

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7431 OF 2015**

Lahu Nama Kadav

..Petitioner

Vs.

Denis C Lobo & Ors.

..Respondents

**Mr. P. S. Dani Senior Advocate i/b Mr. Saurab Oka for the Petitioner
Mr. Onkar Gupte i/n G. P. Law & Associates for the Respondents**

**CORAM : R. M. SAVANT, J.
DATE : 14th SEPTEMBER, 2015**

P.C.

1 The Writ Jurisdiction of this Court is invoked against the order dated 16-4-2015 passed by the Learned Joint Civil Judge Senior Division, Panvel, by which order, the application Exhibit 145 filed by the Defendant Nos.1 to 5 for rejection of the averments made in paragraph 24 to 34 of the affidavit in lieu of examination in chief filed by the Plaintiff Exhibit 119 came to be allowed to the extent mentioned in paragraph 6 of the impugned order.

The relevant excerpt of which is reproduced herein under:

“On perusal of this issue it appears that burden is on defendant nos.1 to 5 and 10 to prove whether the agreement is legal. According to plaintiff instead of proving the agreement is illegal after the evidence of defendant, he is producing the evidence earlier to show that it is illegal. On perusing plaint it appears that facts with respect to contents of para nos.24 to 34 of affidavit of evidence are not mentioned in it. Unless there is pleading the party cannot lead evidence to that effect. As facts mentioned in para nos.24 to 34

evidence are beyond pleadings of the plaintiff he cannot lead evidence to that effect. The evidence lead cannot be canceled or struck off, but can be ignored. In such circumstances evidence lead by plaintiff in para nos.24 to 34 in his affidavit in lieu of examination-in-chief are irrelevant and therefore cannot be considered in evidence. The same has to be ignored.”

2 The Trial Court i.e. the Learned Joint Civil Judge Senior Division, Panvel, has therefore in terms held that the evidence led vide paragraphs 24 to 34 though cannot be canceled or struck off but can be ignored and thereafter has also recorded a finding that the evidence contained in paragraphs 24 to 34 in the affidavit in lieu of examination in chief is irrelevant and therefore cannot be considered in evidence and the same has to be ignored.

3 However, in so far as documents which are exhibited as Exhibits 138 to 142 are concerned, they undoubtedly have a reference in the evidence contained in paragraphs 24 to 34 of the said affidavit of examination in chief and on the earlier occasion it seems that the said documents were exhibited on the ground that the Defendants have not raised any objection. It is well settled that there cannot be any evidence de-hors the pleadings, the Trial Court has also appreciated the said fact and has accordingly made observations which are contained in the excerpt of paragraph 6 which have been reproduced hereinabove. The logical corollary of the said observations of the Trial Court would be that the evidence contained in paragraphs 24 to 34 cannot be

considered and that the said documents Exhibits 138 to 142 also cannot be considered otherwise it would lead to an incongruent situation were the evidence is not to be considered but the documents are. Hence the evidence supported by the said documents Exhibits 138 to 142 would be covered by the observations made by the Trial Court in the last three lines of paragraph 6 of the excerpt which is reproduced hereinabove. However, it would be open for the Plaintiff to apply for amendment of the plaint if they so chose and if they are so advised so as to place the pleadings relating to the said evidence on record. Any such application would undoubtedly be considered by the concerned Court on its own merits and in accordance with law.

4 With the aforesaid observations, the Writ Petition is disposed of.

[R.M.SAVANT, J]

CERTIFICATE

Certified to be true and correct copy of the original signed order