

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 6256 OF 2005

Sarvajanik Shikshan Samiti, Nandurbar. Petitioner

Versus

Ketan Ranchhoddas Ahire & Ors. Respondents

.....

Mr. Jayant R. Shah, Advocate for the petitioners

Mr. D. S. Bagul, Advocate for respondent No. 1

Mr. G.V. Wani, Advocate for respondent Nos. 7, 9, 11 to 15, 17, 24 & 25

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AND

WRIT PETITION NO. 6254 OF 2005

Yogesh Pramodchandra Desai & Ors. Petitioners

Versus

Ketan Ranchhoddas Ahire & Ors. Respondents

.....

Mr. Jayant R. Shah, Advocate for the petitioners

Mr. D. S. Bagul, Advocate for respondent No. 1

Mr. R. R. Sancheti, Advocate h/f Mr. R. R. Mantri, Advocate for respondents No. 1, 3, 4 to 7

Mr. Mukul Kulkarni, Advocate for respondents No. 2, 8 to 16 & 23

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CORAM : RAVINDRA V. GHUGE, J.

DATED : 19TH SEPTEMBER, 2019

PER COURT:-

1. In both these petitions, the petitioners are original defendants No. 1, 9, 17 and 25. These defendants are aggrieved by

the common order passed by the trial court dt. 02.08.2005, below Application Exh. 172 and 173, both having been rejected.

2. I have considered the strenuous submissions of the learned advocates for the respective sides.

3. Considering that the suit of 1995 is pending adjudication and as a short issue is raised in this matter, I am not required to advert to the entire pleadings of the litigating sides. Suffice it to say, that the trial Court had passed an order on 31.01.1996, against these defendants, for proceeding with the suit *ex parte*. The matter was carried in writ petition before this Court and subsequently, the order of proceeding *ex parte* was vacated by order dt. 16.04.2004. The issues were again cast on 04.10.2004.

4. Earlier, after the proceeding *ex parte* order was passed on 31.01.1996, the trial Court framed issues based on the pleadings of the plaintiff. The plaintiff then led oral evidence on 04.07.1996. In fact, the matter reached the stage of final arguments and judgment and as the trial Court noticed that there were certain deficiencies in the pleadings in the plaint, leave to amend was granted. By way of an amendment, para 8-A was added by the plaintiff.

5. The first examination-in-chief was recorded by the plaintiff on 04.07.1996. Thereafter, as the 'proceed *ex parte*' order was vacated by this court, the written statement of such defendants were taken on record and the issues were recast on 04.10.2004. Thereafter, additional issues were cast on 05.01.2005 and this was followed by the plaintiff filing one more affidavit in lieu of examination-in-chief on 25.07.2005 invoking Order XVIII Rule 4 of the Code of Civil Procedure.

6. These petitioners, therefore, preferred Application Exh. 172 on 27.07.2005 and Exh. 173 on the same date. The gravamen of the contentions of these petitioners in Exh. 172 and 173 is that, once an examination-in-chief has been recorded by the plaintiff, the second affidavit could not be permitted and if at all it is so permitted, it could not enable the plaintiff to introduce contradictory statement vis-a-vis the earlier affidavit and conflicting stand could not be taken. So also, the statements which run counter to the statements made in the first affidavit, cannot be permitted through the second affidavit.

7. The learned advocate for the petitioners contends that, at best, the second affidavit can be discarded and the plaintiff can be permitted to file further examination-in-chief through an affidavit in continuation to the earlier examination-in-chief so as to deal with the

new issues cast and pleadings of the defendants which were permitted after the proceed *ex parte* order was vacated.

8. Reliance is placed on the judgment of this Court in the matter of *Banganga Co-operative Housing Society Limited and others Versus Vasanti Gajanan Nerurkar and others* reported in *2016 (7) ALL M.R. 415*, and in the matter of *Digambar Ramchandra Bawaskar vs. Soma Prabhu Pawar and others* reported in *2018(1) Mh.L.J. 169*.

9. It requires no debate that, if a plaintiff, in the peculiar facts as like in this case, comes forward with conflicting statements in his examination-in-chief, the defendants are bound to pounce upon such discrepancies and contradictions and would attempt to prove before the trial Court that the testimony of the plaintiff is found unreliable and needs to be discarded. However, in the instant case, the petitioners/defendants contend that, the second affidavit in lieu of examination-in-chief not only contains contradictory statement, but also contains statements not pleaded in the testimony of the plaintiff. Contradictory statements in evidence, which are beyond the pleadings and the issues, need to be discarded.

10. The learned advocate for the original plaintiff submits that, there are no contradictions and the plaintiff is capable of defending the statements made in both the recordings. He, however, submits that, in the event this court is of the view that the plaintiff can lead further examination-in-chief either orally or by tendering an affidavit to the extent of the new issues cast and in the light of the pleadings of these defendants through their written statement, which has come on record in 2004, it has to be left to the plaintiff to choose as to whether he would prefer to step into the witness box and lead further examination-in-chief orally or file a fresh affidavit in lieu of further examination-in-chief.

11. I find from the law laid down by this Court in Banganga (supra) and Digambar (supra) that, once an affidavit in lieu of examination-in-chief is tendered before the court, it becomes a part of the record of the trial court in the concerned suit. Once such an affidavit is granted an exhibit number and having been sworn before the authority competent to administer an oath on affirmation, the said affidavit cannot be discarded under any circumstances. This Court has further recorded that, if any deponent desires to step into the witness box for further oral examination-in-chief, he can be permitted to do so. If he chooses to file a second affidavit in lieu of

examination-in-chief, it has to be presumed that such affidavit would amount to further examination-in-chief of the deponent and the opponents would be entitled to cross-examine him on both such affidavits.

12. The learned advocate for the plaintiff submits that, he has no difficulty if the trial Court is directed to simply file the second affidavit that was tendered on 25.07.2015, with liberty to the plaintiff to prepare a fresh affidavit in lieu of examination-in-chief, in addition to the earlier affidavit, to the extent of the pleadings of the defendants in their written statement and the newly framed issues. The learned advocates for these petitioners submit that, they are agreeable to this proposition.

13. In view of the above, these two petitions are disposed off considering the statements made, with the following directions:-

- [a] The affidavit by way of examination-in-chief filed by the plaintiff on 25.07.2005, shall be simply filed and shall not be read in evidence.
- [b] Application Exh. 172 and 173, therefore, do not survive and stand disposed of.

- [c] The plaintiff is permitted to tender an affidavit in lieu of examination-in-chief to the extent of the pleadings of these petitioners in their written statement and the new issues cast. This affidavit would be read in continuation to the oral examination-in-chief recorded on 04.07.1996.
- [d] The defendants would be at liberty to cross-examine the plaintiff on the oral evidence recorded on 04.07.1996 and through the affidavit in lieu thereof which would be filed by the plaintiff on or before 05.10.2019.
- [e] Since the suit is lodged in 1995, the trial Court would give highest priority to the said suit, keeping in view that it is 24 years old and if required, shall grant shorter adjournment for posting the matter.
- [f] The trial court would decide R.C.S. No. 40/1995, in any case, on or before 31.03.2020.

[RAVINDRA V. GHUGE]
JUDGE