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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 6th February, 2020
+ **CM(M) 650/2019 & CM APPL. 19603/2019**
BRIJ PRAKSH GUPTA Petitioner

Through: Mr. R.S. Kela, Advocate (M-9810241752)

versus

ASHWINI KUMAR Respondent
Through: Mr. Ruchir Batra, Advocate (M-9811278762).

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition challenges the impugned order dated 23rd February, 2019, by which the Id. Sr. Civil Judge has directed the Plaintiff/Petitioner (*hereinafter*, “*Plaintiff*”) to file a fresh affidavit by way of evidence. Some parts of the earlier affidavit were expunged by the Trial Court on the ground that the same were not reflected in the pleadings.
2. The submission of Mr. R.S. Kela, Id. counsel for the Plaintiff, is that the paragraphs which have been expunged are, in fact, only elaborating on or giving the factual foundation for the pleadings already contained in the plaint. Id. counsel submits that nothing alien to the plaint has been stated in the affidavit.
3. On the other hand, Id. counsel for the Respondent/Defendant (*hereinafter*, “*Defendant*”), after taking the Court through various portions of the affidavit-in-evidence, which, according to him, go beyond the plaint, submits that some of the facts sought to be introduced in the affidavit have

no basis in the pleadings. Hence, he submits that the Trial Court's order deserves to be affirmed.

4. This Court has perused the impugned order and heard the submissions of the parties. The trial court record was also summoned by this Court. The suit is one for recovery of possession, *mesne profits* and occupation charges, filed by the Plaintiff i.e., Mr. Brij Prakash Gupta against the Defendant i.e., Mr. Ashwini Kumar. The case of the Plaintiff in the plaint is that the Defendant's father – Mr. J.C. Bahree was a tenant in the suit property bearing No. 812, Joshi Road, Karol Bagh, New Delhi (*hereinafter*, "*suit property*"). Details of the relationship of landlord and tenant have been stated in paragraph 3. The manner in which the notice of termination of tenancy was issued and the factum of the termination of the said notice having not been withdrawn is contained in paragraphs 3 to 5. Thereafter, details have been given of how Ms. Satya Wati Bahree, i.e., the Defendant's mother, had a limited inheritance in the suit property. Further, the manner in which notice was served upon the Defendant and acknowledged by him, as also the reply thereof has been mentioned in paragraphs 11 and 12 of the plaint. The quantum of *mesne profits* claimed and the relief are also contained in the plaint.

5. The legal position governing the filing of examination-in-chief by way of an affidavit is well settled. It is by way of the amendments introduced in the Code of Civil Procedure, 1908 (*hereinafter*, "*CPC*") in 2002 that filing of the examination-in-chief by way of an affidavit was introduced. Prior to that, examination-in-chief was oral, followed by cross-examination and re-examination, if permitted. The purpose of introducing the provision for examination-in-chief by way of affidavit was to expedite

the recording of evidence and to ensure that judicial time could be utilized more pragmatically.

6. The two provisions governing the contents of affidavits in evidence are Order XVIII Rule 4 CPC read with Order XIX Rule 3 CPC. The said provisions are set out below:

“ORDER XVIII

Hearing of the suit and examination of witnesses

..

4. Recording of Evidence. - (1) *In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.*

Provided that where documents are filed and the parties rely upon the documents, the proof of admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

...

ORDER XIX

Affidavits

...

3. Matters to which affidavits shall be confined. - (1) *Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated.*

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.”

7. The Supreme Court in ***Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd., (2004) 1 Supreme Court Cases 702*** considered Rules 4

and 5 of Order XVIII of the CPC and agreed with the Bombay High Court's harmonious reading of the two provisions in ***F.D.C. Ltd. v. Federation of Medical Representatives Assn. India (FMRAI) & Ors., AIR 2003 Bom 371***. The Bombay High Court, in ***F.D.C Ltd. (supra)***, held that in the case of appealable orders the examination-in-chief may be filed by way of an affidavit, however, the same would not form part of the evidence until and unless the deponent appears before the Court and confirms the contents of the affidavit. The Supreme Court, however, further observed as under:

“33. The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the court in writing and in any event, the attention of the witness can always be drawn while cross-examining him. The defendant would not be prejudiced in any manner whatsoever if the examination-in-chief is taken on an affidavit and in the event he desires to cross-examine the said witness he would be permitted to do so in the open court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the court would not be wasted in examining such witness in open court.”

8. From the above it is clear that when an affidavit by way of evidence is filed, if an objection is raised regarding the same being beyond the pleadings etc., the trial would not be halted but the objections would be recorded and decided at the final stage. Cross-examination too would be permitted, subject to the said objection(s). The said provisions have also been considered by the Bombay High Court, in the context of the observations of

the Supreme Court in *Ameer Trading (supra)*, in the following judgments:

1. ***Harakchand Gulabchand Dhoka v. Kashinath Narsingh Marathe, (2010) 4 AIR Bom R 31***
 2. ***Harish Loyalka & Anr. v. Dileep Nevatia & Ors., [Suit No.3598/1996, decided on 7th April, 2014]***
 3. ***Mahabanoo Navroz Kotwal v. Piloo Fali Bomanji & Anr., (2015) 3 AIR Bom R 151***
9. In *Harakchand (supra)*, the ld. Single Judge of the Bombay High Court observed as under:

“5 I have carefully considered the submissions. It will be necessary to consider the decision of the Apex Court in case of Amir Trading Corporation (supra). The Apex Court considered the scheme of the provisions of Rule 4 and Rule 5 of Order XVIII of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code). The Apex Court noted that as per the rule 4 of Order XVIII of the said Code, examination-in-chief in every case shall be on affidavit. In paragraph 19 of the decision, the Apex Court observed that the evidence of every witness will be in the form of an affidavit and what remains is only cross examination or reexamination. Paragraph 32 of the said decision reads thus:

“32 The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such as objection can always be taken before the Court in writing and in any event, the attention of the witness can always be drawn while cross examining him. The defendant would not be prejudiced in any manner whatsoever the examination-in-chief is taken on an

affidavit and in the event, he desires to cross examine the said witness he would be permitted to do so in the open Court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the Court would not be wasted in examining such witness in open Court.”

(Emphasis added)

Once the affidavit in lieu of examination-in-chief is filed it partakes the character of the examination-in-chief of the concerned witness. There is no provision under the said Code under which the Court can direct deletion of any portion of an examination-in-chief. Nevertheless, an objection can always be taken by the rival party in writing to any objectionable portion of the affidavit. Moreover, the attention of the witness can be always invited to said portion while cross examining him. If there are irrelevant statements in the affidavit in lieu of examination-in-chief and if there are statements which are beyond the scope of the pleadings, the rival party can always record his objection in writing to the objectionable portion of the affidavit. The law is well settled. A party to the suit cannot be permitted to travel beyond his pleadings. If any evidence is tried to be adduced which has no foundation in the pleadings, the Court always has a power to discard such evidence while finally deciding the suit or proceeding.

6 The submission of the learned counsel for the petitioner was that as the Apex Court has held that the aggrieved parties can file objections in writing to any portion of an affidavit in lieu of examination-in-chief, it is the duty of the Court to consider the objections on merits and to pass appropriate order dealing with the objections. The learned counsel for the petitioner is right when he says that the objection has to be considered. However, it is necessary to see at what

stage it should be considered and in what manner the objection should be dealt with. Considering the scheme of the amended provisions of the said Code, objection raised in writing will have to be considered at the time of final hearing of the suit or proceeding. If on the basis of the objection, the Court finds that certain statements made in the affidavit are beyond the scope of the pleadings, the Court can always discard that part of the evidence while delivering the final Judgment. On the basis of such objection raised, the Court has no power to order deletion of the certain portions of the affidavit but the Court certainly has a power to discard a part of the evidence while deciding the suit.

7 The Apex Court further held that even if the objection in writing is not filed, while cross examining the witness, the attention of the witness can be drawn to the objectionable portion of the affidavit. This is the second mode suggested by the Apex Court of raising an objection to any part of the affidavit.

8 The very object of amending rule 4 of Order XVIII of the said Code is to ensure that there is a speedy trial. The object is to ensure that the time of the Court is not wasted in recording the lengthy examination-in-chief. Consistent with the said object, it is obvious that the objection raised to any part of the affidavit in lieu of examination-in-chief will have to be considered at the time of final hearing of the suit or proceeding. The party raising objection cannot insist upon the Court considering the said objection before cross examination of the witness starts. In a given case, rival party may not raise objection in writing. As stated earlier, the party can cross examine the witness by inviting attention of the witness to the statements which according to the rival party are objectionable. Even in such a case, at the time of final hearing, objection will have to be considered by the Court though there may

not be any specific objection in writing. It is always the duty of the Court to decide as to how much evidentiary value should be given to a particular piece of evidence. If a portion of the affidavit is found to be not relevant or if it is found that the portion has no foundation in the pleadings, the Court can always discard it while deciding the suit.”

10. This finding is reiterated in ***Harish Loyalka (supra)*** as under:

“13. Generally speaking, matters of relevancy can be deferred to the stage of arguments; indeed, they must be. It is not always possible to say at the stage of examination-in-chief whether a given statement is or is not relevant. Some statements may be ex-facie entirely irrelevant; these might stand on a different footing, as the Rajendra Singh Court said. Therefore, unless the material is ex-facie entirely and demonstrably irrelevant, the affidavit evidence must retain the material provided it is a deposition of some fact that is to the deponent's knowledge. Matters of surmise, conjecture, arguments and in the nature of legal submission or in the nature of pleadings attempting to controvert what is stated in the plaint or the written statement are not evidence. They are, therefore, not examination in chief.”

11. In ***Mahabanoo Navroz (supra)***, the Id. Single Judge, in view of the Division Bench judgment of the Bombay High Court in ***Rajendra Singh Chhatrasal Singh Kushwaha (Deceased) v. Jitendra Singh Rajendra Singh Kushwaha, (2013) (6) Mh.L.J. 802***, has disagreed with the judgment in ***Harakchand (supra)*** to the extent that deletion of portions of the affidavit in evidence may be ordered in the following circumstances:

“42. In my view, the affidavits permitted to be filed under Order 18 Rule 4 in lieu of examination-in-chief has to contain only the deposition which is relevant

facts in issue in the suit or relevant aspects which the witness has to prove before the Court and not beyond what is pleaded by the parties and also not which is irrelevant to the issues framed. If an opposite party raises any objection about any part of the deposition which is totally irrelevant, beyond the pleadings and/or the same is irrelevant ex facie, Court can direct the deponent to file fresh affidavit after deleting the irrelevant part of evidence or can ignore such irrelevant part of evidence on which no cross-examination could be warranted.”

12. In **Ramesh Kumar Arora v. Bhola Nath & Ors., 2011 (125) DRJ 356**

a ld. Single Judge of this Court has held:

“18. A perusal of the aforesaid Rule (4) of Order 18 shows that the purpose of conducting the examination in chief by way of affidavit is to cut short the delay in the recording of the evidence of the parties, as deciding the objection at that stage only causes delay in the disposal of the suit itself.

19. It may be pertinent here to refer to the portion which has been highlighted in the aforesaid Rule which clearly mandates that if a party has any objection then such an objection can be got recorded before the Local Commissioner and the question can be decided ultimately by the Court at the stage of final argument. The whole purpose and the scheme of the aforesaid order is to ensure that there is minimum loss of time in recording the evidence of the parties as it cause incalculable delay in the disposal of the suit.

20. In the instant case also, I feel that since the learned Local Commissioner who had been appointed was an experienced and seasoned Retired Additional District Judge and if at all there was any averment made in the affidavit by the petitioner which was beyond pleadings to which the defendants/applicants had any objection, the same could be taken by him before the learned Local Commissioner and got recorded rather than

filing the present application.

21. I fully agree with the contention of the learned senior counsel for the defendants that as a matter of law, a fact which is not pleaded cannot be proved and therefore, evidence has to be confined only with regard to the facts which are pleaded but at the same time, it is not necessary that in the plaint while pleading the facts, the evidence with regard to the same be also averred. It is also correct that under the Evidence Act, 1872 a party who is to adduce evidence is given liberty not only to produce evidence with regard to the 'fact in issue' which is involved in the case but it is also permitted to adduce evidence with regard to the relevant facts provided, they are admissible under Section 5 to 55 of the Evidence Act which clearly lays down the parameters within which a fact must fall and only then it can said to be a relevant fact.

22. It may be pertinent here to mention that a fact may be relevant but still it may not be admissible. ...”

13. A conjoint reading of the above decisions shows that the legal position on affidavits in evidence being filed in lieu of oral examination-in-chief is as under:

1. In cases where the final order would be appealable, the deponent would have to appear before the Court to confirm the contents of the affidavit, for it to form part of the evidence.
2. The deponent can be subjected to cross-examination.
3. The affidavit in evidence should contain facts which are to the deponent's knowledge. Irrelevant statements cannot be made and the affidavit cannot travel beyond the pleadings.
4. If any part of the affidavit in evidence is objected to, including on the ground of mode of proof or admissibility, such objection(s) can be recorded and subject to the same being decided at the time of final

adjudication, the cross-examination could proceed.

5. Unless and until the Court comes to the conclusion that the deposition is totally irrelevant or *ex facie* beyond the pleadings, deletion from the affidavit in evidence is not usually to be ordered.

6. The affidavit in evidence cannot contain matters of surmise, legal arguments or conjecture and cannot controvert the pleadings on record of either party.

14. In daily practice, it is noticed that the affidavits in evidence are a ‘*cut and paste*’ from the plaint, which is not how they are supposed to be. The affidavit should contain facts which are to the personal knowledge of the deponent and the same cannot be a verbatim copy of the plaint. The affidavit in evidence can factually expand on a plea taken in the plaint, it can also support factual assertions made in the plaint but it cannot contradict or state facts which cannot be derived from the plaint. The practice of filing affidavits in evidence which replicate the plaint is incorrect and ought not to be permitted by Courts. Some guidance can be taken from the Delhi High Court (Original Side) Rules, 2018, which, in Rule 2 of Chapter XIX, specifically bar affidavits in evidence from reproducing pleadings/documents on file:

“2. Evidence by affidavit. — The Court may upon any application of either party showing sufficient cause, order attendance, for cross examination of the deponent, and such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court or the Court otherwise directs. Affidavits by way of evidence shall not merely reproduce pleadings and documents already filed.”

15. Viewed in the backdrop of the above legal position, a perusal of the impugned order dated 23rd February, 2019 shows that the Trial Court has done a minute examination of the affidavit-in-evidence to expunge certain portions of the affidavit. This Court has perused the objectionable portions pointed out by the Defendant. Most of the objectionable portions, including paragraphs 2 and 3 are primarily expanding on or giving further factual basis for what has already been pleaded in the plaint.

16. In paragraph No.2, the deponent has stated that he was one of the sons of the Plaintiff and that he has been handling the day to day affairs of the suit property and also dealing with the tenants. This fact is needed for the affidavit-in-evidence in order to give a factual basis as to why one of the sons of the Plaintiff is deposing before the Court. This cannot be said to be alien to the plaint.

17. In paragraph 3, details of the site plan and how the same was signed by the Defendant, as also by Mr. J.C. Bahree, which is a fact which is in the personal knowledge of the deponent cannot be said to be contrary/alien to the plaint.

18. In paragraph 4, details as to why the office copy of the notice dated 3rd January, 1983 has not been produced has been mentioned. This particular notice was, in fact, replied to by the Defendant and thus, the non-production of the office copy of the AD card, etc. would have no bearing on the dispute itself.

19. In paragraph 6, the objectionable portion, according to the Defendant, is that the counterfoils of the rent receipts were not pleaded in the plaint and it is also not pleaded that Mr. J.C. Bahree had signed them in the presence of the deponent. This again is a fact which is within the personal knowledge of

the deponent. The plaint was signed by the father of the deponent i.e., Mr. Brij Prakash Gupta and he could not have mentioned this fact in the plaint. These facts which are in the personal knowledge of the deponent would obviously be contained in the affidavit.

20. In paragraph 8, the manner in which the rent was being tendered by the Defendant's mother has been mentioned and the same are supported by the money order coupons. This would only support the plea in the plaint that the Defendant was paying rent and nothing more.

21. In paragraph 9, the deponent seeks to mention that the termination notice was never withdrawn. This is clear from a reading of the plaint itself wherein the notice of termination has been repeatedly reiterated.

22. In paragraph 11, the deponent is making a statement that the Defendant i.e., the son of Mr. J.C. Bahree was never acknowledged as a tenant. The filing of the suit itself and the seeking of possession is nothing but a clear indication that the Plaintiff does not treat the Defendant as a tenant. This again is not alien to the suit.

23. Insofar as the pleas in paragraphs 13 and 14 are concerned, the Defendant himself has disclosed in the written statement about the piped gas connection which he has taken from Indraprastha Gas Ltd. Thus, the mentioning of the same in the affidavit is not out of place.

24. In paragraph 15, the notice for production of original documents has been mentioned which is a development subsequent to the filing of the suit.

25. Finally, in the last paragraph, the basis for claiming *mesne profits* has been expanded. In the plaint, the Plaintiff has sought Rs.10,000/- per month. However, in the affidavit, the Plaintiff is trying to place on record a document to support the plea that the neighbouring properties are fetching

Rs.35,000/- per month. The question as to what should be the *mesne profits* has to be adjudicated by the Trial Court. The Defendant is obviously at liberty to controvert the averments made in the affidavit-in-evidence.

26. Accordingly, the modifications which have been directed by the Trial Court are not found appropriate. The affidavit-in-evidence shall be read as it is. The objections of the Defendant shall be recorded prior to or during the cross-examination and the same shall be considered at the time of final adjudication. The objections as to mode of proof, admissibility, etc., if raised, would also be liable to be adjudicated at the final stage.

27. Considering that the suit is of 2017, it is directed that the Trial Court shall endeavour to dispose of the suit within a period of one year.

28. With these observations, the petition and all pending applications are disposed of.

FEBRUARY 06, 2020

Rahul/Sy

(Corrected and released on 14th February, 2020)

**PRATHIBA M. SINGH
JUDGE**