

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 663 OF 2016**

HDFC Bank Ltd., A Company registered under the Companies Act, 1956, having its registered office at HDFC Bank House, Senapati Bapat Marg, Lower Patel, Mumbai 400 013, and having its branch at 18th June Road, Panaji, Goa, represented by Mr. Samir Lotlikar, Branch Manager (Panaji Branch), son of Mr. Vamanrao Lotlikar, Indian National, major in age, resident of Caranzalem, Goa.

... Petitioner

Versus

Mr. R.J. Prabhu, Resident of Shantada, Shankarwadi, Taleigao Road, Panaji, Goa, through his Power of Attorney Shri Parag Hede, Resident of Bobby Apartments, Miramar, Panaji, Goa.

... Respondent

Mr. S.S. Kantak, Senior Advocate with Mr. Farid Karachiwala, Ms. Sneh Mehta and Mr. Bhargav Khandeparkar, Advocates for the Petitioner.

Mr. P.A. Kamat, Advocate for the Respondent.

CORAM:- C. V. BHADANG, J.**DATE:- 22nd JULY, 2016.**

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. The learned Counsel for the respondent waives service. Heard finally, by consent of the parties.

2. The challenge in this petition is to the order dated 22.03.2016 passed by the learned Senior Civil Judge at Panaji in Bank Matter No. 81/2007/A. By the impugned order, the application filed by the petitioner for excluding certain part of the affidavit in lieu of chief examination and raising objection as to the admissibility of a portion, thereof has been rejected, as being premature. The learned trial Court has kept the substantive contentions open, to be raised at the time of final arguments.

3. The brief facts are that the respondent has filed the aforesaid suit against the petitioner for recovery of money, by way of refund and

compensation. On behalf of the petitioner, a preliminary objection was raised regarding the territorial jurisdiction of the Senior Civil Judge at Panaji, to entertain the suit. This is basically on the ground that, according to the petitioner in view of the terms and conditions (Exhibit-51), which form part of the account opening form (Exhibit-52), the parties had chosen the forum at Mumbai, as the competent Court to entertain all the disputes. The learned Trial Court has framed the preliminary issue regarding the territorial jurisdiction, which is being heard by the learned Trial Court.

4. It appears that on behalf of the petitioner-defendant, one Samir Lotlikar was examined as DW-1 and thereafter on 17.02.2016, an affidavit in lieu of chief examination of the plaintiff-Mr. Ramchandra J. Prabhu, was filed. The petitioner filed an application on 09.03.2016, seeking a direction to the respondent-plaintiff to withdraw the affidavit

in evidence and directing the respondent-plaintiff to file a fresh affidavit, only on the issue of jurisdiction. Alternatively, it was prayed that the Court may expunge paragraphs 9 to 13 and the averments of the first, second and the last sentence of paragraph 3 and the averments in the second, third, fifth and sixth sentence of paragraph 14 of the affidavit in evidence. The respondent filed a reply opposing the said application. It is submitted that any objection raised to the admissibility of the evidence of a witness, has to be decided at the stage of final arguments.

5. The learned Trial Court in the impugned order has placed reliance on the full bench decision of this Court in the case of **Mr. Hemendra Rasiklal Ghia Vs. Subodh Mody, 2008(6) ALL MR 352**, in order to hold that any such objection should be taken in writing and it is not necessary to decide the objections relating to admissibility or relevancy of

evidence contained in the affidavit filed under Order 18, Rule 4 of C.P.C., as they arise and the determination and the decision thereof has to be deferred to a later stage.

Insofar as the second objection is concerned, reliance is placed on the decisions of the Supreme Court in the case of **Krishi Utpadan Mandi Samiti Sahawan District Badaun through its Secretary Vs. Bipin Kumar and Another**, 2004(2) SCC 283 and **Smt. Gangabai w/o Rambilas Gilda Vs. Smt. Shhabubai w/o Pukharajji Gandhi**, 2003(6) SCC 595 and the decision of this Court in the case of **Bai Hira Devi and Others Vs. The Official Assignee of Bombay**, AIR 1958 SC 448. It has been held that Sections 90, 91 and 92 of the Evidence Act incorporate "Rule of Evidence", to be pressed into operation at the time of appreciation of evidence and not at the time, when the evidence is tendered. It has been found that in all these cases, the objection was taken up for consideration at the time, when the matter was

posted for judgment. In that view of the matter, the application was dismissed as premature.

6. I have heard Mr. Kantak, the learned Senior Counsel for the petitioner and Mr. Kamat, the learned Counsel for the respondent. With the assistance of the learned Counsel for the parties, I have perused the impugned order as also the relevant record.

7. On behalf of the petitioner, strong reliance is placed on the decision of this Court, in the case of **Rajendra Singh Chhatrasal Singh Kushwaha Vs. Jitendra Singh Rajendra Singh Kushwah and Others, 2013(6) Mh.L.J.**, which has been affirmed by the Division Bench of this Court in Appeal (L) No. 474/2013 in Testamentary Suit No. 97/2011 in Testamentary Petition No. 832/2010 dated 10.12.2013. Further reliance is placed on the decision of this Court in the case of **Mahabanoo Navroz Kotwal Vs.**

Piloo Fali Bomanji, 2015(3) AIR BOM R 151. It is submitted that, under Order 18, Rule 2 of C.P.C. (which now enables the party to produce evidence in the form of an affidavit), the Court cannot permit production of irrelevant evidence or evidence not relatable to the issue.

8. Insofar as the contention based on Sections 90, 91 and 92 of the Evidence Act, is concerned, it is contended that the respondent has not disputed the execution of the account opening form (Exhibit-52). It is submitted that by virtue of the said application, the respondent had agreed to all the terms and conditions (Exhibit-51), which *inter-alia* contains the choice of forum, in the event of dispute between the parties. It is submitted that the respondent cannot be permitted to lead evidence, which is contrary to the said terms and conditions (Exhibit-51). It is therefore, submitted that the learned Trial Court was in error in postponing the

consideration of the application at a later stage.

9. On the contrary, it is submitted on behalf of the respondent that the learned Trial Court has rightly deferred the consideration to a later stage. The learned Counsel has placed reliance on the decision of the full bench in the case of **Mr. Hemendra Rasiklal Ghia** (supra), in order to submit that any objection to the admissibility of the evidence, has only to be noted down. However, its consideration has to be postponed to the stage of final disposal of the suit. Insofar as the claim of exclusion of certain portion of the affidavit is concerned, it is submitted that the contents of paragraphs 9 to 13 also pertain to the preliminary issue of territorial jurisdiction, in as much as, it is the respondent's case that there was a fraud practiced, which is within the territorial jurisdiction of the Trial Court. In short, it is submitted that the contents of paragraphs 9 to 13,

which are now sought to be excluded, pertain to the issue of territorial jurisdiction and therefore, they cannot be excluded.

10. I have carefully considered the rival circumstances and the submissions made. As noticed by the learned Trial Court, the objection raised on behalf of the petitioner is on two counts firstly, it is contended that certain parts of the affidavit in evidence namely, paragraphs 9 to 13 contain averments, which are beyond the scope of enquiry on the preliminary issue and secondly, the respondent cannot be allowed to tender evidence, which is in variance with Exhibits 51 and 52, in view of Section 91 and Section 92 of the Evidence Act.

11. Insofar as the first issue is concerned, it is necessary to mention that this Court in the case of **Rajendra Singh Kushwaha** (supra), has *inter-alia* held that the Court has to see that the evidence led

by the parties is relevant in the context of the issues involved and only such part of the evidence, can be allowed to be led/retained. The following observations in paragraph 13 of the judgment are to the point.

"13. On perusal of Order 18, Rule 2 of the Code of Civil Procedure, it is clear that the party is entitled to produce his evidence in support of all the issues which he is bound to prove. The court has to see whether evidence proposed to be led by the party is relevant in support of the issues involved. Only such evidence which is relevant in support of the issues, the party is bound to prove such issue. Any evidence which is not relevant to the issues involved, can be considered irrelevant. There was an amendment to Order 18, Rule 4 of the Code of Civil Procedure, 1908 by which examination in chief of the witness is allowed to be filed on affidavit. The legislative intent to

permit examination in chief of the witness by filing affidavit was to expediate the trial. The question that arises for consideration of this court is if there was no such amendment permitting the party to file affidavit in lieu of examination in chief of the witnesses and if the oral examination of the party who seeks to lead oral evidence was required to be recorded in the court, whether court could have permitted the party in examination in chief to lead any evidence which was not relevant to the issue. In my view, the court could not have permitted or would have stopped the party from leading evidence in examination in chief to the issue which were not relevant for the purpose of deciding the suit. The court cannot permit the party to lead an irrelevant evidence or evidence not related to the issue even in affidavit filed by way of examination in chief in lieu of oral evidence. Order 18, Rule 4 in my

view has to be read with Order 18, Rule 2 which clearly provides that evidence has to be in support of the issues which party is bound to prove. In my view, since the defendant is not bound to prove nor it is relevant in the testamentary proceedings that the deceased who was alleged to have bequeathed particular property was not owner of the said property such part of evidence is irrelevant and cannot be permitted by Court. If the court could not have permitted the defendant to lead such evidence as not related to the issue involved under Order 18, Rule 2, the court cannot permit the said party to lead evidence not related to the issue involved or the issue which the party is not bound to prove under Order 18, Rule 4 by filing affidavit in lieu of examination in chief."

(Emphasis supplied)

12. Further in paragraph 15, this Court has held

that the Court is empowered to ask the party, who is proposing to give evidence, in what manner the alleged fact, if proved would be relevant and the Court shall admit the evidence, if it deems that the same is relevant and not otherwise. In the facts of that case, certain paragraphs of the affidavit in evidence, were struck off, as not being relevant. It can thus be seen that in an appropriate case, the Court can direct a particular part of affidavit in evidence, to be either struck off or ignored, if the same is not necessary or relevant.

13. Presently, the Trial Court is only concerned with the preliminary issue of territorial jurisdiction and it is necessary to see whether the contents of paragraphs 9 to 13 are indeed relevant for deciding the said controversy. Before doing that, it may be mentioned that, it was not disputed on behalf of the petitioner that the contents of the affidavit at paragraphs 1 to 8 and paragraph 14

would be relevant, so far as the preliminary issue of territorial jurisdiction is concerned.

14. Let us now consider paragraphs 9 to 13. In paragraph 9, the respondent has averred about he having met the new Manager of the petitioner-Bank and he having transferred a sum of U.S.\$ 60,000/- to a account in a bank in Japan. In paragraph 10, it is contended that Mr. Waman Pai alongwith Mr. Joe D'Costa, the Zonal Manager came to the residence of the respondent at Taleigao and stated that 1,10,000/- dollars FCNR deposit was also tampered and prematurely closed and 1,00,000/- dollars were transferred to Japan based on similar request received from Nigeria, but they will restore both the deposits and after some discussion they went back. To the similar effect are the averments made in paragraph 11. In paragraph 12, there is a mention about the respondent having lodged a complaint before the Panaji Police Station on

03.04.2005. Paragraph 13 refers to certain correspondence in the form of E-Mails, in which the bank has stated that it will be depositing the FCNR deposit. In the said paragraphs, the respondent has stated about he having approached the National Consumer Redressal Commission at New Delhi and thereafter, having approached the Civil Court.

It can thus be seen that the contents of paragraphs 9 to 13 do not relate to the issue of territorial jurisdiction and thus, this part of the affidavit will have to be deleted/ignored. In my considered view, the Trial Court could not have deferred this consideration at a later stage.

15. It may be mentioned that, after its amendment, Order 18, Rule 4 of C.P.C., permits leading of evidence in the form of an affidavit. Prior to the amendment, a party used to enter the witness box and his/her chief examination was recorded orally. In that case, the adversary was

in a position to raise objection and the Court could decide whether the evidence in examination in chief on a particular point could be permitted, then and there.

16. It would be necessary to make a reference to the full bench decision of this Court in the case of **Mr. Hemendra Rasiklal Ghia** (supra). In that case, the following issue was referred to the full bench.

"Whether the objection as to the admissibility, or proof of evidence, oral and documentary, should be decided upon, when raised or whether the decision thereon can be deferred to a later stage ?"

The full bench framed the following questions for determination:-

"Question-A: At which stage, the objection to the admissibility and/or proof of documents which may be produced or tendered should be raised; considered and decided by the

Court ?

Question-B: At which stage, an objection to the admissibility or relevancy of evidence contained in the affidavit filed under Order XVIII, Rule 4 of Civil Procedure Code should be considered and decided by the Court ?”

Insofar as the question (B) is concerned, the same was answered as under:

“The objection to the admissibility or relevancy of the evidence contained in the affidavit in evidence under Order XVIII, Rule 4 of CPC, can be admitted at any stage reserving its resolution until final judgment in the case as held in the case of **Ameer Trading Corporation Ltd. Vs. Shapoorji Data Processing Ltd.** (supra).”

17. The words admissibility and relevancy are often used interchangeably. Section 5 of the Evidence Act provides that evidence can be given of

facts in issue and relevant facts. The fact which is relevant can be said to be admissible. Thus, if the Court is in a position to decide whether the part of affidavit in lieu of chief examination does not pertain to the issue/s, which fall for determination, there is no prohibition for the Court in excluding such part. The whole object of the procedural law is to ensure a fair and expeditious disposal of the matter. As held by the full bench in the case of **Mr. Hemendra Rasiklal Ghia** (supra), "the aim is always to prevent miscarriage of justice and expedite trial, which is the dire need of time". It has been held that the Court can always work out its own modality in the peculiar facts of each case to meet the ends of justice and not to give the handle to either of the parties to protract litigation (paragraph 92 of the judgment). Thus, if the Court finds on a bare perusal of the affidavit that certain part does not relate to the issue/s involved, there is no prohibition from excluding the

said part.

18. The decision of the learned Single Judge in the case of **Rajendra Singh Kushwa** (supra), was the subject matter of an appeal before the Division Bench. The Division Bench has held that the contention that the Court is not entitled to adjudicate upon the affidavit in lieu of examination in chief, till the stage of arguments, is not well founded (paragraph 3 of the judgment).

19. In the circumstances, in my considered view, the contents of paragraphs 9 to 13 will have to be ignored with a clarification that the petitioner/defendant need not cross examine the said witness with respect to such part.

20. This takes us to the second objection based on Section 91 of the Evidence Act. Here the only contention raised is that the respondent having

signed the account opening form, had agreed to all the terms and conditions as contained in Exhibit-51, *inter-alia* mentioning the choice of forum being the Civil Court at Mumbai and therefore, the respondent cannot now led evidence, which is in variance of the same.

21. In my considered view, in so far as this objection is concerned, it would be appropriate that the trial Court records the said objection, reserving its resolution until the final judgment, on the preliminary issue of jurisdiction, in accordance with the decision of the full bench of this Court, in the case of **Mr. Hemendra Rasiklal Ghia** (supra).

22. In view of this, the following order is passed:

O R D E R

(a) The petition is partly allowed.

(b) The impugned order, is hereby set aside.

(c) The Trial Court shall expunge/delete paragraphs 9 to 13, as forming part of examination in chief of PW-1, Mr. Ramchandra Prabhu, with the clarification that the petitioner/ defendant need not cross examine the said witness in respect of these paragraphs.

(d) The Trial Court shall record the objections to the admissibility of the evidence based on Section 91 and Section 92 of the Evidence Act and the same shall be decided at the later stage, in accordance with the full bench decision of this Court in the case of **Mr. Hemendra Rasiklal Ghia** (supra).

(e) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.