

BDP-SPS-TAC

BHARAT
DASHARATH
PANDIT

Digitally signed
by BHARAT
DASHARATH
PANDIT
Date: 2022.01.17
12:03:46 +0530

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2919 OF 2017**

Shri Sitaram Govind Panse & Anr.Petitioners

V/s

Shri Laxman Govind PanseRespondent

Mr. Ashutosh Kulkarni i/b Mr. Akshay P. Shinde for the Petitioners.

Mr. Girish Godbole i/b Ms. Manjiri S. Parasnis for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 14, 2022

P.C.:-

1] This Petition is by original Defendants to a suit for partition and recovery of amount.

2] On 18/3/1994, Respondent/Plaintiff initiated Special Civil Suit No. 151 of 1996, seeking partition of properties and recovery of amount of Rs 11,40,000/-. It is claimed that Defendants are exclusively operating business viz. Mangal Karyalaya and catering over the suit property and are not sharing profit.

3] The present Petitioners contested suit vide Written Statement-Exhibit-34 and additional Written Statement at Exhibit-77.

4] On 16/11/2009 and 12/12/2010, Respondent/Plaintiff tendered his affidavit of evidence.

5] Application Exhibit-153 is taken out by the Respondent/Plaintiff, seeking directions against the Petitioner/Defendant No.1 regarding production of documents whereby Petitioner/Defendant No.1 was directed to produce documents as prayed.

6] Defendant No.1 filed pursis vide Exhibit-155, thereby producing certain documents which he claimed to be available with him.

7] On 25/7/2016, Petitioner/Defendant No.1 filed his affidavit of examination-in-chief vide Exhibit-303 pursuant to the provisions of Rule 4 of Order 18 of the Civil Procedure Code.

8] Before Defendant No.1 entered into witness box, Application-Exhibit-469 was taken out by the Respondent/Plaintiff, thereby praying for striking out some of the portion of the affidavit of evidence of Defendant No.1, details of which are mentioned in para 2 of the

said Application. The said Application-Exhibit-469 came to be allowed vide impugned order dated 06/02/2017. As such, this Petition.

9] Submissions of Mr. Kulkarni, learned Counsel appearing on behalf of the Petitioners are, the Trial Court has no power to order deletion of certain portion of affidavit of evidence that too at the behest of Counsel for the Plaintiffs. However, such part of evidence which is not supported by pleadings of the parties can be ordered to be discarded that too at the time of final decision only after analysis of evidence and pleadings. Drawing support from the judgment of this Court in the matter of *Harakchand Gulabchand Dhoka vs. Kashinath Narsingh Marathe* reported in **2019 SCC OnLine Bom 78**, he would claim that Court is not armed with power to order deletion of certain portion of the affidavit of evidence. Mr. Kulkarni would invite attention of this Court to the contents of order impugned so as to claim that no specific reasons are provided in support of the non-consideration of the evidence of the Petitioner/Defendant No.1. He would rely on pleadings in the Application and also language of the order impugned. According to Mr. Kulkarni, evidence of witness of Defendant No.1 which is placed on record at Exhibit-303 can be

subjected to scrutiny. However, same cannot be dealt with like the one, as has been done by the impugned order. He would claim that if the Petition is dismissed and Petitioners are permitted to raise such ground in appeal considering advance age of the witness, there will be strong chances of the Petitioners suffering injustice. As such, according to him, Petition needs to be allowed.

10] Mr. Godbole, learned Counsel assisted by learned Counsel Ms. Parasnis appearing for the Respondent would support the order impugned. He would urge that affidavit of evidence is not in tune with pleadings of the Petitioner/Defendant No.1 in his Written Statement and as such court below was justified in passing the order impugned. As such, he has sought dismissal of the Petition.

11] I have considered the submissions.

12] Application-Exhibit-469 is moved by the Respondent/Plaintiff, praying therein to struck off portion of affidavit of evidence of Petitioner/Defendant No.1 at Exhibit-303 as detailed in para 2. The said Application is allowed by the Court below to the extent of

directing Respondent/Plaintiff not to record any cross-examination on the contents mentioned in paras 2.2, 2.4, 3.1, 3.2, 3.3, 4.1, 4.2, 5, 6, 7, 8.1, 8.2, 9.1, 9.4, 9.2, 12.2, 12.3, 13.1, 13.2, 13.3, 13.4, 15, 21.1, 21.2. The Trial Court permitted to proceed with the cross-examination of the witness of Defendant No.1. As such, what can be inferred from the impugned order passed by the Trial Court is, Respondent/Plaintiff is permitted to cross-examine witness of the Petitioner/Defendant No.1 on the examination-in-chief as referred to in paras mentioned in the order impugned. As a consequence of above, affidavit of evidence of the Petitioners remains intact and portion therein is not ordered to be deleted as is claimed by the Petitioner/Defendant No.1. By relying on the above referred judgment of this Court in the matter of *Harakchand Gulabchand Dhoka* cited supra, it has to be inferred that evidence affidavit of either parties to the suit cannot be permitted to be altered. The impugned order is passed at the behest of the Respondent/Plaintiff. In case if the Respondent/Plaintiff is not intending to cross-examine the witness of the Petitioners/Defendants on certain part of evidence-in-chief, the same is at the risk and peril of Respondent/Plaintiff.

13] While passing the order impugned, thereby permitting Respondent/Plaintiff not to cross-examine witness of the Petitioner/Defendant No.1 on the examination-in-chief in paras mentioned therein, Court below considered evidence i.e. examination-in-chief to the extent of the pleadings in the Written Statement. Court below noticed absence of pleadings to the extent of evidence mentioned in the above referred paras and proceeded to pass impugned order. Apart from above, what can be noticed is, whether Court below was justified in restricting cross-examination of the Plaintiff to the extent of certain part of the evidence of the witness of Petitioner/Defendant No.1 can be an issue which can be questioned in appeal, if final verdict goes against the Petitioner/Defendant No.1. Keeping such right of the Petitioner/Defendant No.1 intact of raising such ground in appeal, if so required to be preferred, against the adverse judgment, if any, delivered against his interest in the suit in question, in my opinion, in extraordinary jurisdiction of this Court, at this stage of the proceedings, no case for interference is made out. This Court is sensitive to the fact that provisions of Order XVIII Rule 4 contemplate speedy disposal of the trial.

14] In the aforesaid backdrop, Petition is dismissed with above liberty, as has been observed hereinabove.

(NITIN W. SAMBRE, J.)