

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.692 OF 2017
with
CAA/926/2017**

Janardhan Subrao Pai

... Appellant

Vs.

Shrinivas Narayan Pai
since deceased, through

1A. Smt.Jayanti T. Bhandarkar & Ors.

... Respondents

Mr.Rajesh Shah i/b Asha Bhambwani for the Appellant
Ms.Vrishali Raje for Respondent Nos.1B to 1H, 2/1 to 2/8, 3B to 3E and 4

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JANUARY 8, 2018**

P.C. :

1. Mr.Shah, learned Counsel appearing for the appellant, submits that all the respondents are served as Mr.Raje appears for Respondent Nos.1B to 1H, 2/1 to 2/8, 3B to 3E and 4 and the respondent No.1A has refused to sign the notice. Further, respondent No.3A, has expired, and her legal heirs are already on record i.e., respondent Nos.3D and 3E.

2. This Appeal from Order is directed against the order dated 4.5.2017 passed by the learned District Judge, Palghar, in Regular

Civil Appeal No.53 of 2012 thereby setting aside the judgment and decree dated 15.12.2008 in Special Civil Suit No.40 of 1997 (old Special Civil Suit No.286 of 1999). The original plaintiff has filed as suit for specific performance of the contract against the respondents i.e., the defendants. In the suit, the plaintiff has examined 6 witnesses and the defendants examined 3 witnesses. The witnesses filed their affidavit in chief as per Order 18 Rule 4 of the Civil Procedure Code and all the witnesses were cross-examined. The suit was decreed and the defendants challenged the said judgment and decree in Appeal being Regular Civil Appeal No.53 of 2012. At the time of hearing of the Appeal, it was found that the witnesses did not adopt the affidavit in chief as a part of examination in chief nor were the affidavits affirmed.

3. The learned Judge of the Appellate Court had observed that though the witnesses have filed affidavits on record in lieu of their oral evidence, in absence of verification of the said affidavits, the evidence cannot be appreciated. Therefore, he directed that the matter be remanded to the learned Civil Judge, Senior Division, Palghar, to cure the defects in the oral evidence which occurred at the time of filing of the affidavit of examination in chief and decide

the matter afresh within three months after the date of the order. The said order is the subject matter of this appeal.

4. Heard the learned Counsel for both the sides. There is no dispute that the affidavit in chief has to be affirmed. The learned Counsel for the appellant has submitted that though it is not affirmed, it is not an illegality but is a curable irregularity. In support of his submission, he relied on the judgment of the Supreme Court in the case of **Rasiklal Maniklal Dhariwal & anr. vs. M.S.S. food Products**¹, wherein a similar issue under Order 18 of the Civil Procedure Code regarding admissibility of such evidence in the nature of affidavit in chief, was dealt with by the Supreme Court.

5. Per contra, the learned Counsel for the respondents, i.e., the original defendants, while supporting the order of the learned first appellate Court, has relied on an unreported judgment in the case of **Anantrao s/o. Krishnaji Kulkarni vs. Smt.Vaishali w/o. Renukadas Vaidya**² and also relied on the judgment of a learned Single Judge in the case of **FDC Limited vs. Federation of Medical Representatives Association of India (FMRAI) & Ors.**³

1 (2012) 2 SCC 196

2 FA/777/2011 dated 5.7.2011

3 AIR 2003 Bombay 371

She also relied on the judgment of the Supreme Court in the case of **Ameer Trading Corporation Ltd. vs. Shapoorji Data Processing Ltd.**⁴

6. In all the three judgments relied on by the learned Counsel for the respondents, the Supreme Court and learned Single Judges of this Court had an opportunity to deal with the provisions of Order 18 Rule 4 and its applicability and also the rationale of the amendment. Though these affidavits in chief are a replacement for the oral evidence in Court, a view was taken that the provisions under Rules 4 and 5 are required to be harmoniously construed and are to be followed in each and every case of recording of evidence where the examination in chief is permitted in the form of affidavit as per the procedure prescribed under Rule 5 which is to be followed in appealable cases. Rule 5 of Order 18 of the Civil Procedure Code is as follows:

“5. How evidence, shall be taken in appealable cases.- In cases in which an appeal is allowed, the evidence of each witness shall be,—

(a) taken down in the language of the court,—

(i) in writing by, or in the presence and under the personal direction and Superintendence of, the Judge, or

(ii) from the dictation of the Judge directly on a typewriter; or

4 (204) 1 SCC 702

(b) if the Judge, for reasons to be recorded, so directs, recorded mechanically in the language of the court in the presence of the Judge.

7. Rule 5 is substituted by the Act of 104 of 1976 for the former Rule as the evidence is to be taken down in the language of the Court, in all the appealable cases and as per Rule 4 of Order 18, the examination in chief of the witnesses shall be on affidavit. In the case of **Ameer Trading Corporation Ltd. vs. Shapoorji Data Processing Ltd. (supra)**, it was held that both the provisions are to be harmoniously made applicable and read and, therefore, after filing of the affidavit in chief, the same is not to be read or it is not to be just taken on record as it is and, therefore, the witnesses are required to adopt their affidavit in chief on oath.

8. In the case of **Ameer Trading Corporation Ltd. vs. Shapoorji Data Processing Ltd. (supra)**, the view taken by the learned Single Judge of the Bombay High Court in **FDC Limited vs. Federation of Medical Representatives Association of India (FMRAI) & Ors. (supra)**, is referred and it is found consistent with the ratio laid down by the Supreme Court and in the case of **Anantrao s/o. Krishnaji Kulkarni vs. Smt.Vaishali w/o. Renukadas Vaidya (supra)**, the learned Single Judge of this

Court considered FDC limited (supra). In the case of **Dilip Madanlal Jain vs. Pritam Kaur**⁵, the Court has taken a view that the affidavit is to be allowed to go on record unobjected as examination in chief. The deficiency of formal affirmation of the affidavit is a deficiency of form than of content.

9. After considering the ratio laid down in all these cases and the nature of evidence, the facts of the present case are to be seen. In the present case, the affidavit in chief of all the 9 witnesses was not adopted by the respective witnesses on oath before the trial Court. However, all the witnesses were cross-examined by the opposite parties on the basis of the contents in their respective affidavits. Thus, in a way, the parties have waived their challenge in respect of adopting the affidavits in chief on oath before the trial Court, which should have been done at the trial stage. This objection was also not raised before the trial Court at the time of final arguments. Thus, it appears that due to oversight of the learned trial Judge and of the advocates for both sides, proper procedure of affirmation was not followed. This lacuna remained and was carried forward till the appellate stage. Thus, technically, though they have not adopted their affidavits in chief on

⁵ 2008 B.C.I. 159

oath in reality, both the parties have relied on the examination in chief and cross examination of all the witnesses. In appeal, when this lacuna was pointed out, the learned Judge has taken a technical approach. It is necessary to keep in mind that the progress which is already made in the case should not be lost. It is a suit of 1991 and again, the parties and the witnesses cannot be put to the rigor of examination / re-examination, cross-examination. The Court has to take a pragmatic approach to meet the ends of justice. I rely on the ratio laid down in the the case of **Rasiklal Maniklal Dhariwal & anr.)** supra, wherein the Court has observed in para 78 as under:

“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.”

10. However, it is also to be noted that as per the procedure laid down under the Civil Procedure Code and also under the Evidence

Act, Court to endeavour to cure the irregularity, if it is possible; thus, it is required to cure it by passing an effective order.

11. I, therefore, set aside the order of the appellate Court dated 4.5.2017 in Regular Civil Appeal No.53 of 2012 with necessary modifications as under:

- i) The judgement and decree dated 15.12.2008 in Special Civil Suit No.40 of 1997 (old Special Civil Suit No.286 of 1999) is hereby restored;
- ii) The appeal is restored to the appeal of the appellate Court;
- iii) The appellate court is directed to record the evidence of all the witnesses only on the point of adopting their respective affidavits in chief on oath. Cross-examination on that point only is permissible, if required.
- iv) If any witness has expired in between, then, his/her death certificate is to be produced and the same will be admissible and read as evidence in appeal;

v) The parties to appear before the appellate Court, Palghar, on 24.1.2018 at 11am, whereupon the appellate Court shall give a time-bound programme for recording of evidence and that recording is to be done within two dates. All the witnesses are to be examined within two days as per the schedule given by the appellate Court.

vi) The parties to cooperate and the appeal is to be decided on or before 30.4.2018.

vii) A copy of this order be sent to the trial Court.

12. Appeal from Order is disposed of in the above terms.

13. In view of the disposal of the appeal, Civil Application stands disposed of.

14. All concerned to act on an authenticated copy of the order.

(MRIDULA BHATKAR, J.)