

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 6164 OF 2018

Sultan Suleman Qureshi

...Petitioner

Versus

Anisa Rafiq Charolia

And others

...Respondents

....

Mr. Akhil Kupade i/b. Manoj Harit & Co. for the Petitioner.

Mr. S.M.Vyas, Advocate for Respondents No.1 to 5.

Ms. Geeta Sonawane, AGP, for Respondent No.6-State.

....

CORAM : R. G. KETKAR, J.

DATE : 04th FEBRUARY, 2019

P.C.

1. Heard Mr. Akhil Kupade, learned counsel for the petitioner, Mr. S.M. Vyas, learned counsel for respondents No.1 to 5 and Ms. Geeta Sonawane, learned counsel for respondent No.6-State, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 2nd April, 2018 passed by the learned Judge, Court Room No.25 of the Court of Small Causes at Mumbai below Exhibit 51 in R.A.E & R Suit No.103/163 of 2004. By that order, the learned trial Judge partly allowed the application filed by the plaintiff for discarding paragraphs 2 to 35 of Affidavit of evidence dated 6th December, 2017 of petitioner/D.W.1 Sultan Suleman Qureshi.

3. In support of this Petition, Mr. Kupade relied upon decision of

this Court dated 10th June, 2014 (Coram: R.D. Dhanuka, J) in the case of **Mahabanoo Navroz Kotwal Vs. Piloo Fali Bomanji in Chamber Summons (L) No.67 of 2014 in Testamentary Suit No.26 of 1999 in Testamentary Petition No.504 of 1998)** and in particular, paragraphs 17 to 22 and 28 and decision in the case of **Harakchand Gulabchand Dhoka Vs. Kashinath Narsingh Marathe, 2010 (6) Bom. C.R. 379** and **Bipin Shantilal Panchal Vs. State of Gujarat (AIR 2001 Supreme Court 1158** to contend that objection about alleged irrelevancy of evidence can be kept in abeyance till the matter is heard.

4. The petition was heard on 12.6.2018 and notice for final disposal was issued to respondents No.1 to 5.

5. Rule. Mr.Vyas & Ms.Sonawane waive service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

6. In support of this Petition, Mr. Kupade has taken me through the written statement filed by the defendant dated 20.4.2004 as also the affidavit of evidence of the defendant dated 7.11.2017. He also invited my attention to issue No.3 framed by the learned trial Judge on 9.9.2011, which is to the following effect :

“3. Whether plaintiff is entitled for possession of suit premises ?”

7. Mr. Kupade submitted that because of issue No.3, the defendant has filed elaborate affidavit of evidence. The learned trial Judge was not justified in striking out paragraphs-2 to 35 of that evidence. If paragraphs-2 to 35 are struck out, then nothing remains in the examination-in-chief of the defendant. He submitted that the learned trial Judge should have kept that objection of respondents No.1 to 5/plaintiffs about the alleged evidence open to be decided at the time of hearing of the suit. In other words, the this was not appropriate stage for striking out paragraphs from the deposition of the defendant.

8. On the other hand, Mr.Vyas has invited my attention to paragraphs-1 and 2 of the plaint as also paragraph-2 of the written statement. In paragraph-1, the plaintiff asserted that he is the owner and landlord of the property in dispute and in paragraph-2 of the written statement the defendant admitted the contents of paragraph-1 of the plaint. In other words, there is no dispute about the relationship of landlord and tenant between the plaintiffs and the defendant. He submitted that the learned trial Judge rightly struck out paragraphs-2 to 35 of the affidavit of examination-in-chief of the defendant as the contents therein are not in consonance with the pleadings of the defendant.

9. I have considered the rival submissions advanced by the

learned Counsel appearing for the parties. I have also perused the material on record. A comparison of the written statement filed by the defendant with the examination-in-chief of the defendant clearly shows that the defendant has deposed the facts which are beyond the pleadings in the written statement.

10. The learned trial Judge while passing the impugned order has observed in paragraph-8 that the plaintiffs raised objection with regard to evidence of DW-1 on the ground that the contents therein are not in consonance with the pleadings of the defendant. After going through the pleadings of the defendant as also the examination-in-chief, the learned trial Judge thought it appropriate to strike out paragraphs-2 to 35 of the examination-in-chief of the defendant.

11. Section 136 of the Indian Evidence Act, 1872 lays down that when either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise. In the present case, after comparing the pleadings of the parties and the affidavit of evidence tendered by DW-1, directed striking out paragraphs-2 to 35. It is settled principle of law that no amount of evidence is admissible which is beyond the pleadings of the parties.

After perusing the written statement and the examination-in-chief of the defendant, I do not find that the learned trial Judge has committed any error in observing that the contents of paragraphs-2 to 35 excepting paragraph-25 are not in consonance with the pleadings of the defendant. Insofar as the contents of paragraph-25 of the examination-in-chief of the defendant are concerned, the same are referable to paragraph-6 of the written statement.

12. In view thereof, the impugned order is modified only to the extent of paragraph-25 of the affidavit of examination-in-chief of DW-1 and the same shall remain part of his examination-in-chief. In other words, paragraphs-2 to 24 & 26 to 35 of the affidavit of examination-in-chief of DW-1 shall stand struck out from the evidence of the defendant. Rule is partly made absolute in aforesaid terms with no order as to costs. Liberty to the plaintiffs to apply for disposal of the suit in a time bound manner. If such an application is made, the learned trial Judge will bear in mind that the suit is of the year 2004. Order accordingly.

(R. G. KETKAR, J.)