

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 234 OF 2016

Rafique Khalique Shaikh .. Applicant
vs.
Zakiabi Kadar Mohd. and ors. .. Respondents

Mr. Suresh K. Mali for the Applicant.
Mr. Vivek V. Salunke for Respondent Nos.1,2,3.
Mr. G.B. Walawalkar i/b Mr. S.P. Thorat for Respondent No.5.

CORAM : M. S. SONAK, J.
DATE : 07 JULY 2016.

P.C. :-

1] Rule.

2] The respondents have been duly served in the matter. Mr. Vivek Salunke appears for respondent Nos.1,2 and 3 and Mr. Walawalkar appears for respondent No.5. Respondent No.4 is the son of respondent No.1 – Mrs.Zakiabi Kadar Mohd.. The address in respect of respondent Nos.1 and 2 on one hand and respondent No.4 is the same. In these circumstances, this petition is disposed of finally.

3] The challenge in this petition is to the order dated 3 March 2016, by which the 2nd Addl. Principal Judge, City Civil Court, Mumbai (Trial Court) has dismissed the applicant's application at

Exhibit-9 seeking leave to withdraw the affidavit in lieu of examination-in-chief filed on 19 December 2014 and substitute the same with fresh affidavit in lieu of examination-in-chief.

4] The learned counsel for the applicant has contended that the first affidavit dated 19 December 2014, was filed even before the issues could be framed on 12 January 2015. Consequent upon framing of the issues, the application at Exhibit-9 was made. In these circumstances, the learned counsel for the applicant submitted that there was sufficient cause for grant of relief in terms of the application at Exhibit-9. The learned counsel for the applicant placed reliance upon the decision of this Court in case of ***F.D.C. Limited Vs. Federation of Medical Representatives Association India and ors. - 2003 AIR (Bom) 371.***

5] On the other hand, Mr. Salunke, learned counsel for the contesting respondents, submitted that it is impermissible to withdraw the affidavit already filed in the Court and therefore, the impugned order was rightly made by the learned Trial Court. Mr. Salunke relied upon the decision of this Court in case of ***Banganga Cooperative Housing Society Ltd. and ors. Vs. Vasanti Gajanan***

Nerurkar and ors. - 2015(5) BomC.R. 813.

6] The decision in case of ***Banganga Cooperative Housing Society Ltd. (supra)***, takes into consideration the earlier decision in case of ***F.D.C. Limited (supra)***. Upon such consideration, this Court, in case of ***Banganga Cooperative Housing Society Ltd. (supra)***, has held that it may not be permissible for a party to withdraw the affidavit of evidence under Order 18 Rule 4 of the C.P.C. However, upon making out a suitable case, there can be no bar to filing of additional affidavit in lieu of examination-in-chief or filing of further or supplemental affidavit in lieu of examination-in-chief. In support of this view, reliance has been placed upon the decision in case of ***Rajesh Varma Vs. Aminex Holdings & Investments and ors. - 2008 (2) Bom.C.R. 588 (O.S.)***.

7] In this case, considering the circumstance that the first affidavit was filed even before framing of the issues, the applicant, if he so desires, might be entitled to file additional or supplemental affidavit in lieu of examination-in-chief. However, there is no question of seeking to withdraw the affidavit already filed.

8] Accordingly, the impugned order is modified. The impugned order, to the extent it denies the applicant leave to withdraw the affidavit already filed on record is hereby upheld. However, considering the circumstance that the issues were framed only 12 January 2015, it is held that the applicant is entitled to file further/ additional or supplemental affidavit in lieu of examination-in-chief.

9] Mr. Salunke submits that no blanket leave may be granted to the applicant to file such additional / supplemental affidavit in lieu of examination-in-chief. At this stage, it is not only held that the applicant has a right to file further/additional or supplemental affidavit in lieu of examination-in-chief. Accordingly, liberty is granted to the applicant to place before the Trial Court such further/additional/supplemental affidavit in lieu of examination-in-chief after furnish of necessary copy to the respondents. The Trial Court to afford an opportunity of hearing to both the parties and thereafter take a decision in the matter of acceptance of such further/supplemental/additional affidavit in lieu of examination-in-chief.

10] The impugned order is modified to the aforesaid extent. Rule is made partly absolute. There shall however, be no order as to costs.

11] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

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