

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

WRIT PETITION NO.2218 OF 2019

**SUDHAKAR DEVAJI MALI
VERSUS
THE ASSISTANT CHARITY COMMISSIONER, DHULE AND OTHERS**

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Advocate for Petitioner : Mr. D. S. Bagul
AGP for Respondents – State : Mr. S. W. Munde
Advocate for Respondent No.2 : Mr. Umesh B. Gite
Advocate for Respondent Nos. 3 to 5 : Mr. M. S. Deshmukh

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 11th AUGUST, 2022

PER COURT :

1. By this petition, the petitioner challenges order dated 26/09/2018, passed by Assistant Charity Commissioner, Dhule, in Change Report Inquiry No.615/2013, thereby allowing the application filed by respondent No.5 Trust and discarding the evidence of respondent No.3 filed in the form of affidavit in lieu of examination-in-chief.

2. Respondent Nos. 2 to 4 have filed Change Reports bearing No.593/2013 and 615/2013 in respect of respondent No.5 Trust. Inquiry in the said change reports is in progress before Assistant Charity Commissioner, Dhule. Petitioner is objector to the Change Report No.615/2013. Respondent No.3 filed his affidavit in lieu of examination-in-chief in the said proceedings.

3. Thereafter, on 26/09/2018, application was filed by the respondent No.5 Trust contending that though evidence affidavit of respondent No.3 Ananda Dharmaji Patil, Secretary, was filed earlier, however, due to ill health he is not in a position to attend the proceeding and cannot undergo cross-examination. Therefore, evidence affidavit of respondent No.4 is filed and the same may be taken in evidence. The said application was opposed by the petitioner. Assistant Charity Commissioner has allowed the application, however, while allowing the application he has discarded the evidence affidavit of respondent No.3. Petitioner is aggrieved by this order.

4. Heard the rival submissions of learned advocate for petitioner, learned advocate for respondent No.2, learned advocate for respondent Nos.3 to 5, and the learned Assistant Government Pleader for respondent – State, perused the grounds raised in the petition.

5. Point raised in the present petition is squarely covered by the decision of this Court in ***Banganga Co-operative Housing Society Limited and Others Vs. Vasanti Gajanan Nerurkar and Others, 2015 (5) Bom.C.R. 813***, on which learned advocate for petitioner has rightly placed reliance. The Co-ordinate Bench of this Court in the said decision has held that:-

"22. *The result of this discussion is that:*

(a) No Evidence Affidavit under Order XVIII Rule 4 of the CPC can be allowed to be 'withdrawn'. It is evidence as soon as it is affirmed.

(b) The Evidence Affidavit cannot contain matter that is irrelevant, inadmissible or both; or is in the nature of arguments, submissions or prayers. This is not 'evidence' as required by law. Were it to be attempted from the witness box, it would not be permitted; and hence it cannot be allowed to creep in merely because it happens to be placed on affidavit.

(c) It is permissible, and in fact often necessary, for a Court, with a view to expedition and to avoid a needlessly protracted cross-examination on irrelevancies and matter that is not 'evidence' to order that any such material that does not constitute evidence be struck off or be ordered or directed to be ignored without fear of adverse consequence.

(d) Where an Evidence Affidavit is filed and the witness or deponent, though otherwise available, is not made available for cross-examination, the well-established consequences in law will follow. Specifically, the opposite party will be entitled to submit that an adverse inference be drawn against such a witness or the party who fails to produce that witness for cross-examination; and, further, that should that evidence contain any admissions, these may be used by the other party; but so much of the evidence as is against the party entitled to cross-examination but which has gone untested for want of production of the witness will be liable to be ignored."

6. In the light of the above observations, evidence affidavit filed by respondent No.3 cannot be discarded. It will remain in the evidence and the Assistant Charity Commissioner can draw appropriate inference in the light of above observations, as the respondent No.3 is not in a position to undergo cross-examination.

7. However, the evidence affidavit of respondent No.4

cannot be faulted with. Petitioner is entitled to cross-examine the said witness on merits. Assistant Charity Commissioner shall consider evidentiary value of the evidence led by the parties at the time of final decision of change report inquiries.

8. In the result, impugned order dated 26/09/2018, passed by Assistant Charity Commissioner, Dhule, in Change Report Inquiry No.615/2013, is modified by deleting the portion to the extent it discards the evidence of respondent No.3 Ananda Dharmaji Patil. Evidence of respondent No.3 shall remain on record and shall be considered at the time of final decision of the change report inquiries.

9. With these observations, writ petition is disposed of. Considering that the challenge report inquiries are of the year 2013, the proceedings are expedited and the Assistant Charity Commissioner shall decide the same as expeditiously as possible, in any case within a period of six months from today.

(NITIN B. SURYAWANSHI, J.)