

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

WRIT PETITION NO.9089 OF 2018

Shankar Jayram Tale,
Age : 68 years, Occupation : Agri,
R/o Harbal, Tq.Kandhar,
District Nanded.

...PETITIONER
(Orig.Plaintiff)

-VERSUS-

1 Narba s/o Pundlik Tale,
Age : 70 years, Occupation : Agri,
R/o Harbal, Tq.Kandhar,
District Nanded.

2 Basveshwar s/o Narba Tale,
Age : 32 years, Occupation : Agri,
R/o Harbal, Tq.Kandhar,
District Nanded.

...RESPONDENTS
(Orig.Defendants)

...

Advocate for the Petitioner : Shri Pathan Hamzakhan I.
Advocate for the Respondents : Shri Wakade Ramesh I.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 12th February, 2019

Oral Judgment :

1 Rule. Rule made returnable forthwith and heard finally by the
consent of the parties.

2 The Petitioner/ original Plaintiff is aggrieved by the order dated 25.06.2018 by which, the Trial Court has rejected the application Exhibit 48 filed by the Plaintiff under Order 18 Rule 17-A of the Code of Civil Procedure seeking permission for producing certain documents and examining certain witnesses in view of a particular statement made in the examination-in-chief and cross-examination of Respondent No.2/ defendant No.2, which was never pleaded in the written statement.

3 I have heard the strenuous submissions of the learned Advocates for the respective sides. Defendant No.2 (Basveshwar), who has filed his written statement, is said to have signed certain documents pertaining to the transaction which is a part of the pending suit. With reference to these documents, his signature is relevant. The documents, which are already on record and have been exhibited in the enquiry upon being proved by the litigating sides, indicate signature of Basveshwar in Marathi. He is said to have passed his 12th standard only.

4 It is pertinent to note that Basveshwar in his written statement has only canvassed that the documents relied upon by the plaintiff are bogus and were never created. He has also canvassed that he is not a party to the preparation of the said documents. The case of the Plaintiff is that Basveshwar has himself signed on those documents which have been proved before the Trial Court and that would indicate the genuineness of the documents and the involvement of Basveshwar. With

such pleadings on record in the plaint, it would have been open to Basveshwar to state that he had never signed in Marathi language in his lifetime and that his signatures are always in English and he only signs in English and never in Marathi. This specific statement is not put forth in his written statement, inasmuch as, it is not even averred that Basveshwar signs only in English.

5 It requires no debate that the principle under the Indian Evidence Act is "first plead and then prove". It also requires no debate that if there are no particular pleadings in the written statement, the affidavit in lieu of examination-in-chief cannot introduce any new factual matter, which is beyond the pleadings. Since Basveshwar himself has chosen not to aver in the written statement that he signs only in English and had never signed in Marathi in his lifetime, he could not have made this statement in paragraph 7 of his affidavit in lieu of examination-in-chief dated 16.07.2016 that his signature is always in English and never in Marathi. In the absence of pleadings, this statement by way of oral evidence was impermissible in law.

6 The grievance of the Plaintiff is that as Basveshwar has introduced a new case in paragraph 7 of his examination-in-chief, the Plaintiff desires to produce certain school records and notarized register which would evidence that Basveshwar used to sign in Marathi as well.

7 The learned Advocate appearing for Basveshwar relies upon

the judgment of the Honourable Supreme Court in the matter of ***Bagai Construction vs. Gupta Building Material Store, (2013) 14 SCC 1*** to support his contention that an order under Order 18 Rule 17 seeking recalling of the witness cannot be passed if the intention of the litigant is to fill up a lacuna by leading evidence on the plea of recalling of the witness.

8 The issue, therefore, before this Court is either to permit the Defendant to lead evidence on the aspect which was never pleaded or averred in the written statement or to condone such a deficiency and permit the plaintiff to file fresh documents to deal with this new issue taken up for the first time only in the examination-in-chief of Basveshwar. In my view, permitting the litigant to lead evidence on an aspect which was never averred in the written statement is impermissible in law and hence, such a view would not be sustainable. If Basveshwar is precluded from leading evidence on such an aspect which was never pleaded or averred, the plaintiff need not be permitted to produce new documents and bring in new witness to deal with such an issue.

9 In view of the above, this Writ Petition is disposed of by recording that the statement of Basveshwar set out in paragraph 7 of the examination-in-chief declaring that he signs only in English and not in Marathi, shall stand deleted from the testimony of Basveshwar and the Trial Court shall not deal with the said aspect in the suit since it was never

pleaded or averred. In view of this, the Plaintiff need not be permitted to produce any new document and examine a new witness to deal with the said issue.

10 Rule is, accordingly, discharged.

kps

(RAVINDRA V. GHUGE, J.)