

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.655 OF 2023

Corniche Land Private Limited,
A company incorporated under
the Companies Act, having its
Registered Officer at Unit No.81,
Plot No.14, Marol Co-operative
Industrial Estate, Off Andheri
Kurla Road, Andheri (East),
Mumbai 400059.

Presently having its registered
office 132, Bayside Mall, 1st Floor,
Tardeo, Haji Ali Mumbai
400034. Represented herein by
authorised representative Adv.
Premanand Gawas, s/o. Vasant
Gawas, aged 39 years, r/o.
H.No.24/19, Durigwada,
Navelim, Sakhalim Goa, duly
authorized by resolution dated
16/11/2009.

... Petitioner

Versus

Reis Magos Estates Pvt. Ltd. A
Company incorporated under
Companies Act, 1956, having its
registered office at Landscape
Mendes Plaza, Opp. The Goa
State Corp. Bank Ltd.,
Caranzalem, Panaji, Goa
represented by its Director,
Suresh Vishwanath Parulekar,
aged 60 years, son of Mr.
Vishwanath Parulekar, Indian
National, businessman, resident
at House No.107/A, Vishwanath
Sadan, Verem, Betim, Goa.

...Respondent

Mr Sudin Usgaonkar, Senior Advocate *with Ms Pooja Naik and Ms Divya Parab, Advocates for the Petitioner.*

Mr Hanumant D. Naik, Advocate *with Mr Aditya Naik, Advocate for the respondent.*

CORAM:
DATED:

PRAKASH D. NAIK, J
10th OCTOBER, 2023

JUDGMENT:

1. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India challenging the order dated 03.05.2023 passed by the Civil Judge Senior Division, Mapusa, North Goa, whereby the application filed by the petitioner in Commercial Civil Suit No.23/2022/A was rejected.

2. The petitioner filed a suit in the Court of Civil Judge, Senior Division, Mapusa, viz., Special Civil Suit No.173/2009/B on 30.11.2009 against the respondent for seeking directions to specifically perform the Agreement of Sale dated 03.07.2008 by executing conveyance of the suit property in favour of the petitioner company and in the alternative/in lieu thereof the respondent be directed to refund Rs.14,90,00,000/-(Rupees Fourteen Crores Ninety Lakhs only) along with interest @13%

per annum on the said amount from 02.02.2009 till actual payment with damages and compensation of rupees ten crores.

3. The suit was amended to include additional alternate prayer to the effect that the defendant be directed to refund Rs.14,90,00,000/- (Rupees Fourteen Crores Ninety Lakhs only) along with interest @13% per annum on the said amount from 02.02.2009 till actual payment and damages as well as compensation being an amount of rupees ten crores.

4. The petitioner/plaintiff examined Sanjay Ghatwal as PW1 representing the petitioner. His examination-in-chief was recorded. He was cross-examined. According to petitioner, the witness refused to come to Court to complete his examination.

5. The petitioner filed application to discard the evidence of PW1 on the ground that the witness is not available. The respondent filed reply to the application dated 25.07.2022 and opposed the relief sought in that application. In the reply it was contended that the application is not maintainable in law. There is no provision to discard the evidence of the witness who has been examined in support of the case of plaintiff. In the

application it has been stated that the witness was an employee of sister concern of plaintiff company and he has left employment and started working elsewhere. However, in the affidavit in evidence the said witness had stated that he is working in the plaintiff's company and it was not known as to how it was then stated that he was an employee of sister concern of plaintiff company. It was further contended that the witness was cross-examined extensively and almost 33 pages of cross-examination has been recorded and, therefore, at this stage, the evidence of the witness cannot be discarded merely on the ground that he has left the company. If PW1 has resigned from the company, the plaintiff ought to have produced the resignation letter as well as the acceptance of such resignation. If the witness is not going to depose before the Court in spite of all the efforts made by the plaintiff, as contended by the plaintiff, then the Court can issue summons or warrant. Substantial evidence has been recorded and the defendant is entitled to refer to the said deposition in support of defendant's case to the extent of cross-examination. If the witness was not cross-examined at all, then the evidence could have been discarded. However, in the present case witness has been cross-examined at great length and, therefore, the evidence cannot be discarded.

6. Learned Civil Judge decided the application vide order dated 03.05.2021. The order stipulates that the application was partly granted. The order indicates that the plaintiff was permitted to examine second witness who would be PW2 for the purpose of evidence in the present case. Both the parties were given liberty to raise all objections if any, at the appropriate stage pertaining to incomplete evidence of PW1.

7. Learned Senior Advocate Mr Sudin Usgaonkar appearing for the petitioner submitted that the impugned order is contrary to the well-established principles of law. The evidence of the witness which could not be completed is required to be discarded. It is not complete evidence. The plaintiff has a right to re-examine the witness. Cross-examination is absolute right of the plaintiff. In the absence of re-examination, it cannot be said that the evidence is complete. If the evidence is not complete it has to be discarded. Section 137 of the Evidence Act relates to examination-in-chief, cross-examination and re-examination. The petitioner cannot be deprived of the right of re-examining the witness. The witness has left the employment

and started working elsewhere. The trial Court was empowered to entertain the application preferred by the petitioner by invoking Section 151 of the Code of Civil Procedure. The trial Court has passed an erroneous order directing that the plaintiff is permitted to examine its second witness who would be PW2 for the purpose of evidence in the case. The question of examining second witness does not arise. The evidence of first witness has to be discarded and the plaintiff must be given an opportunity to examine another witness by discarding the evidence of the first witness. The trial Court overlooked the reasons stated in the application preferred by the petitioner. The trial Court failed to realise the impact and implication of Order XVIII Rule 3A of Code of Civil Procedure which deals with hearing of the suit and examination of witnesses. As per Section 3A of the Code of Civil Procedure, where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for some reasons to be recorded permit him to appear as his own witness at a later stage. If the party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined. It is for this reason the application was preferred to examine another person representing the

plaintiff as PW1 but by discarding incomplete evidence of witness already examined as PW1. The examination of another person as PW2 would be deficiency and would not meet the purpose for which suit was filed as that would not be in accordance with procedural law. The witness would not be a representative of the plaintiff but an ordinary witness. Since PW1 is examined, it would be held that plaintiff has not examined himself leading to an adverse inference to be drawn against the petitioner although the petitioner in fact wishes to examine itself. To examine the second witness, no leave of the Court was required as that would be a right of the party. The trial Court has held that the point relating to relevancy/admissibility of the incomplete evidence should be raised at appropriate stage and disagreed with the petitioner to discard the incomplete evidence of PW1. PW2 cannot produce the documents of petitioner and hence would necessarily rely upon the incomplete evidence of PW1 which is not complete as the petitioner did not get opportunity to re-examine PW1. The trial Court overlooked the fact that PW2 cannot produce the documents of the petitioner and would necessarily rely upon the incomplete evidence of PW1. The trial Court has chosen to ignore the fact that in case another witness is not examined as

PW1 and again produces all the documents relied upon by the plaintiff, the trial Court will have to rely upon the incomplete evidence of PW1 only, which is highly detrimental to the case of the petitioner.

8. Mr Usgaonkar has relied upon large number of decisions delivered by the Courts in India as well as the foreign courts in an attempt to bring home the submissions urged by him which are as follows:

- a. *The Regional Manager And Another v/s. Pawan Kumar Dubey*¹.**
- b. *Vidhyadhar v/s. Manikrao And Another*².**
- c. *V. Jayakannan and Ors. v/s. V. K. Sampath*³.**
- d. *Hari Shrawan Sutar v/s. Ramdas Tukaram Patil*⁴.**
- e. *Shantabai w/o. Jagannath Jaiwsal and Others v/s. Anandibai wd/o Satyanarayan Jaiswal*⁵.**
- f. *Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In Re v/s. State of Andhra Pradesh And Others*⁶.**

1 (1976) 3 SCC 334

2 (1999) 3 SCC 573

3 (1991) 2MLJ77

4 1985 Mh.L.J.

5 [2006(5) Mh.L.J.

- g. Mahabanoo Navroz Kotwal v/s. Piloo Fali Bomanji Amarchand Mansion and Another⁷.***
- h. Rajendra Prasad Gupta v/s. Prakash Chandra Mishra And Others⁸.***
- i. R. Transport Corporation v/s. Philhino Sales Corporation⁹.***
- j. Kenneth Ramalope And The State¹⁰.***
- k. The State And Msimango, Zwelithini Ndumiso Sindane, Mendi Ottis Ready Pedy Bel-Air¹¹.***
- l. Beardsworth v/s. Whitehead.¹²***
- m. Siddharth Ray v/s. State of Punjab¹³.***
- n. Raghu Nath Biswas v/s. Rabi Ram Chandra Jaladhar & Ors¹⁴.***
- o. Rammi alias Rameshwar v/s. State of M.P¹⁵.***
- p. Shri Gurdial Singh v/s. M/s. Arudatta Triotex Engineers Pvt. Ltd., & Anr¹⁶***
- q. Shri Durgashankar S. Tridevi & Ors. v/s. Shri Babubhai***

6 (2021) 10 SCC 598

7 2014 SCC OnLine Bom 615

8 (2011) 2 SCC 705

9 G.R.No.148150 dated 12.07.2006 by Supreme Court of Manila

10 Case No.690/93 dated 29.03.1995 decided by Supreme Court of South Africa.

11 Case No.187/2005 decided by South Gauteng High Court, Johannesburg.

12 (137 App. Div.306), Supreme Court, New York County dated 24.03.1910.

13 2014 SCC OnLine P&H 19222

14 2008 SCC OnLine Cal 74

15 (1999) 8 SCC 649

16 2011 (6) ALL MR 505

***Bhulabhai Parekh*¹⁷**

9. Learned advocate Mr Hanumant D. Naik for the respondent submitted that the evidence of PW1 cannot be discarded. The said witness was cross-examined at length. The cross-examination was running into 33 pages. There is no provision for discarding the evidence. After extensive cross-examination, the plaintiff cannot contend that in place of PW1 some other witness can be examined. Merely on the ground that the petitioner contends that the witness can be re-examined, his evidence which is on record does not vitiate. The petitioner is at liberty to examine any other witness for further evidence. The petitioner had contended that the witness was employed with sister concern of the petitioner and he left the employment, whereas, in the evidence, it was stated that he was employee of the plaintiff company. The resignation letter of the witness was not produced. If the witness was not cross-examined at all then probably his evidence could have been discarded but not after detailed cross-examination and admission given by him in the evidence. The petitioner has not placed on record the copy of the affidavit-in-evidence and the cross-examination of PW1. As

¹⁷ 2003(2) ALL MR 565

per Order XVIII Rule 4 of Code of Civil Procedure party has a right to withdraw the affidavit prior to commencement of cross-examination of that witness without any adverse inference being drawn based on such withdrawal provided that any other party shall be entitled to tender his evidence. The reason given by the petitioner that the witness left service cannot be reason to discard the entire evidence. The trial Court has not closed the evidence of petitioner and permitted them to examine its second witness. Both the parties are at liberty to raise all objections at appropriate stage pertaining to incomplete evidence of PW1. The defendant is entitled to rely upon the evidence already recorded.

10. Mr Naik has relied upon the following decisions:

- a. *Dever Park Builders Pvt. Ltd. And Ors v/s. Madhuri Jalan and Ors.*¹⁸.**
- b. *Digambar Ramchandra Bawaskar v/s. Soma Prabhu Pawar and Ors*¹⁹.**
- c. *Amrut Rohokale and Ors v/s. Bhaskar Shrimant Rohokale and Ors.*²⁰.**

18 G.A. No.1350 of 2002 decided on 09.09.2002 High Court of Calcutta;
MANU/WB/0241/2002

19 Writ Petition No.1539/2016 decided on 19.07.2017;
MANU/MH/1608/2017.

20 Writ Petition No.06959/2017 decided on 29.11.2017;
MANU/MH/3118/2017.

- d. Sharat Dass and Associates v/s. Rameshwar Singh and Ors²¹.***
- e. Banganga Cooperative Housing Society Ltd., v/s. Mrs. Vasanti Gajanan Nerurkar²².***

11. The petitioner/plaintiff filed a suit for specific performance of contract. It was filed through its authorised representative Shri Premanand Gawas. Trial had commenced. The evidence of PW1 Sanjay Ghatwal was recorded. Surprisingly, representative of the plaintiff company through whom the suit was filed was not examined as PW1. Mr Sanjay Ghatwal in affidavit of evidence has stated that he is working in plaintiff's company. In the application for discarding evidence it is stated that Sanjay Ghatwal was an employee of the sister concern of the plaintiff. His evidence remained inconclusive. He has left employment. He is no more in the employment of the sister concern of the plaintiff. It is pertinent to note that plaintiff is a company. Any other person can be examined for further evidence on behalf of the company. After affidavit-in-evidence of PW1 was filed, his cross-examination was conducted at length for a substantial

21 W.P.(C)12292/2021, CM Appls.38585/2021 and 38587/2021 decided on 28.10.2023 by High Court of Delhi.

22 2016(7) ALL MR 415

period of time. It runs into around 33 pages. No case is made out for discarding the evidence of PW1.

12. Order XVIII Rule 4 of Code of Civil Procedure reads as follows:

**“ORDER XVIII
HEARING OF THE SUIT AND EXAMINATION OF
WITNESSES:**

1. ...
2. ...
3. ...
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 and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:

(3) The Court or the Commissioner, as the case may be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner, he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court of the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission under this rule."

13. The Order XVIII relates to hearing of the suit and examination of witnesses. Rule 4 provides procedure for recording evidence. As per the said rule in every case the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court. The evidence of the witnesses in attendance, whose

evidence by affidavit has been furnished to the Court shall be taken either by Court or by Commissioner appointed by it. The Court or the Commissioner shall record the evidence. After recording of evidence and substantial cross-examination there is no provision for discarding the examination-in-chief and the cross-examination. The petition for discarding the evidence on account of absence of PW1 at this stage when the application was preferred by the petitioner cannot be allowed.

14. In the case of ***Rammi alias Rameshwar v/s. State of M.P.*** (supra), it was observed that the very purpose of examination is to explain matters which have been brought down in cross-examination. There is erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. That is not the only function of re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination, he is at liberty to put questions to re-examine to get the explanation. In the case of ***Raghu Nath Biswas v/s. Rabi Ram Chandra Jaladhar*** (supra), the Calcutta High Court has considered the scope of Section 137 of the Indian Evidence which refers to examination-in-chief, cross-

examination and re-examination. It was observed that Section 137 and Section 138 of the Indian Evidence Act indicate that statute vests an absolute right upon a party to re-examine its witness if the party calling upon him or her so desires. In the case of ***Shri Gurdial Singh v/s. M/s. Arudatta Triotex Engineers Pvt. Ltd., & Anr.*** (supra), it was observed the re-examination of witness is not confined only to clarification of facts stated in cross-examination. In the case of ***Siddharth Ray v/s. State of Punjab***, (supra), the Punjab & Haryana High Court has observed that re-examination shall be directed to the explanation of matters referred to in cross-examination and if new matter is, by permission of the Court, introduced in re-examination, the party who is calling the witness has a right to re-examine the witness. In the case of ***Rajendra Prasad Gupta v/s. Prakash Chandra Mishra And Others*** (supra), it was observed that the civil procedure has permitted to Court for doing justice unless expressly prohibited. In the case of ***Mahabanoo Navroz Kotwal v/s. Piloo Fali Bomanji Amarchand Mansion and Another*** (supra), it was observed that Section 151 of the Code of Civil Procedure gives inherent powers to the Court to strike of the irrelevant evidence at the stage of the party tendering the affidavit in lieu of examination-

in-chief with a view to avoid any further delay in the matter and to avoid any cross-examination of irrelevant issues. In the case of ***Shri Durgashankar S. Tridevi & Ors. v/s. Shri Babubhai Bhulabhai Parekh*** (supra), this Court had observed that objection to admissibility of documents in evidence should be dealt with and decided at the time of affidavit with documents are produced and being taken on record. Decision cannot be postponed till final disposal of the case or any time after the documents are exhibited in accordance with Order XIII Rule 14 of Civil Procedure Code. In ***Hari Shrawan Sutar v/s. Ramdas Tukaram Patil*** (supra), it was held that except where leave granted, party is not free to examine at a later stage. In the case of ***V. Jayakanna and Ors. v/s. V. K. Sampath*** (supra), it was observed that the party examining himself before other witnesses are examined is the rule. The party examining himself after the other witnesses are examined, is an exception. An exception can be made only for valid reasons and that those valid reasons will depend on the facts and circumstances of each case. The obvious purpose of this rule is to do away with the practice which had grown in Indian Courts of examining all other witnesses first and then the party entering the witness box to fill up all the lacunae which

might have left or to undo the damage which might have been made by other witnesses. In the case of ***The Regional Manager And Another v/s. Pawan Kumar Dubey*** (supra), it is observed that it is the rule deducible from the application of law to the facts and circumstances of a case which constitute its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or difficult fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts. In the case of ***Shantabai w/o. Jagannath Jaiwsal and Others v/s. Anandibai wd/o Satyanarayan Jaiswal*** (supra), it was held that order to admit or reject the document need not be postponed. It must be decided so as to enable the party in case its application is rejected to resort to lead any other evidence to establish the fact to be established by producing the document in question. In ***Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In Re v/s. State of Andhra Pradesh And Others*** (supra), it is held that the Presiding Officer should decide objection in questions during the course of proceedings. In ***Vidhyadhar v/s. Manikrao And Another*** (supra), it is observed that, where a party to the suit does not appear in the

witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct.

15. In ***R. Transport Corporation v/s. Philhino Sales Corporation*** (supra), the Supreme Court of Manila has observed that after the testimony of witness was completed the cross-examination was conducted. Application was moved for suspension of cross-examination. The defendant's witness was required to leave. It was prayed that the scheduled cross-examination be cancelled. The trial Court passed order to strike out from the records the testimony of the witness due to failure of the latter. In the case of ***Kenneth Ramalope v/s. The State*** (supra), it was observed that the right of a party to re-examine his or her witness is not a privilege or favour granted by the Court, but a legal right statutorily entrenched. In ***State And Msimango, Zwelithini*** (supra) the foreign court dealt with the issue as to what probative value, if any, must be attached to the evidence of a witness who was not completely cross-examined during a criminal trial, for example where a witness dies during cross-examination. It was observed that the accused has right to cross-examine any witness called by the

prosecution at criminal proceedings. In ***Beardsworth v/s. Whitehead*** (supra), it is observed that while there may be circumstances under which failure or refusal of a party to appear and be examined by his adversary will either a stay of the proceedings or dismissal thereof and the existence of such circumstances must be clearly shown. The usual remedy for failure or refusal of a witness to appear for cross-examination being to strike out his testimony.

16. All of these decisions were decided in the context of the factual matrix of those cases.

17. In the case of ***Dever Park Builders Pvt. Ltd. And Ors. v/s. Madhuri Jalan and Ors*** (supra), the Calcutta High Court had dealt with a point as to whether the evidence recorded by the original defendant being dead should be expunged or rejected as it could not be completed in view of death during examination. It was held that the provisions of Section 33 of the Evidence Act is not applicable. The issue is precisely the evidence already recorded by the Commissioner of the deceased defendant, who did not face cross-examination fully, is to be admitted and further to be considered at the time

of the trial of and deciding the suit or not. The testimony of the deceased defendant is admissible and the Court is bound to consider its weight to be attached for deciding this matter. Each and every proof in examination in chief does not require being cross-examined. There are cases where no cross-examination is really required. Portion of the examination-in-chief was cross-examined and such portion is admissible in evidence and be considered without any hesitation by the learned Judge at the time of hearing and deciding suit. The Court refused to accept the argument that the evidence of the deceased defendant shall be expunged and rejected altogether. It was held that it shall be considered and how much weight should be attached shall be decided considering the other facts and circumstances surrounding it. In the case of ***Digambar Ramchandra Bawaskar v/s. Soma Prabhu Pawar and Ors*** (supra) decided by this Court, the petitioner was aggrieved by the order by which his application to withdraw the affidavit filed in lieu of examination-in-chief was rejected. The petitioner had tendered affidavit in lieu of examination-in-chief. Before the cross-examination began he filed an application to withdraw the affidavit. This Court referred to decision in the case of ***Banganga Cooperative Housing Society Ltd., v/s. Mrs.***

Vasanti Gajanan Nerurkar (supra) and it was held that the petitioner cannot be permitted to withdraw his affidavit filed before the Court. However, the plaintiff would have an option to explain the error in the affidavit by stepping in the witness box to lead over oral examination-in-chief. In the case of **Amrut Rohokale and Ors v/s. Bhaskar Shrimant Rohokale and Ors** (supra), this Court was considering the issue relating to the evidence of the defendants wherein it was stated that he is deposing on behalf of himself and the other defendants. This fact was admitted in his cross-examination. At the time of cross-examination defendant no.4 was present in the Court. Subsequently, defendant no.4 filed affidavit-in-examination. It was prayed that the said affidavit be discarded. It was held that the defendant no.4 filed his affidavit-in-chief and in fact it was read and recorded after verification by the Court. When it has become part of the evidence it cannot be discarded for which there is no specific provision. The Advocate representing the party relied upon Order XVIII of Code of Civil Procedure and Section 151 of Code of Civil Procedure. The Court observed that Order XVIII deals with hearing of the suit and examination of witnesses. Provision is made in respect of right to begin, statement, etc. There is no provision to discard a piece of

evidence which has been admitted. Section 151 of Code of Civil Procedure cannot be applied. It relates to inherent powers of the Court. After the affidavit of examination-in-chief of defendant no.4 was read and recorded, it had become part of evidence and, therefore, such part of evidence cannot be discarded. In the case of ***Sharat Dass and Associates v/s. Rameshwar Singh and Ors.*** (supra), the Delhi High Court was dealing with the case of the petitioner therein that once the affidavit of evidence was filed by the witness and the cross-examination was taking place, the permission and liberty could not have been granted by the Authority under the Act to withdraw the affidavit of evidence and file fresh affidavit of evidence. It was held that the affidavit cannot be withdrawn. In the case of ***Banganga Cooperative Housing Society Ltd., v/s. Mrs. Vasanti Gajanan Nerurkar*** (supra), this Court considered the question of law relating to affidavits in lieu of examination-in-chief filed under Order XVIII Rule 4 of the Code of Civil Procedure and the question of powers of a Court when dealing with an affidavit in lieu of examination-in-chief under Order XVIII Rule 4 of Code of Civil Procedure. The principle submission of the advocates was whether an evidence once filed can be withdrawn. It was argued that such affidavit become part

of the record and it cannot be changed, altered or withdrawn by the party filing it. It was observed that what is not in doubt is that there can never be withdrawal of evidence affidavit just as there can never be withdrawal of examination-in-chief conducted directly in Court. The Court referred to the situation where a party may want to lead the evidence of a witness and the witness filed an affidavit of evidence. While opportunity for cross-examination is allowed, the witness is not willing to give evidence. This is noticeable in the case of companies and bodies corporate, independent juristic entities. It was observed that, where the testimony is incomplete by reason of death or incapacity of the witness before cross-examination, the evidence, admissible when given, does not cease to be so merely on account of that fact merely on account of that intervening factual circumstance. What probative or evidentiary value is to be attached to this evidence is another matter, and turns on the circumstances of each case. A court may seek independent corroboration of that evidence. It may accept it, cautiously, and that is no infirmity *per se* in the final decision. Order XVIII Rule 4 requires two things. (1) what is stated must constitute examination-in-chief; and (2) it must be stated in the form of affidavit. Order XIX indicate what an affidavit cannot contain

and to what it must be restricted. The Evidence Act discloses what can construe examination-in-chief or evidence and what cannot. If any portion of evidence affidavit does not conform to this requirement, it is not examination-in-chief and cannot be allowed to pass into the evidentiary record of the trial. No evidence affidavit under Order XVIII Rule 4 of Code of Civil Procedure can be allowed to be withdrawn. It is evidence as soon as it is affirmed. Whether the evidence affidavit is filed and the witness though otherwise available is not made available for cross-examination, the well-established consequence in law will be followed. The opposite party will be entitled to submit that an adverse inference be drawn against such witness.

18. Applying the principles of law as enunciated in various decisions to the present case, I do not find any reason to interfere in the impugned order. The affidavit of evidence in chief with substantive cross-examination cannot be discarded. The plaintiff in this case is a company. PW1 was examined on behalf of the company. His examination-in-chief is recorded. The cross-examination was conducted for about 33 pages. Thereafter, witness did not turn up. Right to re-examine witness is not absolute right as party will have to make out case for re-

examination of witness in certain circumstances. After evidence of PW1 in chief his cross-examination was conducted by Advocate for respondent on 16.09.2016, 22.09.2016, 25.11.2016, 04.01.2017, 12.04.2017, 12.06.2017, 10.09.2018 and 10.01.2020. The learned Civil Judge has observed that, since the witness is claimed to be not available to complete his cross-examination and further re-examination, his evidence would remain incomplete. Whether such incomplete evidence would be relevant, admissible or could be relied upon by the parties at the time of final arguments or not, can be considered at appropriate stage. This is not the stage to discard the evidence of PW1 merely because his evidence is incomplete. The plaintiff was permitted to examine its second witness. Both parties were given liberty to raise all objections at appropriate stage pertaining to incomplete evidence of PW1. The learned counsel for petitioner has urged that trial Court ought to have decided admissibility of evidence issue at this stage. In the facts of this case, I do not find any infirmity in the impugned order. In the cross-examination of PW1 the respondent has brought on record several facts in their defence. The plaintiff is a company. PW1 was examined as representative of plaintiff company. This Court in the case of ***Banganga Cooperative Housing Society***

Ltd., v/s. Mrs. Vasanti Gajanan Nerurkar (supra) had dealt with issues such as permissibility of deletion or redaction of any portion of any such affidavit if that part is found to be inadmissible as evidence and if so, at what stage of the proceedings should this be done; can a party withdraw an evidence affidavit without consequence; can an evidence affidavit, once filed, ever be returned; what are the consequences if an affidavit is filed and then it is found perhaps a long time later that the deponent of that evidence affidavit is either unavailable or cannot be tendered for cross-examination. It is observed that there can never be a withdrawal of an Evidence Affidavit, just as there can never be a withdrawal of an Examination-in-chief, conducted in Court. Where the testimony is incomplete by reason of death or incapacity of the witness before cross-examination, the evidence, admissible when given, does not cease to be so merely on account of that intervening factual circumstance. What probative or evidentiary value is to be attached to this evidence is another matter and turns on the circumstances of each case. In the present case, exhaustive cross examination was conducted and thereafter PW1 did not appear for further evidence. The petition is devoid of merits and deserves to be dismissed.

ORDER

(i) Writ Petition No.655 of 2023 is dismissed.

(ii) Petition is disposed of.

(PRAKASH D. NAIK, J.)

MARIA SUZANA REBELLO Digitaly signed by MARIA SUZANA REBELLO
Date: 2023.10.27 18:55:50 +05'30'