

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9448 OF 2017

Nirali Ashwin Negandhi .. Petitioner
Versus
Jayantilal Investments & Anr. .. Respondents

WITH
WRIT PETITION NO. 13190 OF 2017

Nirali Ashwin Negandhi .. Petitioner
Versus
Jayantilal Investments & Anr. .. Respondents

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- Mr. Ish Jain a/w Mr. Rajan Yadav & Ms. Radha Ved i/by Mr. Kiran Jain & Co for Petitioner
 - Mr. Yatin R. Shah a/w Ms. Shweta Singh for Respondents
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CORAM : MILIND N. JADHAV, J.

DATE : JANUARY 12, 2023

P.C.:

- 1.** Heard Mr. Jain, learned Advocate for Petitioner and Mr. Shah, learned Advocate for Respondents.
- 2.** Perused the impugned order dated 29.07.2017 passed by the learned Trial Court in both Petitions, which are identical. This order shall dispose of both Petitions. For convenience facts in Writ Petition No.13190 of 2017 are considered.
- 3.** By the present Petition, Petitioner (original Plaintiff) has challenged the order dated 29.07.2017 passed below Exh. 24 by the Bombay City Civil Court allowing the Application filed by Respondents

(original Defendants) seeking leave of the Court to file additional affidavit.

4. At the outset, Mr. Jain, learned Advocate for Petitioner has drawn my attention to the additional affidavit which is at page 147 of Writ Petition No. 13190/2017 wherein he has restricted his objection to allow the contents of paragraph Nos. 6, 7 and 8. He submitted that by virtue of the said paragraphs, Defendants have sought to delete and add certain specific admissions which were originally there in paragraph Nos. 4 and 7 of the earlier affidavit. I have perused the deletions / additions which are sought for by the Defendants in the additional affidavit dated 19.07.2017.

5. Mr. Jain submitted that by virtue of the said deletion / addition, specific admissions which were contended by the Defendants in the earlier affidavit are sought to be reversed and such course of action is not permissible in law. He has placed reliance on the decision of this Court in the case of **Banganga Co-operative Housing Society Ltd Vs. Vasanti Gajanan Nerurkar**¹ to contend that a party who has filed his affidavit of evidence earlier cannot be allowed to retract and withdraw the said affidavit of evidence and permit him to file a fresh affidavit of evidence by reversing the admissions and deleting the material portion which goes to the root of the matter in a given case. He submitted that once evidence affidavit is filed, it is

¹ 2015 SCC OnLine Bom 3411

equivalent to the witness giving his deposition in the witness box and in that view of the matter, he cannot be thereafter permitted to file fresh / additional affidavit of evidence.

6. I have perused the said decision and it is no doubt correct that once the affidavit of evidence is filed and the witness steps into the witness box, it follows that his examination-in-chief is in progress as soon as it is affirmed and in that view of the matter, it would not be possible for the said witness to withdraw the said evidence affidavit. However such is not the case here.

7. In the instant case, Defendant has filed additional affidavit seeking specific deletion of certain words and addition of conjunction 'and' as stated in paragraph Nos. 6, 7 and 8 of the Application. The learned Trial Court has examined the issue in accordance with law and has returned a correct finding. The learned Trial Court has come to the conclusion that since the witness is not cross-examined by the Plaintiff, the Plaintiff has an adequate opportunity to cross-examine the witness on the said aspect / documents and therefore permission to file additional affidavit as prayed for needs to be granted. That apart, the finding returned by the learned Trial Court in paragraph Nos. 14 and 15 go to the root of the matter. I find it necessary to reproduce the findings in paragraph No. 14 of the impugned order which lays down the procedure in the event if a clarification is

required to be given by the witness before his cross-examination beings. Paragraph No. 4 reads thus:-

“14. In the other Judgment in Testamentary Suit No.65 of 2005 in Testamentary Petition No.2 of 2005, Aban Homa Petit & Anr. V/s. Naryosang D. Cassad, in which the Hon’ble Bombay High Court discussed that:-

The form in which the examination in chief is completed is not determinative. As the Supreme Court has repeatedly held the purpose of the amendment to the Civil Procedure Code with amended Order XVIII Rule 4 was to expedite trials. Examination in chief can also be recorded in court. It was not in any sense to restrict the primary duty of a Court which is to ascertain the truth. Order 18 Rule 4 cannot be used to shut out evidence. The Supreme Court has specifically stated that our Rules or procedures must yield to the cause of justice. Each one of these objectives is defeated if Mr. Tiwari’s submissions are accepted. There seems to be no call for the opposition other than the fact that the evidence affidavit was filed some seven years ago and the second affidavit is very recent. This is not so much the fault of any party or any witness as a result of the delays endemic to our judicial system. I do not see how any party can be disadvantaged in this manner. It may sometimes happen that after a few days’ reflection but before cross examination begins a witness may wish to elaborate or clarify a statement made at some earlier point in time. This is hardly unfair. In fact, even if the evidence in chief is taken directly (and not on affidavit), a witness is usually afforded the opportunity to go through the transcript so that he is not held to some statement that is inaccurately noted. I can understand the objection if the witness had attempted to file a further affidavit after his cross examination was commenced. But that, as Mr. Diwan points out, is not the case here. The matter has been awaiting trial for many years. In his second affidavit, the witness seeks to clarify some statements made earlier. There can be no possible objection to this. After all, Mr. Tiwari will have the fullest latitude in cross examination, including cross-examining the witness on why some statements are made in 2015 that were not made in 2008.”

8. In view of the above observation and finding, the impugned order does not call for any interference. Both Writ Petitions are dismissed.

9. Needless to state that it is clarified that all contentions of the parties are expressly kept open and it shall not only be open to the Plaintiff to cross-examine the witness / Defendant but also to plead all

such defences available in law with respect to addition / deletion /
withdrawal of the admissions as allowed by the Trial Court.

[MILIND N. JADHAV, J.]

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signed by
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