

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.889 OF 2023**

**SHAMPRASAD VISHWANTH DEV
VERSUS
MANJIRI SHARDUL DEV AND OTHERS**

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Mr. Rajendrraa Deshmukh, Senior Advocate i/by Mr. Sanket Kulkarni, Advocate for the Petitioner.

Mr. L. V. Sangit h/f Mrs. M. L. Sangit, Advocate for the Respondent No.1.

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**CORAM : SHARMILA U. DESHMUKH, J.
DATED : 24th JANUARY, 2023.**

FINAL ORDER:-

1. By impugned order dated 13.01.2023 the District Judge-2, Kopargaon allowed the application seeking striking down certain portion of the affidavit in lieu of examination-in-chief filed by the petitioner in Civil Miscellaneous Application No.3/2020.

2. The facts of the case are as under:

Respondent no.1 filed Miscellaneous Civil Application No.3/2020 under the provisions of the Guardians and Wards Act, 1890 in the Court of the District Judge, Kopargaon for the custody of her son Reyansh and for declaration that respondent no.1 is the guardian of the child and respondent no.3 i.e. father is incompetent to take care of the child. In the said proceeding alongwith the father, the grand-parents and the paternal aunt of the child Reyansh also came to be impleaded as party-respondents. The petitioner filed his written statement dated 28.10.2021, which was divided into four parts dealing with the legal and factual submissions. Part IV of the written statement dated 28.10.2021 adopted

the written statement filed by respondent no.3 i.e. the father of the child and Part IV is reproduced hereinafter:

PART IV

14) Hereinafter and to the extent of pleadings of the applicant in her application, to avoid repetition and for the sake of brevity, this opponent adopts the written statement filed by respondent 1 at Exhibit 162 dated 05/10/2021. This respondent 3 further craves leave to add, amend or alter the written statement as and when necessary, and without prejudice to his independent right to take part in proceeding including separate cross-examination.

15) For all the fact and law referred hereinabove, the application of the applicant may kindly be dismissed with costs.

3. Affidavit in lieu of examination-in-chief under the provisions of Order XVIII Rule 4 of Code of Civil Procedure was filed by the petitioner on 10.01.2023 running into 83 pages. An application was filed by the respondents seeking striking down certain portions of the affidavit of evidence on the ground that the affidavit in lieu of examination-in-chief deposes the entire written statement of respondent no.3-husband, whose defence has been struck off and as there was no pleading of the petitioner in respect of paragraph nos.1 to 47 and 60 to 83 of the affidavit of evidence in his written statement, the same is not admissible in evidence. The Trial Court on consideration of the written statement of the petitioner and after consideration of the provisions of the Code of Civil Procedure laid down in Order VI and Order VIII pertaining to the pleadings and the written statement concluded that the written statement of the petitioner adopted the written statement of respondent no.3-husband, whose defence has been struck off, does not meet the requirements of the Order VI and Order VIII of the Code of Civil Procedure and directed striking down of certain portions of the

affidavit in lieu of examination-in-chief being paragraph nos.1 to 47 and 60 to 83.

4. Heard Mr. Deshmukh, learned senior counsel for the petitioner and Mr. Sangit, learned counsel for respondent no.1.

5. Mr. Deshmukh submits that the petitioner adopted the written statement of respondent no.3-husband and Part IV of the written statement makes it clear that it was only to avoid the repetition and for the sake of brevity the entire written statement of respondent no.3-husband was not reproduced by way of the written statement of the petitioner and pleadings were adopted in Part IV of the written statement. He would further submit that there is a difference between the striking off defence and striking off pleadings, which are two distinct and independent terms. He would further submit that the proceedings instituted under the provisions of the Guardians and Wards Act are for the custody of the minor child and the paramount consideration is welfare of the child. He would further submit that, although the defence of respondent no.3-husband has been struck off, the written statement of respondent no.3-husband has been adopted by the petitioner prior to the striking off of the defence and therefore, it cannot be said that the petitioner has indulged into any surreptitious or clandestine conduct, as observed by the Trial Court in the impugned order. In support of his submissions, he relies upon the following decisions:

1. ***Smt. Mamoni Pal (Biswas) Vs. Sri Samir Pal, FMAT 107 of 2022 with CAN 1 of 2022, decided on 21st July, 2022***

2. *Nil Ratan Kundu & Anr. Vs. Abhijit Kundu, (2008) 11 SCR 1111.*
3. *Harakchand Gulabchand Dhoka Vs. Kashinath Narsingh Marathe, 2010 (6) Bom.C.R. 379.*
4. *Vijay Baburao Katore & Ors. Vs. Bhausaheb Baburao Katore & Ors.; Writ Petition No.9033 of 2012, decided on 05th November, 2012.*
5. *Harikisha Vedprakash Agarwal & Anr. Vs. Burjor Joshi & Ors., Notice of Motion No.2658 of 2012 alongwith Notice of Motion No.1002 of 2010 In Suit No.92 of 1982; decided on 10th April, 2015.*

6. Per contra, learned counsel for the respondent submits that the decisions which are relied upon by the petitioner are distinguishable on facts, as in the present case the issue of custody is between respondent no.3-father and respondent no.1-mother and the petitioner is the grand-father and cannot be considered as a natural guardian. He would further point out that Part IV of the written statement merely adopts the written statement of the petitioner and upon striking off of the defence of respondent no.3, the written statement of the petitioner, which adopts the written statement of respondent no.3 also cannot be considered. He would further submit that the averments made in paragraph nos.1 to 47 and 60 to 83 are not found in the written statement filed by the petitioner and the affidavit in lieu of examination-in-chief cannot go beyond the pleadings.

7. I have considered rival submissions of the parties.

8. It is not in dispute that the written statement filed by respondent no.3-husband has been adopted by the petitioner

herein and as such, will be considered to be the written statement of the petitioner. For non compliance by Respondent No 3, the defence of the Respondent No 3 has been struck off under Order XXXIX Rule 11 of the Code of Civil Procedure, 1908 (High Court Amendment). The effect of the impugned order dated 13.01.2023 is that the defence of the Petitioner is struck off as the Petitioner adopts the written statement of Respondent No 3, which cannot be sustained.

9. There is another aspect of the matter. The application of the Respondent No 1 is for deletion of portion of Affidavit of evidence which according to her are beyond the pleadings in as much the Petitioner's evidence reproduces the written statement of Respondent No 3, whose defence is struck off. An Affidavit of evidence partakes character of examination in chief of witness and there is no provision in the Code of Civil Procedure under which Court can direct deletion of any portion of examination in chief. An objection can always be taken to any portion of the Affidavit of evidence and during cross examination, the attention of the witness can be drawn towards the portion which is beyond pleadings, which objection can be considered by the Trial Court at the time of final adjudication.

10. The decision in the case of ***Vijay Baburao Katore*** (supra) is squarely applicable to the facts of the present case, wherein it has been held that the relevancy of the evidence and the weightage given to the evidence can be considered at the time of the final adjudication and at this stage it is improper for the Court to discard the said evidence itself. Faced with the decision in the case of ***Vijay Baburao Katore*** (supra), the

learned Counsel for Respondent is unable to support the impugned order directing deletion of portion of Affidavit of evidence.

11. Considering that the objection raised by respondent no.1 to the affidavit of evidence is for the reason that the evidence is beyond the pleadings, the trial Court will have to consider the objection at final adjudication.

12. The other decisions relied upon by the learned senior counsel for the petitioner lays down that consistent view that it is welfare of the child which is a paramount importance and the same should not be defeated by taking a technical views. It would be worthwhile to note that in the present case the defence of respondent no.3-husband has been stuck off and no written statement order has been passed against respondent nos.2 and 4 and as such, by virtue of the impugned order, the proceedings have been rendered defenseless.

13. Considering the above, the Petition succeeds. The impugned order dated 13.01.2023 is hereby quashed and set aside.

(SHARMILA U. DESHMUKH)
JUDGE

Devendra/January-2023