

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO.961/2019

Prakash S/o Kesharao Deshmukh and another

..Vs..

Omprakash S/o Girdharilal Agrawal and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mrs. Anjali A. Bhide, Advocate h/f Shri A.V. Bhide, Advocate for the
petitioners.

Ms. Sonali Saware, Advocate for respondent Nos.1 to 3.

CORAM : Z.A. HAQ, J.

DATED : 29.7.2019.

Heard.

2] The respondent Nos.1, 2 and 3 have filed civil suit praying for declaration that the respondent Nos.1, 2 and 3 / plaintiffs and Sou. Mirabai Sureshkumar Tibdewal (defendant No.5 in the civil suit) are the owners of the suit property and are in possession of the suit property, and defendant Nos.1 to 4 have no right, title and interest in the suit property. The plaintiffs have prayed for other reliefs also. The civil suit is filed in 1996. The trial of civil suit progressed. After recording of evidence of plaintiffs witnesses, the defendant Nos.3 and 4 had filed an application (Exh. No.207) under Order 6 Rule 17 of the Code of Civil Procedure seeking permission to amend the written statement. By order dated 30th August 2018, learned trial Judge partly allowed the application (Exh. No.207) and permitted the defendants to incorporate paragraph Nos.2(a), 2(b),

2(c), 2(d) and 2(e) in the written statement, however, prayer made on behalf of the defendant Nos.3 and 4 to incorporate paragraph No.12A was dismissed. Accordingly, defendant Nos.3 and 4 amended the written statement and the trial progressed. The affidavit in lieu of examination-in-chief of defendant No.1 came to be filed. Before cross-examination of defendant No.1 started, the plaintiffs filed an application (Exh. No.218) pointing out that the defendant No.1 had included several material facts in the affidavit filed by him in lieu of examination-in-chief which were not supported by pleadings. The plaintiffs prayed that such material facts which were not supported by pleadings should be excluded. By order dated 3rd January 2019, learned trial Judge has upheld the objection raised on behalf of the plaintiffs and has directed the defendant No.1 to file fresh affidavit in lieu of examination-in-chief, excluding the portion of evidence as pointed out by the plaintiffs in the application (Exh. No.218).

3] In this petition, the defendant Nos.3 and 4 have challenged both the orders i.e. order passed on application (Exh. No.207) and the order passed on application (Exh. 218).

4] As far as the order passed on the application (Exh. No.207) is concerned, I find that the petitioners / defendant Nos.3 and 4 had accepted the order and proceeded to file affidavit in lieu of examination-in-chief

of defendant No.1 without making any grievance regarding rejection of their prayer to incorporate proposed paragraph No.12A in the written statement. It is only after the learned trial Judge upheld the objection of the plaintiffs for inclusion of the material facts in the affidavit in lieu of examination-in-chief of defendant No.1 on the ground that these material facts were not supported by pleadings in the written statement, defendant Nos.3 and 4 have chosen to challenge the order passed on application (Exh. No.207). In these facts, I am not inclined to consider the challenge raised by the defendant Nos.3 and 4 to the order passed on the application (Exh. No.207). Apart from this, I find that the amendment proposed by paragraph No.12A cannot be permitted as the facts stated in paragraph No.12A are vague.

5] As far as the order passed on application (Exh. No.218) is concerned, the petitioners have not been able to point out that the material facts introduced in the affidavit in lieu of examination-in-chief of defendant No.1 are supported by pleadings in the written statement. The learned trial Judge has found that there is no foundation in the pleadings to support these facts and, therefore, has rightly directed defendant No.1 to file fresh affidavit in lieu of examination-in-chief, excluding the portions pointed out by the plaintiffs in the application (Exh. No.218).

6] Learned Advocate for the petitioners relied on the judgment given by this Court in the case of *Anita Sitaram Sawant and others V/s Gosar Developers and others* reported in **2017 (4) Mh.L.J. 334** and argued that the Court has to be very slow in excluding / cancelling certain portion of evidence of the witness. There can't be any dispute about the proposition laid down in the above referred judgment, however, party cannot be permitted to bring new material in evidence, which is not supported by pleadings.

7] I see no reason to interfere with impugned orders. The writ petition is **dismissed**. In the circumstances, the parties to bear their own costs.

8] It is relevant to note that the impugned orders have attained finality viz-a-viz the defendant No.5, as the defendant No.5 is not impleaded as respondent in the present petition.

9] As the civil suit is of 1996 and is at the stage of recording of evidence of defendants witness / witnesses, trial Court is directed to decide the civil suit till 30th November, 2019.

JUDGE