

Special Legal Issues Seminar

Are the Terms 'Party' and 'Witness' Interchangeable in respect of Order XIII Rule 1(3)(a) of The Code of Civil Procedure, 1908?

Relevant Provisions of the Code of Civil Procedure, 1908

- ❖ **Order XIII - Original documents to be produced at or before the settlement of issues -**
 - (1) *The parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original where the copies thereof have been filed along with plaint or written statement....*
 - (3) *Nothing in sub-rule (1) shall apply to documents –*
 - (a) ***produced for the cross-examination of the witnesses of the other party; or***
 - (b) ***handed over to a witness merely to refresh his memory.*** [Emphasis supplied.]

- ❖ **Order VII Rule 14 - Production of document on which plaintiff sues or relies.-**
 - (1) *Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint...*
 - (3) *A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.*
 - (4) ***Nothing in this rule shall apply to document produced for the cross-examination of the plaintiffs witnesses, or handed over to a witness merely to refresh his memory.*** [Emphasis supplied.]

Relevant Provisions of the Code of Civil Procedure, 1908 (Contd.)

- ❖ **Order VIII Rule 1-A - *Duty of defendant to produce documents upon which relief is claimed or relied upon by him. -***
 - (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement...*
 - (3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.*
 - (4) Nothing in this rule shall apply to documents--*
 - (a) produced for the cross-examination of the plaintiff's witnesses, or*
 - (b) handed over to a witness merely to refresh his memory. [Emphasis supplied.]*
- ❖ **Order XVI Rule 1 - List of witnesses and summons to witnesses**
- ❖ **Order XVI Rule 21 - Rules as to witnesses to apply to parties summoned**
- ❖ **Order XVIII Rule 17 - Court may recall and examine witness**

Relevant Provisions of the Code of Civil Procedure, 1908 (Contd.)

- ❖ **Order XVIII Rule 19 - Power to get statements recorded on commission**
- ❖ **Order I Rule 1 - Who may be joined as plaintiffs**
- ❖ **Order I Rule 3 - Who may be joined as defendants**
- ❖ **Order 1 Rule 6 - Joinder of parties liable on same contract**
- ❖ **Order I Rule 9 - Misjoinder and nonjoinder**
- ❖ **Order 1 Rule 13 - Objections as to non-joinder or misjoinder**
- ❖ **Order II Rule 2 - Suit to include the whole claim**
- ❖ **Order VI Rule 2 - Pleading to state material facts and not evidence**
- ❖ **Order IX Rule 1 - Parties to appear on day fixed in summons for defendant to appear and answer**
- ❖ **Order X - Examination of parties by the court**
- ❖ **Order XI Rule 1 - Discovery by interrogatories**
- ❖ **Order X11 Rule 1 - Notice of admission of case**
- ❖ **Order XIV Rule 1 - Framing of issues**
- ❖ **Order XV Rule 1 - Parties not at issue**
- ❖ **Order XV Rule 2 - One of several defendants not at issue**
- ❖ **Order XIV Rule 10 - Procedure where witness fails to comply with summons**

Relevant Provisions of the Indian Evidence Act, 1872

- ❖ **Section 3 – 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;...*

- ❖ **Section 118 - Who may testify**
- ❖ **Section 120 - Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.**
- ❖ **Section 137 - Examination in Chief**
- ❖ **Section 138 - Order of examinations**
- ❖ **Section 143 - When they may be asked**
- ❖ **Section 146 - Questions lawful in cross-examination**
- ❖ **Section 155 - Impeaching credit of witness**
- ❖ **Section 156 - Questions tending to corroborate evidence of relevant fact, admissible**
- ❖ **Section 159 - Refreshing memory**

Relevant Case Laws

❖ *Purushottam Ghadgoankar v. Gajanan Ghadgaonkar and Ors.*, [2012 (6) MhLj 648]

- “...On plain reading of the said provision, it is abundantly clear that such production of documents which is at later stage of the proceeding and not prior to the framing of the issues, can be produced in the cross examination of the witnesses of other party but the said Rule does not contemplate that such document can be produced for the cross examination of the party.”
- “...there is distinction in the term witness and a party to the suit. The party to the suit cannot be equated with the witness and cannot be confronted with a document by casting surprise upon him, particularly when the documents were not filed by the plaintiff along with the list of documents on which he is going to rely upon.”
- “...it was not open for the trial court to allow production of documents to confront the original defendant...It is different matter if the production is allowed for confronting the witnesses of the party...”

Relevant Case Laws (Contd.)

❖ *Vinayak M. Dessai v. Ulhas N. Naik and Ors.*, [2018 (2) MhLj 348]

- *“on a plain reading of this Judgment there is no force in the contention...that the Judgment in Purshottam...was per incuriam since it did consider Order XIII Rule 1(3)(a) of the Civil Procedure Code... Whether the learned Single Judge did or did not correctly interpret Rule 3(a) to the extent that it applied only to the witnesses and not to the party is a matter which was not considered in the context of the relevant provisions of the Indian Evidence Act...”*
- *“...a discussion of these relevant provisions of the Evidence Act no doubt substantiate the contention...that if a party is not a witness, it would lead to a disastrous interpretation and even to the extent that Section 137 of the Evidence Act may not apply to a party and which could defeat the purpose of examination and cross examination. Nonetheless, the discussion on the point is purely academic...if [such] an interpretation...is accepted...the provisions of Order VII, Order VIII and Order XIII would be rendered nugatory...”*

Relevant Case Laws (Contd.)

- ❖ ***Mohammed Abdul Wahid v. Smt. Nilofer and Ors.*, [Writ Petition Nos. 6931 and 7717 of 2019, Bombay High Court on February 9, 2021]**

- ❖ **Questions before the Court:**
 - 1) Whether a party to a suit is also a witness and the provisions of Order VII Rule 14, Order VIII Rule 1-A(4)(a) and Order XIII Rule 1(3)(a) of the CPC need to be interpreted by equating “party” and “witness”?
 - 2) Whether documents can be directly produced at the stage of cross-examination of a party and/or a witness to confront them without seeking prior leave of the Court under the afore-mentioned provisions?
 - 3) Whether the observations made in the judgments in *Purushottam* and *Vinayak M. Dessai* are correct, and if accepted would lead to whittling down the effectiveness of cross-examination of a witness and/or a party ?

Mohammed Abdul Wahid v. Smt. Niloferand Ors. (Contd.)

Party	Witness
Is a person who files/defends a suit/proceeding and prosecutes, claims entitlement to a relief/opposes grant of any relief	Does not file a suit/proceeding or prosecute or claim any relief of any nature
In his capacity as a plaintiff/defendant has the choice to enter the witness box to give evidence, in his own cause.	Does not have a choice, if summoned to give evidence.[Order XVI Rules 7, 10, 12]
Party, in case wants to appear as a witness, has to do so, before other witnesses (O. XVIII Rule 1 (3) (a), unless so permitted by Court	Enters the witness box, after the party.
A party, can be plaintiff/s or defendant/s or a witness	Witness can be any person, who is capable of giving evidence for proving any fact, opinion or document or for production of documents but cannot be a party
If enters the witness box, does so, in his own cause, not entitled to any expenses.	Is entitled to expenses when summoned
A party is bound by its pleadings and can be examined at the first hearing.	No such restriction upon the witness. Cannot be examined at the first hearing.

Mohammed Abdul Wahid v. Smt. Nilofer and Ors. (Contd.)

Questions before Court	Observations and Findings
<p>Whether a party to a suit is also a witness and the provisions of Order VII Rule 14, Order VIII Rule 1-A(4)(a) and Order XIII Rule 1(3)(a) of the CPC need to be interpreted by equating “party” and “witness”?</p>	<p>A party to a suit (plaintiff/defendant) cannot be equated with a witness. The provisions of Order VII Rule 14(4), Order VIII Rule 1-A(4)(a) and Order XIII Rule 1(3)(a) of the CPC are not applicable to a party, who enters the witness box to tender evidence in his own cause, and are applicable to a witness alone.</p>
<p>Whether documents can be directly produced at the stage of cross-examination of a party and/or a witness to confront them without seeking prior leave of the Court under the afore-mentioned provisions?</p>	<p>Documents can be directly produced at the stage of cross-examination of a witness, (who is not a party to the suit), to confront the witness for refreshing his memory, under Order VIII Rule 1-A(4) and Order XIII Rule 3 of C.P.C. without seeking prior leave of the Court.</p>

Mohammed Abdul Wahid v. Smt. Nilofer and Ors. (Contd.)

Questions before Court	Observations and Findings
<p>Whether the observations made in the judgments in <i>Purushottam</i> and <i>Vinayak M. Dessai</i> are correct, and if accepted would lead to whittling down the effectiveness of cross-examination of a witness and/or a party?</p>	<p>Since it has been held that a party cannot be equated with a witness in the matter of applying the provisions of VII Rule 14 (4); Order VIII Rule 1-A(4) and Order XIII Rule 1 (3) (a) of the CPC, the observations made in <i>Purushottam</i> and <i>Vinayak M. Dessai</i>, are correct and would not lead to whittling down the effect of cross-examination of a witness. Even if the witness was a party to the suit, what has been held in <i>Purushottam</i> and <i>Vinayak M. Dessai</i> would equally hold good.</p>

THANK YOU!

Questions?

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