

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 1539 OF 2016

Digambar Ramchandra Bawaskar
Age 50 years, Occ. Agriculture,
R/o Kerhale Bk., Tq. Raver,
District Jalgaon.

..Petitioner

Versus

1. Soma Prabhu Pawar
Age 55 yeas, Occ. Agriculture

2. Smt.Reshmbai Kamalsingh Chavan
Age 68 years, Occ. Agriculture,

Both r/o Jinasi, Tq. Raver,
District Jalgaon.

3. Shri Maheshchandra Namdeo
Lokhande, Age 45 years,
Occupation Agriculture,
R/o Wani Galli, Raver,
District Jalgaon.

..Respondents

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Advocate for Petitioners : Shri M.M.Bhokarikar
Advocate for Respondents 1 to 3 : Shri Vijay B. Patil

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CORAM : RAVINDRA V. GHUGE, J.
Dated: July 19, 2017

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ORAL JUDGMENT :-

1. Heard learned Advocates for the respective parties.
2. Rule.

3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.

4. The petitioner is aggrieved by the order dated 5.12.2015, by which, his application Exhibit 17 seeking leave to withdraw the affidavit filed in lieu of examination-in-chief or discard the said affidavit, was rejected.

5. I have considered the strenuous submissions of the learned Advocates for the respective sides.

6. There is no dispute that the petitioner had tendered his affidavit in lieu of examination-in-chief on 4.11.2015. Copy of the same was supplied to the defendants. However, before the cross-examination could begin, he filed an application Exhibit 17 on 18.11.2015, stating that owing to a typographical error on Page No.3 at paragraph No.(C), it is wrongly stated that the plaintiff admits certain documents, which were favouring the defendants. It was canvassed that paragraph No.(C) is out of inadvertence and a typing mistake and hence the plaintiff be permitted to withdraw the said affidavit.

7. By the impugned order, the trial Court concluded on the basis of the view taken by this Court in Banganga Cooperative Housing Society Vs. Vasanti Gajanan Nerurkar and others [2015 (5) Bom. C.R. 813], that the affidavit cannot be withdrawn as it has become a part of the record.

8. Issue is, as to whether, the affidavit filed in Court and prior to the verification of the plaintiff would amount to being an oral evidence and whether it would be a part of the record. If not, whether it could be withdrawn.

9. This Court in the matter of Bank of India Vs. M/s Allibhoy [AIR 2008 Bom. 81], has concluded in paragraph Nos. 19 to 21 as under:-

“19. Now, the second question is: Can affidavits in support claim to be read as evidence? The legal position is that the affiants, filing an affidavit, are required to appear before the Court. They are required to enter the witness box to testify the contents of their respective affidavits as laid down by this Court in the case of F.D.C. Ltd. v. Federation of Medical Representatives Association India (FMRAI) and Ors.: AIR 2003 Bom 371. The relevant extract of the said judgment is reproduced herein below for immediate reference.

(A) Civil P.C. (5 of 1908), Order 18, Rule 4, examination-in-chief in each and every case is permitted in form of affidavit-taking affidavit on record-procedure to be followed in appealable cases is prescribed in Rule 5- in non-appealable cases procedure under Rule 13 is to be followed.

In other words, in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under R-5.

(Emphasis supplied)

20. The above judgment is approved by the Apex Court in the case of *Ameer Trading Corporation v. Shapoorji Data Processing Ltd.* : AIR 2004 SC 355.

21. In the above view of the matter, since none of the affiants have entered the witness box, the said affidavits cannot form part of evidence. Thus, they cannot be read in evidence.”

10. It is thus apparent that this Court has taken a view that an affiant is necessarily required to enter the witness box and

testify the contents of the affidavit after which, it would get converted into a record of the Court to be read in evidence.

11. However, the Honourable Supreme Court, in Rasiklal Manikchand Dhariwal Vs. M.S.S. Ford Products [(2012) 2 SCC 196], has held that in paragraph Nos. 76, 77 and 78 as under:-

"76. *The prejudice principle was accordingly applied and the Court said that: (Ammer Trading Corpn. Ltd. case - (2004) 1 SCC 702*

"33. *.....the Defendant would not be prejudiced in any manner whatsoever if the examination-in-chief is taken on an affidavit and in the event the Defendant desires to cross-examine the said witness he would be permitted to do so in the open court.*

77. *For all this, it cannot be said that in Ameer Trading Corpn. Ltd. : (2004) 1 SCC 702, it has been laid down as an absolute rule that in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be treated as part of the evidence unless the deponent enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature. Where the examination-in-chief of a witness is produced in the form of an affidavit, such affidavit is always sworn before the Oath Commissioner or the Notary*

or Judicial Officer or any other person competent to administer oath. The examination-in-chief is, thus, on oath already.

78. *In our view, there is no requirement in Order XVIII Rule 5 that in appealable cases, the witness must enter the witness box for production of his affidavit and formally prove the affidavit. As it is such witness is required to enter the witness box in his cross-examination and, if necessary, re-examination. Since a witness who has given his examination-in-chief in the form of affidavit has to make himself available for cross-examination in the witness box, unless Defendant's right to cross examine him has been closed, such evidence (examination-in-chief) does not cease to be legal evidence."*

12. It is now, therefore, settled that even in appealable cases, examination-in-chief is permissible through an affidavit and such affidavit, once is sworn before the authority empowered to administer the oath, would not necessarily mandate the appearance of the affiant in the witness box for affirmation to formally prove the affidavit. He has to step into the witness box for further examination in chief or for cross examination as held in paragraph No.12 by this Court in the matter of Rajesh Varma Vs. Aminex Holdings and Investments [2008 (3) Mh.L.J.460].

Paragraph No.12 reads as under:-

"12. The Counsel for the Defendants, would, however, argue that in the examination-in-chief, the Plaintiff has made no mention about the fact as to who had signed the said document and whether it was signed in his presence or that he was in a position to identify the signature appearing on the said document. According to the Defendants, this evidence ought to have come in the affidavit in lieu of examination-in-chief as is required to be filed in terms of Order XVIII Rule 4 of the C.P.C. It was argued that although the Plaintiff later on entered the witness box and his further examination-in-chief has been recorded by the Court, in which all necessary details are mentioned in relation to the suit Bill of Exchange, that evidence cannot be looked into. This argument deserves to be merely stated to be rejected. There is nothing in the amended C.P.C. which precludes the Court from recording further examination-in-chief of the Plaintiff. In the present case, recording of further examination-in-chief of the Plaintiff was necessitated as the Defendants admitted all documents relied by the Plaintiffs, except the suit Bill of Exchange. For that reason, the Plaintiff, upon entering the witness box, was first examined for the purpose of further examination-in-chief. He deposed about the details in relation to the execution of said document, where after the document was taken on record and marked as Exhibit P-9. Ideally, the Plaintiff could have spoken about such details in the affidavit filed in lieu of examination-in-chief itself. However, failure to mention those details in the affidavit does not preclude the Plaintiff to enter the witness box to depose further; nor does it preclude the Court from permitting the Plaintiff to lead

further evidence of examination-in-chief before the Court in addition to the affidavit in lieu of examination-in-chief already placed on record, filed in terms of Order XVIII Rule 4 of C.P.C. All that the Court ought to ensure is that the Defendants get fair opportunity to cross-examine the Plaintiff on matters deposed by him in the further examination-in-chief."

13. This Court in the matter of Arun Bhika Mahale Vs. Ishwarlal Onkar Marathe - Writ Petition No.6288 of 2013 has concluded by order dated 19.9.2013, that in some circumstances, where the party realizes some error in the affidavit in lieu of examination-in-chief, he is entitled to lead further examination-in-chief or can also file an affidavit. But the Court cannot order deletion of any portion of the said affidavit.

14. This Court in the case of Banganga (supra), has concluded in paragraph Nos.7 to 11 as under:-

"7. The submission by Mr. Jagtiani and Mr. Kanade is well founded, and it has one immediate consequence for our present purposes: once an Evidence Affidavit is thus filed, and since there is no absolute requirement of it being required to be reaffirmed by the deponent from the witness box before that affidavit forms part of the evidentiary record, it follows that it is examination-in-chief as soon as it

is affirmed (or, at any rate, affirmed and filed) and it is not thereafter possible to "withdraw" an Evidence Affidavit. Once an Evidence Affidavit is filed, the examination-in-chief of the deponent has, to all intents and purposes, begun. It may be permissible for the deponent to file a further affidavit, since Order XVIII Rule 4 does not limit itself to a single affidavit, and although there is some authority for the proposition that a witness may not continuously file fresh affidavits to keep improving his case, the view of our court is somewhat different, viz., that there is no impediment to the taking of additional Examination-in-Chief or the filing of a further or additional or supplemental Affidavit in lieu of Examination-in-Chief. This was the view taken by a learned single Judge of this Court (Khanwilkar, J., as he then was) in *Rajesh Varma v Aminex Holdings & Investments & Ors.* : 2008 (3) Mh.L.J. 460, paragraph 12 Not only am I in most respectful agreement with that decision, but it binds me; and it is also the view that I took in a recent order.

8. What is not in doubt is that there can never be a withdrawal of an Evidence Affidavit just as there can never be a withdrawal of an examination-in-chief conducted directly in Court. This position, following *Rasiklal Manikchand*, raises some subsidiary questions: (1) what are the consequences of a deponent filing an Evidence Affidavit but not making himself available to a cross-examination? (2) Is it permissible for a Court to order the expunging or redaction of any part of an Evidence Affidavit?

9. The first of these questions arises more frequently

than one might suppose on a bare reading of the statute. Implicit in the CPC and its provisions regarding evidence is the assumption that a trial progresses without long gaps in time and with reasonable dispatch. Our experience is different. The reasons are many, but perhaps the most obvious is the crowding of court dockets. This makes it impractical to take every single case in the timely fashion that it deserves. The result is that there is often a considerable time lag, sometimes of several years, between the filing of an Evidence Affidavit and the commencement of cross-examination. Time is unkind to us all; to litigants perhaps more than anyone else. By the time the trial begins, the deponent may not be in a position any longer to withstand the stress of a cross-examination. This is the situation in which Mr. Doctor's client, for instance, finds himself. At the time when he filed his Evidence Affidavit, some years ago, he was prepared to undergo a cross-examination. For whatever reason, that did not happen. His age and failing health no longer permit him to withstand a cross-examination.

10. *There are other situations too. A party may want to lead the evidence of a witness. That witness does file an Evidence Affidavit. But by the time the opportunity for a cross-examination finally comes around, that witness may longer be willing to give evidence. This is particularly noticeable in the case of companies and bodies corporate, independent juristic entities all, but who can only ever give evidence through individuals speaking on their behalf. Again, years after an Evidence Affidavit is filed, the witness*

is simply unavailable to that body corporate. This is of some significance in commercial disputes. It often happens that large corporations file an Evidence Affidavit of a serving officer. This is true of large government sector companies, insurance companies, as also private companies of varying sizes. Sometimes the deponent and the company part ways on less than amicable terms and the deponent is then longer available to be offered for cross-examination. Should the corporate then be required to summon the deponent, i.e., to compel his attendance, particularly where the corporate is conceivably placed at a very considerable disadvantage? For having parted ways unhappily, the deponent might well disavow his Evidence Affidavit earlier filed and give evidence against the body corporate. Or should the body corporate be permitted to 'substitute' the evidence of that witness with the evidence of another? After all, these are not situations of the parties' making, be they individuals or bodies corporate; they are the result of the delays endemic to our judicial system. Our practices seem to be out of step with our rules of procedure and, consequently, with the provisions of substantive law such as the Evidence Act.

11. Broadly, there are two situations we must consider. First, where the witness is no longer physically available, i.e., he has expired between the time of filing of his Evidence Affidavit and the time for cross-examination. The law in this regard is, I believe, well-settled, and it is simply this: that where the testimony is incomplete by reason of death or incapacity of the witness before cross-examination, the evidence, admissible when given, does not cease to be so

merely on account of that intervening factual circumstance. What probative or evidentiary value is to be attached to this evidence is another matter, and turns on the circumstances of each case. A court may seek independent corroboration of that evidence. It may accept it, albeit cautiously, and that is no infirmity per se in the final decision. This was the view of Mr. Justice H.R. Khanna as a learned single Judge of the Delhi High Court in Krishan Dayal v Chandu Ram : (1969) ILR 1090 and I am in most respectful agreement with that view.”

(Emphasis supplied)

15. In the light of the above, I do not find that the impugned order could be termed as being perverse or erroneous. The petitioner cannot be permitted to withdraw his affidavit filed before the Court. However, considering the law laid down, the plaintiff would have the option of explaining the error in the affidavit by stepping into the witness box to lead further oral examination-in-chief or file an additional affidavit as a part of the examination-in-chief and clarify the mistake if any.

16. This petition is, therefore, disposed off with the above observation. Rule is discharged.

(RAVINDRA V. GHUGE, J.)

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