

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 580 OF 2016**

Shri Madhukar Dharmaji Shevale

..Petitioner

Vs

Jayshree Charitable Trust and
Ors

.. Respondents

Mr. Shailendra S. Kanetkar, Advocate for Petitioner.
Mr. Vaibhav Sugdare a/w Rahul Hingmire i/b Hariani & Co.,
Advocates for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 15/01/2016

PC:

1. Heard Mr. Shailendra Kanetkar, learned counsel for the petitioner and Mr. Vaibhav Sugdare, learned counsel for the respondents at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 30.10.2013 passed by the learned 8th Jt Civil Judge, Senior Division, Pune below Exhibit 124 in Special Civil Suit No.625 of 2009. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as plaintiff, seeking permission to cross examine the defendant on the basis of affidavit of Mr. Ramchandra N. Naik filed at Exhibit 43 in support of the written statement.
3. Mr.Kanetkar submitted that the plaintiff has instituted suit,

inter alia, praying for declaration that the alleged sale deed dated 28.2.1996 in favour of the defendant does not create any interest in favour of the defendant and that the said sale deed is not binding on the plaintiff; for possession of the suit property which is unauthorisedly taken over by the defendant and for compensation for wrongful use and occupation; for injunction restraining the defendant from creating third party interest. The defendant filed written statement resisting the suit. The issues were framed and in support of the written statement, Ramchandra Naik filed affidavit at Exhibit 43.

4. Mr.Kanetkar submitted that the plaintiff completed his evidence. All of a sudden, the defendant filed closure purshis of their evidence. Because of that, the plaintiff could not cross examine the defendant on the points which have been raised in the written statement. As the defendant is not leading evidence in support of their case in the written statement and has filed affidavit in support of the written statement. Mr. Naik who has made affidavit at Exh.43 may be subjected to cross examination. He relied upon Order 18 (4) as also Order 19, Rule 1 of C.P.C. He submitted that Order 19, Rule 1 lays down that any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that affidavit of any witness may be read at the hearing, on such conditions as the Court

thinks reasonable.

5. He also relied upon the decision of the Apex Court in the case of Ramesh Kumar Vs. Keshao Ram, AIR 1992 SC 700 and in particular paragraphs 8 and 9 thereof. On the other hand Mr Sugdare supported the impugned order.

6. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has completed his evidence. The defendant has filed purshis to the effect that he does not want to lead evidence. In other words, the defendant has not filed affidavit in examination in chief as contemplated by Order 18, Rule 4 of C.P.C. The affidavit at Exh.43 filed by Mr Ramchandra Naik as per Order 6, Rule 15 (4) of C.P.C. Order 6, Rule 15(4) of C.P.C requires a person verifying the pleadings has to furnish an affidavit in support of his pleadings. The learned trial Judge observed that the affidavit in support of pleadings cannot be treated and equated as evidence of affidavit if a party does not step into a witness box. As the defendant does not want to lead evidence, it also did not file affidavit of evidence in terms of Order 18, Rule 4. In view thereof, the plaintiff cannot take cross-examination of defendant who does not want to lead evidence and prove his case.

7. Section 137 of the Indian Evidence Act, 1872 (for short,

'Act') lays down that examination of a witness by a party who calls him shall be called his examination in chief. The examination of a witness by adverse party is called his cross examination. Thus, the cross examination contemplated by section 137 contemplates first examination of a witness by the party who calls him for leading evidence and thereafter followed by examination of that witness by a adverse party. In the present case, the defendant does not want to lead evidence and consequently the plaintiff cannot be allowed to cross examine such witness.

8. Mr. Kanetkar relied upon the decision in the case of Ramesh Kumar (supra). In that case, the Court was considering the decree of eviction passed on the ground of bonafide requirement. The respondent landlord has filed petition for eviction of the appellant. The Addl. Rent Controller, Delhi dismissed the petition. The respondent-landlord preferred Revision Petition and sought to plead certain subsequent events which, according to him justified grant of order for possession. It is in that context, the Court observed in paragraphs 8 and 9 thus :

“8. The submissions of learned Counsel are only partly correct. While it is true that a distinction must be made between pleading and proof, the further submissions that these must necessarily be in two successive sequential stages need not always be so and particularly when dealing with pleas of subsequent events in appeals and revisions. If the allegations of facts made in support of such a plea are

denied then alone the question of their proof in an appropriate way arises. If those allegations of facts are admitted, there is no need to prove what is admitted or must be deemed to be admitted. There can be admissions by non-traverse. The High Court proceeded to accept the allegations as proved presumably in view of the fact that appellant's learned Counsel did not even appear, let alone challenge the allegations. But there might also be cases in which, having regard to the nature of the circumstances, the Court may insist upon proof independently of such admission by non-traverse.

9. When subsequent events are pleaded in the course of an appeal or proceedings of revision, the Court may, having regard to the nature of the allegations of fact on which the plea is based, permit evidence to be adduced by means of affidavits as envisaged in Rule 1 of Order 19, C.P.C. The Court may also treat any affidavit filed in support of the pleadings itself as one under the said provision and call upon the opposite side to traverse it. The Court, if it finds that having regard to the nature of the allegations, it is necessary to record oral evidence tested by oral cross-examination, may have recourse to that procedure. It may record the evidence itself or remit the matter for an enquiry and evidence. All these depend upon the factual and situational differences characterising a particular case and the nature of the plea raised. There can be no hard and fast rule governing the matter. The procedure is not to be burdened with technicalities."

9. As noted earlier, in the present case, the defendant does not want to lead evidence. In view thereof and for the reasons stated in paragraphs 5 and 6 of the order, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity

in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)