

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST.) NO. 23530 OF 2015

M/s. J.M. Constructions .. Petitioner
vs.
Antoinette Gomes and ors. .. Respondents

Mr. Charles D'Souza for the Petitioner.
Mr. Zubin Behram Kamdin and Ms Shlesha Sheth i/b Ranjana Parikh
for the Respondents.

CORAM : M. S. SONAK, J.
DATE : 08 OCTOBER 2015.

P.C. :-

1] The challenge in this petition is to the order dated 10 August 2015, by which the learned Small Causes Court at Mumbai (Trial Court) has rejected the Petitioner's Application at Exhibit-352 urging the discard of evidence of DW-2 recorded in paragraphs 3 to 22, 24 to 42, 44 to 85 and 87 to 112 from the affidavit in lieu of examination-in-chief filed at Exhibit 347.

2] Mr. Charles D'Souza, learned counsel for the Petitioner, submitted that the Trial Court has not even gone into the issue as to whether the contents of the aforesaid paragraphs of the affidavit in lieu of examination-in-chief are beyond the pleadings in the written statement filed by and on behalf of the Respondents (Defendants). This according to Mr. D'Souza, clearly amounts to failure to exercise

jurisdiction. Mr. D'Souza placed reliance upon the decisions of this Court in the case of *Mrs. Mahabanoo N. Kotwal Vs. Piloo Fali Bomanji and anr.*¹, *Banganga Cooperative Housing Society Ltd., Mumbai Vs. Mrs. Vasanti G. Nerurkar*² and *Harish Loyalka and anr. Vs. Dileep Nevatia and ors.*³ to submit that the Trial Court was duty bound to undertake the exercise of ascertaining whether the evidence sought to be tendered as travelled beyond the pleadings and if so, made an order to either strike of the portions of affidavit in lieu of examination-in-chief or at least to absolve the Petitioner from cross-examining DW-2 upon the said aspect.

3] After hearing the learned counsel for the parties and perused the record, in my judgment, no case is made out to exercise extraordinary jurisdiction under Article 227 of the Constitution of India. This is because, upon perusal of the impugned order, it cannot be said that there is any failure as such to exercise jurisdiction. The Trial Court has observed that the evidence is basically in the context of reasonable and *bonafide* requirement and comparative hardship. In this context, it may not be appropriate to scan the pleadings and the affidavit-in-lieu of examination-in-chief with a magnifying glass,

1 2015(3) ABR 151

2 2015(4) ABR 639

3 2014(4) ABR 545

in order to ascertain whether any evidence indeed travels beyond the pleadings. At the same time, the Trial Court has made it clear that if ultimately it is found that the evidence let in, is indeed beyond the pleadings, then the same will not be taken into consideration whilst delivering the final judgment and decree. The approach of the Trial Court cannot be said to be *ex-facie* in excess of jurisdiction or manifestly unjust.

4] That apart, there is no case made out to interfere with the impugned order at this stage. The matter has been expedited by the Hon'ble Apex Court. If ultimately, the matter is decided against the Petitioner and the Petitioner chooses to institute an appeal against such final decision, the Petitioner will undoubtedly have an opportunity to question the order impugned in this petition alongwith the various other grounds which may they choose to urge in such substantive appeal. It is precisely for this reason, even this Court has refrained from making any further observations on merits and demerits of the impugned order. However, it is suffice to record that it cannot be said that the impugned order made by the Trial Court is patently excess of jurisdiction, as urged by the learned counsel for the Petitioner.

5] No doubt, the decisions upon which reliance was placed by the learned counsel for the Petitioner require the Courts to examine whether the evidence is beyond the pleadings or is totally irrelevant. In this case, it cannot be said that the approach of the Trial Court is contrary to the principles set out by this Court in the said decisions. Whether ultimately, the decision of the Trial Court is right or not on the merits can always be decided in the substantive appeal. However, this cannot be said to be a case where the Trial Court has not at all exercised its jurisdiction and therefore, interference with the impugned order under Article 227 of the Constitution of India is warranted.

6] In the aforesaid circumstances, there is no reason to entertain the present Petition. Accordingly, the Petition is dismissed. However, it is clarified that this Court has not gone into the merits of the matter and therefore all contentions of all parties are kept open for the determination, at the appropriate stage.

7] All concerned to act upon the basis of authenticated copy of this order.

(M. S. SONAK, J.)