

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3713 OF 2014

1. Anita Sitaram Sawant .. Petitioners
Age. 45 years, Occ. Advocate
2. Shobha Madhu Sawant
Age. 65 years, Occ. Household
3. Manish Madhu Sawant
Age. 32 years, Occ. Nil
4. Pravin Madhu Sawant
Age. 31 years, Occ. Nil

All R/o. Gulabchand Bhagwanji Chawl,
Malegaon Road, Dhule.

Versus

1. Gosar Developers .. Respondents
A Partnership through
- 1A. Sau. Nita Vasant Gosar
Age. 50 years, Occ. Business
R/o. Shri Ganesh Apartment,
Agrawal Nagar, Dhule.
- 1B. Heena Ketan Gosar
Age. 45 years, Occ. Business,
R/o. 10, Agrawal Nagar, Dhule.
2. Shri Raju Sitaram Sawant
Age. Years, Occ.:
3. Sanjana Sitaram Sawant
Age. Years, Occ.:

Both R/o. Gulabchand Bhagwanji Chawl,
Malegaon Road, Dhule.

Mr.M.S. Kulkarni h/f. Mr. A.S. Shivpuje, Advocate for the
petitioners.

Mr.S.P. Brahme, Advocate for respondent Nos.1A & 1B.

CORAM : S.B. SHUKRE,J.

DATED : 17.02.2017

ORAL JUDGMENT :-

1. Heard. Rule. Rule made returnable forthwith and
heard finally by consent.

2. By this writ petition the legality and
correctness of two orders passed by the Civil Judge are
under challenge. The first order is of 03.10.2011 by
which application vide Exh.54 has been allowed and the
second order is of 16.01.2013, by which the petitioners'
application vide Exh.66 has been rejected.

3. The application vide Exh.54 was filed by the
contesting respondent Nos.1A and 1B, the original
plaintiffs and application vide Exh.66 was filed by the
petitioners, the original defendant Nos. 1,2,3 and 6

respectively. The respondent Nos.2 and 3 are the original defendant Nos.3 and 4. The suit has been filed for delivery of possession and mesne profits.

4. It so happened that the contesting respondent No.1A, who is a partner of plaintiff firm filed her affidavit in lieu of examination-in-chief on 15.03.2010 and it was accordingly taken on record. Thereafter on 25.08.2011, an application (Exh.54) was moved on behalf of the plaintiff firm that respondent No.1A, due to blood pressure, did not keep well and as in any case all the affairs of the firm were looked after by her husband, Vasant, it would neither be possible nor required for the respondent No.1A to appear before the Court for verification of the affidavit as well as submitting herself to cross-examination and that purpose would be served by allowing her husband Vasant to tender affidavit and face the cross-examination. Accordingly, permission in this regard was sought. No say was filed by the petitioners – original defendants. Therefore, by order

passed on 03.10.2011, the learned Civil Judge granted the application.

5. Following the grant of application vide Exh.54, Vasant-husband of respondent No.1A filed affidavit in lieu of examination-in-chief on 17.03.2011. Now it was the turn of the petitioners to come out in open to oppose the affidavit so filed by Vasant. The petitioners filed an application vide Exh.66 contending that the plaintiffs did not submit list of witnesses as required under Order XVI Rule 1 of the Civil Procedure Code nor did seek leave of the Court under Order XVI Rule 1(3) of the Civil Procedure Code to examine a person not named in the list of witnesses as their witness and thus they prayed that the affidavit in lieu of examination in chief filed by Vasant be struck off the record.

6. After hearing both the sides, learned Civil Judge, by order passed on 16.01.2013, rejected this application at Exh.66 reasoning that leave was already

granted as per order passed below application at Exh.54 and in any case the plaintiffs being master of their suit, have their own choice to examine any person as a witness on their behalf. Learned Civil Judge also found that the non-compliance with the provisions of Order XVI Rule 1(3) of the Civil Procedure Code would not deter a plaintiff from examining any person, not named in the list of witnesses as a witness.

7. Let us now consider the first order dated 03.10.2011 passed below application Exh.54. This order has dual effect. Firstly, it cancels the affidavit in lieu of examination-in-chief of respondent No.1A, which is a part of her evidence and secondly it allows a person to enter the witness box as a witness of plaintiffs even though admittedly his name is not to be found in the list of witnesses of the plaintiff. In-fact, there is no dispute about the fact that no list of witnesses was filed by the plaintiffs as required under Order XVI Rule 1 of the Civil Procedure Code. If no list of witnesses

was filed, the question of Vasant's name appearing in any such list would not arise. So, the fact is that the person who was to be brought as a witness in place of respondent No.1A with leave of the Court was not named in any list of the witnesses.

8. Now the question is – can a Civil Court cancel evidence of any witness? The answer to the question has to be in the negative, as there is no provision of law which permits any Court to cancel the evidence of a witness. In section 3 of the Indian Evidence Act, term “Evidence” has been defined to mean and include oral and documentary evidence. Oral evidence includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry and documentary evidence includes all documents including electronic records produced for the inspection of the Court. Here we are concerned with that part of the definition which relates to what is called 'Oral Evidence'. The oral evidence comprises the

statements which are permitted by the Court to be made before it. Such statements are to be made upon oath, as required under section 4 (1)(a) of the Oaths Act, 1969. Once, permission to make such statements upon oath is given by the Court, such permission cannot be withdrawn by the Court unless there is a specific provision made under the Indian Evidence Act or any other relevant statute. There is no such provision made in the Indian Evidence Act, nor the learned Counsel for the contesting respondents could show to me the existence of any such provision. If such withdrawal power is to be read in the power to permit a witness to make the statement, it would amount to withdrawal of oath taken by that witness, which would hit at the very sanctity attached by law to the oath taken by a witness, as under section 8 of the Oaths Act, 1969, a witness giving evidence is under a duty to state the truth. In matters of evidence, there is a presumption, as consistently held by Hon'ble Apex Court (see Aher Raja Khima Vs State of Saurashtra, AIR 1956 SC 217 and Girja Prasad (Dead) by LR.s Vs State of M.P.

(2007) 7 SCC 625), that every person is presumed to have acted honestly. This presumption when seen in the context of duty to speak the truth imposed on a witness under Section 8 of the Oaths Act, would give rise to further presumption, presumption of correctness attached to statements made or tendered on oath. This presumption is rebuttable but that comes later and would be a matter of appreciation of statement called evidence. Such statements, therefore, will have to be considered appropriately while appreciating evidence and necessary conclusions will have to be drawn. It would then follow that such oral evidence once tendered cannot be permitted to be withdrawn or canceled, rather would have to be made available for being scanned and appropriately inferred about. This may not be so, however, in a case where evidence is given though it is impermissible for a witness to tender it and in such a case the evidence so given would have to be ignored. But for the evidence properly given as in the present case, the principles of law discussed earlier would be applicable.

9. To such proper evidence, one more principle of law would be applicable. This principle, an equitable principle having its source in doctrine of election and rule of estoppel, does not permit a person to both approbate and reprobate. Law does not permit a person to do both, to accept and reject or to blow hot and cold, in the same breath. A useful reference may be had to prescriptions of law laid down in this regard by Hon'ble Apex Court in R.N. Gosain Vs Yashpal Dhir, AIR 1993 SC 352, Maharashtra State Road Transport Corporation Vs Balwant Regular Motor Service, Amrawati and others, AIR 1969 SC 329, P.R. Deshpande Vs Maruti Balram Haibatti, AIR 1998 SC 2979 and Rajasthan State Industrial Development and Investment Corporation and another Vs Diamond and Gem Development Corporation Limited and another AIR 2013 SC 1241. Permitting withdrawal or cancellation of properly tendered evidence would amount to giving nod to a witness to approbate and reprobate, something prohibited by law. At the most, as said

earlier, suitable inferences about acceptance or otherwise of such evidence can be made.

10. In view of above discussion, the evidence properly tendered before the Court by respondent No.1A could not have been canceled by the Civil Court. Since the learned Civil Judge has done it in the absence of any power under the law to do so, the learned Civil Judge has exceeded his jurisdiction and thus committed a patent illegality in passing the impugned order dated 03.10.2011, insofar as it has the effect of cancelling the affidavit filed by respondent No.1A in lieu of her examination-in-chief.

11. As regards the second effect of order dated 03.10.2011, I must say that even leave to examine a person as a witness not named in any list submitted by the plaintiffs, could not have been given. There is an express provision of law made in order XVI Rule (1) (3) of the Civil Procedure Code. It reads thus :-

"The court may, for reasons to be recorded, permit a party to call, whether by summoning through court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list."

12. The learned Single Judge of this Court in the case of **M.M. Corporation Vs. Juhu Vile Parle Development, 2010(4) Mh.L.J.931**, has taken a view that where a person who is not named as a witness in the list of witnesses is to be examined by a party, he can do so only with the leave of the Court which can be granted by the Court for sufficient cause. The view so taken by the learned Single Judge commends to me and so I find that any other interpretation of this provision of law would only render it redundant. One can see that behind such procedural requirement prescribed under the statute, there is a clear purpose. It is to put the opposite side on sufficient notice of what rival party is likely to do. What kind of witnesses a party is likely to examine in support of its claim, must be known in advance to other

party, so that it would get sufficient time to put on its armour to defend itself well against the impending onslaught. If this provision is ignored, as the learned Civil Judge in this case has done, the purpose of this procedural requirement would be defeated which may result in causing of prejudice to the defence of the party seeking to contest the claim of the plaintiff. This provision of law, it appears, has not been followed in this case.

13. Learned Counsel for the contesting respondents submits that the said application was not happily worded and therefore it should be construed with some leeway permissible in cases involving interpretations of pleadings. I would say, accepting such a contention, rather would be like giving an adventurous interpretation to the contents of application filed at Exh.54, by trying to find out something conspicuously missing in the application. What was mentioned in the application was that respondent No.1A was not keeping well and so it was

not possible for her to come to the Court for facing cross-examination and that the other witness was well acquainted with the affairs of the firm and therefore it was prayed that affidavit of respondent No.1A be cancelled and this person, her husband - Vasant be allowed to be examined as a witness for the plaintiffs. Nowhere it was stated therein that he was also a person whose name did not figure in any list of witnesses filed by the plaintiffs. There was thus complete violation of the procedural requirement. This non-compliance was prejudicial to the interest of the petitioners, they having been deprived of opportunity to properly brace themselves up for their defence. Such witness could not have been permitted to tender the affidavit in lieu of examination in chief. But he was allowed to do and now his affidavit in lieu of examination-in-chief has also been taken on record. In this circumstance, what can be done at the most, is to direct ignorance of the affidavit and refusal to read it in evidence.

14. In the result, this writ petition will have to be allowed by not only quashing the first order passed on 03.10.2011 passed below application at Exh.54 but also subsequent order dated 16.01.2013, passed below application at Exh.66 which was in consequence of what was permitted to be done by the first order on application at Exh.54.

15. Accordingly, the writ petition is allowed. Both the impugned orders are quashed and set aside. However, as regards subsequent order dated 16.01.2013, it is directed that the affidavit of Vasant taken on record shall not be read in evidence and the plaintiffs are hereby given liberty to file an appropriate application to seek leave of the Court to tender evidence of a person not named in the list of witnesses, if any, in terms of provisions of Order XVI Rule 1 of the Civil Procedure Code and if such an application is filed, same shall be considered in accordance with the law. The suit shall be decided expeditiously, preferably within one year from

the date of this judgment.

16. Rule made absolute in above terms. No costs.

[S.B. SHUKRE, J.]