

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO.10450 OF 2015

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| <p>1. Yogesh Sudhakar Chavanke,
Age 33 years, Occu.Agri.,
R/o 2, Abhinay Society,
Patil Lane No.1, Canada
Corner, College road, Nashik</p> <p>2. Bharti Ramkrushna Misal
Age 45 years, Occu. Housewife
and Agriculture,
R/o at Post Mundhewadi,
Taluka Kannad, Dist.Aurangabad
through her G.P.A. Holder
Balkrushna Namdev Kapse,
Age 45 years, Occu. Business,
R/o Yevla, Taluka and Dist.Nashik</p> <p style="text-align: center;">Versus</p> <p>- Sitaram Damu Mate,
Age 60 years, Occu. Agri.,
R/o Nighoj Nimgaon,
Taluka Rahata,
District Ahmednagar</p> | <p>.. Petitioners
(Orig.Defendants)</p> <p>..Respondent
(Orig. Plaintiff)</p> |
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Mrs Rashmi S. Kulkarni, Advocate h/f Mr S.S. Kulkarni, Advocate for
petitioners
Mr M.S. Shaikh, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 1st December 2015

PER COURT

Heard.

2. Exhibit 106, an application for placing on record the examination-in-chief for the defendants in Special Civil Suit No.27 of 2012, for declaration that the sale-deed is null and void and for injunction, came to be rejected on 12th August 2015 on the ground that the evidence is not in tune with the pleadings in the written statement.

3. Learned Counsel for the petitioners, while assailing the said order would submit that the evidence cannot be part of pleadings and such evidence which is contrary and not admissible pursuant to the provisions of Code of Civil Procedure and Evidence Act will be required to be ignored upon analysis thereof. In order to substantiate her submission, she has placed reliance on the order passed by this Court on 5th November 2012 in Writ Petition No.9033 of 2012 (Vijay Baburao Katore Vs. Bhausahab Baburao Katore and ors.), which according to her directly covers the issue.

4. Learned Counsel for the respondent would urge that the examination-in-chief was filed by the defendants at belated stage. He then would urge that there are sound reasons given by learned Civil Judge, Senior Division, Kopergaon while passing the order and sought dismissal of petition.

5. It is required to be noted that the evidence is not required to be pleaded by the respective parties i.e. plaint and written statement. Such evidence, which is not in tune with the pleadings, is required to be ignored upon analysis thereof by the Court while dealing with the issues which were framed and deciding the suit. The observations made by this Court in the order passed in Writ Petition No.9033 of 2012 on 5th November 2012 (cited supra) clearly covers the issue. Para 5 and 6 in the above cited judgment in case of Vijay Vs. Bhausahab read thus :

“5. With the assistance of learned counsel I have gone through the order. This Court in a case of Harakchand Dhoka Vs. Kashinath Narsingh Marathe referred supra has held thus :

“Specific Relief Act, 1963, Secs. 10 & 12 -
Code of Civil Procedure, 1908, O. 18 Rr. 4 & 5 -
Court's power - Scope - Deletion of paras in
affidavit in lieu of examination-in-chief -
Application rejected by Court holding it had no
power to grant permission for its deletion - Held,
once an affidavit in lieu of examination-in-chief is
filed, it partakes character of examination-in-chief.
There is no provision in Code to enable Court to
order its deletion. In case statement is irrelevant
or beyond scope of pleadings an objection can
always be taken in writing and Court can discard
such portion while finally deciding suit. 2004 (3)
Bom.C.R. 583(S.C.). Trial Court is therefore, right
to extent that it cannot order deletion of
objectionable paras. But on merits application of
appellant be treated as an objection to be decided
by Court at appropriate stage. “

6. What is the relevancy of said evidence, what is the weightage given to the said evidence all these aspects can be considered by the Court at the time of final adjudication. At this stage, it was improper for the Court to discard the said evidence itself. If at the time of final trial the Court finds the said evidence to be irrelevant, not proved, then at that stage, the Court may say that, it does not rely on the said evidence. But at this stage, the Court could not have discarded the said evidence.”

6. In view of above, in my opinion, the order impugned is not sustainable and as such, is set aside. Application - Exhibit 106 stands granted, however, it is made clear that it will be open for the Court to appreciate the evidence at an appropriate stage.

7. Writ Petition stands allowed in above terms.

(N.W. SAMBRE, J.)

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