

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.6779 OF 2009
WITH
WRIT PETITION NO.1892 OF 2017

Abdul Samad s/o Nazmoddin
(since deceased), through LR's

1. Latifabee Abdul Samad Shaikh,
Age-70 years, Occu-Household,
R/o Tilak Nagar, Kannad,
Tal.Kannad, Dist.Aurangabad,
2. Asad Abdul Samad Shaikh,
Age-48 years, Occu-Business,
R/o Tilak Nagar, Kannad,
Tal.Kannad, Dist.Aurangabad,
3. Salim Abdul Samad Shaikh,
Age-46 years, Occu-Business,
R/o Tilak Nagar, Kannad,
Tal.Kannad, Dist.Aurangabad,
4. Amin Abdul Samad Shaikh,
Age-36 years, Occu-Business,
R/o Tilak Nagar, Kannad,
Tal.Kannad, Dist.Aurangabad

– PETITIONERS

VERSUS

Abdul Wahed s/o Shaikh Ameer,
Age-56 years, Occu-Agriculturist and Business,
R/o Maliwada, Kannad, Tal.Kannad,
Dist.Aurangabad

– RESPONDENT

Mr.A.D.Kasliwal, Advocate for the petitioners.
Mr.S.S.Kazi, Advocate for the respondent.

(CORAM : Ravindra V.Ghuge, J.)
DATE : 25/07/2019

ORAL JUDGMENT :

1. I have heard the learned Advocates for the respective sides in both these matters, which are inter connected involving the same litigating sides and in relation to the same RCS No.65/2009.

2. The plaintiff had approached this Court in the first petition in 2009 upon being refused temporary injunction by the Trial Court as well as by the Appellate Court. After approaching this Court, he was granted temporary injunction by order dated 09/10/2009 and the petition was admitted. Since the suit is of 2009, the temporary injunction granted by this Court can be continued until the suit is decided. The first petition is, therefore, disposed off by continuing the temporary injunction in terms of the order dated 09/10/2009. Rule is therefore discharged.

3. In the second petition, the plaintiff is before this Court upon being aggrieved by the order dated 05/01/2016, by which the Trial Court has rejected application Exh.81 filed by the plaintiff seeking rejection of the second affidavit filed by defendant No.1 by way of examination in chief. Submission is that defendant No.1 has first

preferred an affidavit in lieu of examination in chief. Before commencing the cross examination, he has filed one more affidavit in which it is stated that some of the portions set out in the first affidavit shall stand deleted. Exh.81 was filed by the plaintiff praying for an order that a witness cannot be permitted to withdraw an affidavit in lieu of evidence.

4. The Learned Advocate for the sole respondent submits that the cross examination is yet to commence. Either his second affidavit may also be considered or he may be granted liberty to step into the witness box for further recording of his examination in chief.

5. This aspect is no longer *res-integra* in view of the Law laid down by this Court (Coram : G.S.Patel, J.) in the matter of Banganga Co-operative Housing Society Vs. Vasanti Gajanan Nerurkar and others [2016(7) ALL MR 415 = 2015(5) Bom.C.R.813] and the judgment delivered by this Court in the matter of Digambar Ramchandra Bawaskar Vs. Soma Prabhu Pawar and others [2018(3) ALL MR 618] (Coram : Myself).

6. Considering that this aspect has been settled by this Court, it would be apposite to reproduce the conclusions drawn in paragraph

Nos. 13 to 15 in the Digambar case (supra) as under :-

"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 WP/1539/2016 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 WP/1539/2016 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 WP/1539/2016 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 WP/1539/2016 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."

7. In view of the above, the second petition No.1892/2017 is partly allowed. The impugned order dated 05/01/2016 is quashed and set aside and Exh.81 stands disposed off. Needless to state, the sole defendant would be at liberty to step into the witness box and continue the recording of his examination in chief. His affidavit earlier tendered to the Court, which is now a part of the record, shall be read alongwith his further oral examination in chief and the

plaintiff would be at liberty to cross examine the defendant on the affidavit as well as the oral examination in chief recorded before the Court. The second affidavit filed by the defendant shall be discarded.

(Ravindra V.Ghuge, J.)