

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

WRIT PETITION NO. 2581 OF 2018

1. Ganesh s/o Kautik Patil
Age : 34 Yrs., Occ. :
Agri./Business, R/o :
Pataleshwar Nagar,
At, Post, Taluka :
Parola, District.:
Jalgaon.

2. Sundarbai w/o Kautik Patil
Age : 57 Yrs., Occ. :
Household, R/o :
Pataleshwar Nagar,
At, Post, Taluka :
Parola, District.:
Jalgaon.

3. Amol s/o Kautik Patil
Age : 30 Yrs., Occ. :
Agri./Business, R/o :
Pataleshwar Nagar,
At, Post, Taluka :
Parola, District.:
Jalgaon.

4. Kalpana w/o Kiran Patil

Age : 25 Yrs., Occ. :

Household, R/o :

Mahunbare, Taluka :

Chalisgaon, District.:

Jalgaon.

**... PETITIONERS/
[ORI.DEFENDANTS]**

VERSUS

Sitaram Jivanram Sharma

Age : 72 Yrs., Occ. Advocate,

R/o : Nil, R/o : Ramkatora

Mohalla, Sendhwa

Sabji Mandi, At Post :

Sendhwa, Taluka :

Sendhwa, District.:

Badwani [Madhya Pradesh].

**....RESPONDENT/
[ORI.PLAINTIFF]**

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Mr. B.R.Waramaa, Advocate for Petitioners.

Mr. P.B.Patil, Advocate for Respondent.

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CORAM : V.L.ACHLIYA, J.

DATE OF JUDGMENT : 04/05/2018

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JUDGMENT :

1. By this petition under Article 227 of Constitution of India, the petitioners – original

defendants have challenged the impugned order dated 20/02/2018 passed below Exh. 82 in R.C.S. No. 27/2009 by Civil Judge [J.D.], Parola, District Jalgaon. By the impugned order, trial Court has rejected the application moved by the petitioners vide Exh. 82 seeking direction to treat the affidavit in the form of Examination-in-Chief filed by the respondent as no evidence and not to allow plaintiff to examine in the case.

2. Heard learned counsel for the petitioners – original defendants and respondent – plaintiff. Perused the impugned order.

3. Before dealing with the submissions advanced, it is necessary to consider few facts leading to filing of the application. The respondent – plaintiff has filed civil Suit seeking decree of possession and recovery of rent as against the petitioners. The Suit was originally filed against Kautik Bajirao Patil. On his demise, the petitioners were brought on record as the legal representatives of deceased Kautik Patil, the

original tenant. The Suit was instituted in the year 2009. On settlement of issues, the Suit was posted for recording of evidence of plaintiffs' witness. On 23/07/2013, the respondent – plaintiff filed his Examination-in-Chief in the form of affidavit vide Exh. 19. However, plaintiff has not stepped into the witness box. No evidence of plaintiff recorded. On 03/08/2015, the Examination-in-Chief in the form of affidavit of Kalpana Sitaram Sharma, the wife of plaintiff came to be filed vide Exh. 37 in which she has stated that as plaintiff is not keeping good health he has given special power of attorney to her to attend Court, engage Advocate, file reply/say on behalf of petitioner. Learned Judge of the trial Court without passing any order in respect of witness No. 1 i.e. plaintiff, whose Examination-in-Chief in the form of affidavit tendered on record vide Exh. 19 allowed plaintiff to examine the wife of plaintiff. Her cross examination was concluded on 23/01/2018. Subsequent to her evidence, the plaintiff attended the Court for recording his evidence. The petitioner - defendant objected to record his evidence by filing

application vide Exh. 82 to treat his affidavit by way of Examination-in-Chief filed as Exh. 19 to be treated as 'no evidence'. Trial Court has rejected the application by observing that though the plaintiff has examined his wife, her evidence can not be treated as evidence of the plaintiff in the case and her evidence can be treated as witness for plaintiff. It is further observed that as the plaintiff desires to examine himself, the Court can not prevent him to examine. Being aggrieved, the petitioner has preferred this petition.

4. Learned counsel for the petitioner assailed the impugned order with contention that the order is not sustainable in law for the reason that once the plaintiff has chosen to examine his wife as his constituted attorney, it is impermissible for him to now step in to witness box and depose in favour of his case. By referring the affidavit in the form of Examination-in-Chief of Kalpana i.e. wife of the plaintiff, learned counsel submits that the facts stated in the affidavit, demonstrate that she was not

examined as a witness for plaintiff but examined in place of plaintiff. It is further submitted that the plaintiff has even not filed application seeking permission from Court to allow him to examine in the case.

5. On the other hand, learned counsel for the respondent supported the order passed by the trial Court. He has submitted that the order impugned is legal, proper and passed within four corners of law. It is contended that trial Court has rightly observed that Kalpana, the wife of plaintiff, was examined as a witness for the plaintiff and her testimony can not be treated as testimony of the plaintiff, so as to preclude the plaintiff to step into witness box and to depose in favour of his case. It is contended that there is absolutely no perversity and error of jurisdiction in the order passed by the trial Court so as to call for interference in exercise of writ jurisdiction under Article 227 of Constitution of India.

6. On due consideration of the submissions

advanced in the light of overall facts of the case and the order passed by the trial Court, I am of the view that the order calls for no interference in exercise of writ jurisdiction under Article 227 of Constitution of India. The order passed by trial Court is legal, proper and well within due exercise of powers vested with the Court. So also, the order impugned has not resulted into miscarriage of justice to the petitioner.

7. It is apparent from the face of the affidavit filed vide Exh. 19 that though the Examination-in-Chief in the form of affidavit was tendered by the plaintiff, the plaintiff has not stepped into witness box and affirmed on oath before the Court that the contents of affidavit to be true and correct as well as bears his signature. In absence of compliance of Rule 5 of Order 18 of C.P.C. i.e. the deponent appears and affirm on oath before the Court the contents of affidavit as true and correct and further he has signed the same, such affidavit not become an evidence to be read in the case. In this context, it is useful to refer the decision of this Court in the case of

Anantrao Kulkarni Vs. Vaishali Vaidya reported in 2012 (2) Mh.L.J. 61, in which this Court has categorically held that in appellable cases the Examination-in-Chief of the witness though permissible to be produced in the form of affidavit, but such affidavit can not be ordered to form part of evidence unless deponent thereof enters the witness box and affirm that the contents of the affidavit are as per his say and affidavit is under his signature.

8. It is an admitted fact though plaintiff has tendered Examination-in-Chief in the form of affidavit vide Exh. 19, the plaintiff has not stepped into witness box and affirmed the contents of affidavit are as per his say as well as under his signature. Thus, the Examination-in-Chief tendered by plaintiff in the form of affidavit as Exh. 19 can not be treated as evidence. In this view, the application moved by the petitioner vide Exh. 82 seeking order to treat the affidavit Exh. 19 as 'no evidence' itself filed under misconception that same is treated as evidence. In this view, the order passed by trial Court calls for no

interference.

9. Thus, in the instant case, though the Examination-in-Chief in the form of affidavit of the plaintiff came to be filed, but the legal requirement to treat the same as evidence by stepping into witness box and affirming the contents of the affidavit by deponent as true and correct as well as admission of signature on affidavit was not complied. In this view, the Examination-in-Chief of the plaintiff filed in the form of affidavit can not be treated as evidence to be read in evidence and it remains only an affidavit forming part of record and proceeding of the case and no evidenciary value can be attached to it, so as to read in evidence.

10. In the normal course, after tendering the Examination-in-Chief in the form of affidavit, for any reason the plaintiff was not able to personally attend the Court, the proper course on the part of such party is to make application under Order XXVI Rule 9 of C.P.C. seeking appointment of commissioner for

recording his evidence on commission. In the instant case, before entertaining the request of plaintiff to examine Kalpana, the wife of plaintiff, it was expected on the part of trial Court to have pass appropriate order to proceed in the matter without recording evidence of the plaintiff whose affidavit by way of Examination-in-Chief already tendered. The permission could have been sought to examine the plaintiff at a later stage i.e. after recording the evidence of wife of the plaintiff as a witness. However, no such application was made nor trial Court has passed order which lead to create such anamoly. Due to procedural irregularity made in conduct of the proceeding, this situation has cropped up in the matter. In fact, the application could have been filed to change the order of examination of witness and permission to examine plaintiff. The plaintiff could have filed application seeking permission to examine him in the matter.

11. It is quite settled position in law that while dealing with procedural enactment Courts are

expected not to take too technical approach in construing the provisions. The object of the provision being to advance the cause of justice, the Court is expected to adopt a liberal approach and ensure that a substantial justice being made between the parties. The Court is also expected to mould the law in a sense it would lead to make a substantial justice between the parties. In the present case though there is procedural flaw, still the plaintiff can not be deprived to examine himself in support of his case. Trial Court was perfectly justified in observing that though the wife of the plaintiff has been examined in the case, her testimony at the most can be treated as a witness for the plaintiff and same can not be treated as evidence of the plaintiff. Only for the reason that the plaintiff has appointed his wife as constituted attorney due to incapacity to regularly attend the Court, she can not be treated as plaintiff. It is settled position in law that powers to depose can not be given to a person by giving power of attorney. A person has to depose either on the basis of his own knowledge or the knowledge which he gathered on

the basis of record or otherwise.

12. To entertain the request of the plaintiff to allow him to examine in support of his case would not cause any serious prejudice to the defendant. Ultimately, the Court would have to decide the case on its own merit. I am, therefore, not inclined to interfere with the order passed by trial Court. However, in order to set right the procedural irregularity committed in the conduct of the proceeding, the respondent – plaintiff is directed to make application to seek permission to examine himself in the case. Trial Court is directed that in case such application is filed, allow the plaintiff to examine him in support of his case.

13. Writ Petition stands disposed of in above terms.

[V.L.ACHLIYA, J.]

