

Mr. J. V. Parmar for Petitioners.
Mr. Madhav Jamdar a/w. Ms Vrushali U. Kabare for Respondent.

P.C. :

Heard Mr. Parmar, learned Counsel for petitioners and Mr. Jamdar, learned Counsel for respondent at length. Rule. Mr. Jamdar waives service for respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as defendants, have challenged the judgment and order dated 23.09.2015 passed by the learned Judge presiding over Court Room No.27 of the Bombay City Civil Court at Greater Bombay below exhibit-10 in Summary Suit No.7630 of 1996 (High Court Suit No.1549 of 1996). By that order, the learned trial Judge allowed the application filed by the respondent, hereinafter referred to as plaintiff, and permitted him to file additional affidavit by way of examination-in-chief.

3. Mr. Parmar submitted that plaintiff instituted Summary Suit initially on the Original Side of this Court. On 30.10.2007, Advocates for plaintiff submitted draft issues on behalf of the plaintiff. By order dated 31.10.2007, the draft issues tendered on record, were marked 'X'

for identification. Except issue No.9 in draft issues, rest of the issues were treated as settled issues.

4. The Suit was thereafter transferred to the City Civil Court, Bombay. It appears that the Advocates as well as parties were unaware of settling issues by this Court on 31.10.2007. With the result, on 03.02.2014, the learned trial Judge again framed issues at exhibit-4. Defendants took out Chamber Summons No.2460 of 2014 for substituting the issues framed by the trial Court on 03.02.2014 at exhibit-4 along with the issues re-cast on 03.05.2014 by issues framed by the High Court on 31.10.2007. Plaintiff did not file reply to the Chamber Summons. After hearing both sides, on 10.11.2014, the learned trial Judge, by consent of the parties, substituted the issues framed by the High Court on 31.10.2007 in place of the issues framed by the trial Court on 03.02.2014 at exhibit-4.

5. In the meantime, on the basis of issues framed by the trial Court on 03.02.2014, plaintiff had filed affidavit of evidence in lieu of examination-in-chief on 11.09.2014. The plaintiff, therefore, filed application exhibit-10 in March 2015 setting out the substitution of the issues framed by the trial Court by the High Court and prayed for filing additional affidavit of examination by plaintiff. This application was opposed by the defendants by filing reply in or about April 2015. The grievance of the defendants is that the additional affidavit sought to be tendered is beyond the pleadings.

6. Mr. Parmar submitted that paragraphs 4 and 5 of the additional affidavit of evidence filed by the plaintiff on 26.12.2014 go beyond the pleadings set out in the plaint. This aspect is not considered by the learned trial Judge while passing the impugned order and has permitted

the plaintiff to file additional affidavit by way of examination-in-chief without striking out paragraphs 4 and 5 from that affidavit. In support of this submission, Mr. Parmar relied upon decision of this Court in ***Jitendra Singh Rajendra Singh Kushawah Vs. Suresh Rajendra Singh Kushawah*, 2014 (2) ALL MR 132**. He, therefore, submitted that plaintiff may be directed to strike out paragraphs 4 and 5 from the additional affidavit of evidence dated 26.12.2014.

7. On the other hand, Mr. Jamdar supported the impugned order. He submitted that the additional affidavit dated 26.12.2014 is consistent with the pleadings set out in the plaint. He further submitted that once the affidavit in lieu of examination-in-chief is filed, it partakes the character of the examination-in-chief of the concerned witness. There is no provision under the Code under which the Court can direct deletion of any portion of an examination-in-chief. If there are irrelevant statements in the affidavit in lieu of examination-in-chief and if there are statements which are beyond the scope of the pleadings, the rival party can always record his objection in writing to the objectionable portion of the affidavit. A party to the suit cannot be permitted to travel beyond his pleadings. If any evidence is tried to be adduced which has no foundation in the pleadings, the Court always has a power to discard such evidence while finally deciding the suit or proceeding. In support of this proposition, he relied upon the decision of this Court in ***Harakchand Gulabchand Dhoka Vs. Kashinath Narsingh Marathe*, 2010 (6) Bom.C.R. 379**. He also relied upon following decisions:

- a. ***Ameer Trading Corporation Vs. Shapoorji Data Processing Limited*, AIR 2004 SC 355;**
- b. ***Ram Sarup Gupta Vs. Bishun Narain Inter College*, 1987 (2) SCC 555;**
- c. ***Bachhaj Nahar P. Vs. Nilima Mandal*, 2008 (17) SCC 491;**

- d. **Kishore Kirtilal Mehta Vs. Lilavati Kirtilal Mehta Medical Trust**, 2007 (10) SCC 21;
- e. **Charu Kishor Mehta Vs. Lilavati Kirtibai Medical Trust**, Writ Petition No.4698 of 2007 decided on 06.09.2007;
- f. **Cesar Rego Fernandes Vs. Angela Ninette Olivera Fernandes**, 2008 (1) Bom.C.R.270;
- g. **Ashish Nayyar Vs. Shelly Nayyar**, 2009 (3) Law Herald (P & H) 2035;
- h. **Kusum Vs. Jagdish**, 2015 (1) Mh.L.J. 127;
- i. **Jitendra Singh Rajendra Singh Kushawah** (*supra*);
- j. **Salem Advocate Bar Association Vs. Union of India**, (2003) 1 SCC 49;
- k. **Salem Bar Association Vs. Union of India**, AIR 2005 SC 3353.

8. In the case of **Jitendra Singh Rajendra Singh Kushawah** (*supra*), the learned Single Judge of this Court, after relying upon the decision of the Apex Court in the case of **Ameer Trading Corporation** (*supra*) held that in case statement is irrelevant or beyond scope of pleadings, an objection may be taken on that ground in writing and in that event, Court can discard such portion while finally deciding the Suit. In paragraph 12, the learned Single Judge referred to Order 18, Rules 2 and 4 of C.P.C. In paragraph 13, the learned Single Judge observed that Section 151 of C.P.C. gives inherent powers to the Court to strike of the irrelevant evidence with a view to avoiding any further delay in the matter and to avoiding any cross-examination on irrelevant issues. The part of the evidence which is on the face of it irrelevant and not relevant to the issue involved or issue which the Court ultimately cannot decide, can be struck of and / or can be ignored even before commencement of cross-examination. I do not propose to discuss the

decisions cited by the learned Counsel appearing for the parties at the Bar for the order which I propose to pass.

10. Perusal of the impugned order shows that the learned trial Judge has not considered the objections raised by the defendants and without deciding that objection, has permitted the plaintiff to file additional affidavit of evidence. On this count alone, the impugned order is liable to be set aside with direction to the learned trial Judge to set aside application exhibit-10 afresh and consider whether defendants made out a case for striking out the evidence which is beyond the pleadings and whether it can be done at the stage of deciding the Suit finally or even in earlier point of time. Hence, the following order:

- a. Impugned order dated 23.09.2015 is quashed and set aside and application exhibit-10 filed by the plaintiff is restored to the file of the trial Court for deciding it afresh;
- b. All the contentions of the parties on merits are expressly kept open.

11. Rule is made absolute in the aforesaid terms with no order as to cost.

(R. G. KETKAR, J.)

Minal Parab