behalf of Defendant No.1 upon the aforesaid rule is completely misplaced and misconceived.

7. A reading of all the rules in Order XVI of the CPC would show that they apply not to the parties to the dispute but to their witnesses. Chronologically the rules are in respect of the list of witnesses, procuring their presence in Court with or without summons, expenses for the issue of summons, tender of expenses to the witnesses, the contents of the summons, the summons for production of witnesses as well as documents, service of the summons, time of such service, procedure upon non-compliance of the summons or appearance by the witness so summoned, summoning strangers to the suit by the Court, duty of the summoned person and when the summoned witness cannot appear or produce documents as per the summons received, Rule 19 relating to the attendance of the witness in Court, followed by the rules relating to the consequences of the refusal of such summoned party to give evidence when called for by the Court and followed by the last Rule 21 which would apply to the parties also who are summoned as witnesses.

8. Rule 19, therefore, specifically does not apply to the parties to the suit. If, however, any party to the suit requires the other party to give evidence or

produce the documents, then under Rule 21, the provisions relating to witnesses would also apply to such parties. Consequently, there have been amendments made by High Courts of Andhra Pradesh and Calcutta, making the rules under Order XVI applicable when any party to the suit is required by any other party thereto to give evidence or produce the documents.

9. In the case of **Jaya Shanker Mills (Barsi) Ltd. vs. Hazi Zakaria Hari Ebrahim**, AIR 1962 Andhra Pradesh 435, it was held that where a party to the suit on his own motion wants to be examined on commission as witness Order XVI Rules 19 and 21 will not apply but resort may be had only to the provisions of Order XXVI Rule 1 or 4. But even that is not a matter of right for a party but it is left to the discretion of the Court which would be exercised on sound principles of justice, equity and good conscience having regard to the circumstances of the case.

That was a case of a suit filed against the Limited Company which was the working partner of the managing agency of the Company which was running the business of the Company and which had entered into an oral agreement on behalf of the Company. It was held that he did not have the right to be examined on commission as a witness. It was held in that case that Order XVI

Rules 19 and 21 apply to the persons who are ordered to attend in person to give evidence. Order XXVI covers the cases where the persons so required are parties to the suit itself. **But** these provisions were not applicable in the case of a party to the suit who on his own motion wants to be examined on commission as a witness. In paragraph 5 of that judgment, it was held that in that case resort could only be had to Order XXVI Rules 1, 2 and 4 and the benefit of those provisions could be claimed if the necessary circumstances existed. That is when the Court had exercised its discretion but the party has no right to insist upon being examined on commission.

10. It may be mentioned that after the latest amendments of 1999 and 2002 to the CPC, the parties as well as their witnesses are indeed examined on commission. The commission is of the Court Commissioner appointed by the Court. That commission is naturally at the place where the Court is situate and within its territorial jurisdiction. Both the parties to the suit are entitled to examine themselves as well as their witnesses. Both the parties to the suit must, therefore, bear the costs of such commission, essentially equally. In a given case, however, the Court would have discretion to order otherwise. The Court Commissioner has been appointed

in this case. Evidence has proceeded before the Court Commissioner. Cross-examination of the Plaintiff's witness by the Defendant's Counsel has been recorded. It is open to the Defendant to examine himself or not to examine himself. The Court cannot consider the oral evidence which the Defendant might lead. The Court cannot even direct the Defendant to lead oral evidence. In fact, the Defendant's evidence may not be required at all. If, however, the Defendant deems it fit to examine himself, he is obliged to come to the Court under all normal circumstances. The Court would include a Court Commissioner appointed by the Court at the place where the Court is situate. If, however, the Defendant makes out a good case for not attending the Court or the commission where the Court is situate, the Court may in its discretion in the interest of justice, equity and good conscience direct the commission to be appointed at the place where the Defendant is. The Court would then consider the costs of such a commission depending upon the circumstances of the case. If, however, the Plaintiff desires to call the Defendant as his own witness, which practice has otherwise been deprecated by the Privy Council since the case of **Lal Kunwar vs. Chranji Lal, (1909) ILR 32 All 104**, (See also (i) **Sardar Gurbaksh Singh vs. Gurdial Singh, (1927) 29 Bom LR 1392** & (ii) **Pirgonda vs. Vishwanath, AIR 1956 Bom 251**) the provisions of Order

XVI Rule 21 would become applicable. The Plaintiff then would have to bear the costs of the travel of such Defendant as the Plaintiff's witness.

11. In the case of **Indrajeet Roy vs. Bank of Baroda, AIR 1991 Orissa 45**, also it has been held that Order XVI Rule 19 is not applicable to a party to the suit. The Court, however, has a discretion to examine any person on commission which would include a party if required.

12. In this case, however, the commission is the forum before which parties as well as their witnesses would lead evidence under the provisions of Order XVIII Rule 4 of the CPC at the place where the Court is situate.

13. Consequently, the insistence of Defendant No.1 that the Plaintiffs must bring him to Mumbai by air at their costs cannot be countenanced. It will be for Defendant No.1 to attend before the Commissioner, if he so desires and if he requires to lead any oral evidence. If Defendant No.1 attends before the Commissioner at his cost for cross-examination, the cross-examination shall be taken as directed on earlier dates for recording of such cross-examination. If not, the affidavit of examination-in-chief of Defendant No.1 would not be considered as his oral evidence. Defendant

No.1, however, would still be entitled to urge and agitate the preliminary issue of territorial jurisdiction but without his oral evidence.

14. Counsel on behalf of Defendant No.1 drew my attention to Order XXV Rules 1 and 2 of the CPC relating to security for costs. The order and the rules need not be reproduced. Security for costs would be directed to be given only in appropriate cases when the Court deems fit. This is not one such case for requiring any security from the Plaintiffs to proceed, specially with regard to the preliminary issue of jurisdiction which is raised by Defendant No.1.

15. The parties shall attend before the Commissioner on 10th August 2010 at 5 p.m.

16. The suit is adjourned to 13th August 2010.

(SMT.ROSHAN DALVI, J.)

