

THE HON'BLE SRI JUSTICE T. VINOD KUMAR

CRP No.2999, 3000 of 2022

COMMON ORDER:

1. C.R.P. No. 2999 of 2022 and C.R.P. No. 3000 of 2022 are filed challenging separate orders dated 21.11.2022 in I.A. No. 339 of 2022 in O.S. No. 651 of 2006 and I.A. No. 341 of 2022 in O.S. No. 652 of 2006 (hereinafter 'the impugned orders') passed by the learned II Addl. District Judge at Medchal (hereinafter 'the trial court') whereby the Petitioner's application seeking to eschew her earlier affidavit-in-lieu of chief examination (hereinafter 'chief examination affidavit') and permission to file a fresh chief examination affidavit was rejected. As these revisions raise a common issue and the parties are also common, they are disposed of by this common order.

2. The petitioner herein is the Plaintiff No.1 in the above suit.

3. Perusal of the record indicates that the Petitioner in the present civil revisions had instituted two suits bearing O.S. No. 651 of 2006 and O.S. No. 652 of 2006 seeking specific performance

and permanent injunction in respect of the suit schedule property, originally against the Respondent No. 2 herein.

4. Initially Respondent No.2 herein was set-exparte on 12.03.2007 for non-filing of written statement. The Petitioner herein had then filed her evidence as PW-1 on 14.08.2007 and was completed on 29.08.2007. After the Petitioner's evidence was completed, the Respondent No.2/Defendant No.1 filed application to set-aside exparte order along with his written statement. The said application was allowed on 23.07.2008.

5. Thus, after the Respondent No.2/Defendant No.1 was allowed to come back on record, the trial court on 16.09.2008 framed six (6) issues to be decided during the trial based on the pleadings of the plaintiff and the original defendant. Subsequently, during the pendency of the said suits, the suit schedule property was sold to third parties and Respondent Nos. 3 & 4 herein who were the alleged purchasers were impleaded as defendant nos. 2 & 3 in the suits on 26.09.2009. Similarly, as the Petitioner had executed an assignment deed in favour of Respondent No.1 herein, he was impleaded as plaintiff No.2 on 04.11.2011. In sequel, the

plaint was amended and the Respondent No.2/Defendant No.1 filed his additional written statement on 08.10.2012.

6. Thereafter, the trial court posted the matter for trial on 05.12.2012. On the said date the chief examination affidavit filed by Petitioner earlier was recorded as filed and the matter was posted for marking of documents on 18.12.2012. Subsequently, on 22.07.2013 the Respondent No. 1/Plaintiff No.2 also examined himself and gave his evidence in part.

7. On 31.12.2019, the trial court noticing that the Petitioner herein as PW-1 failed to appear for cross examination by Respondent No. 2 to 4 herein, eschewed her evidence i.e., her chief examination affidavit recorded on 05.12.2012 along with the documents marked. The trial court after 15 months therefrom on 22.03.2021 closed the plaintiff evidence.

8. On the trial court closing the plaintiff's evidence, the Petitioner herein filed interlocutory applications in both the suits seeking to reopen the same. The trial court *vide* order dated 16.11.2021 allowed the applications and the plaintiff's evidence was reopened.

9. As Respondent Nos. 3 & 4 herein as defendant Nos. 2 & 3, had filed their written statements pursuant to the application under Order 8 Rule 10 being allowed by the trial court *vide* order dated 31.12.2021 in I.A. No.473 of 2021, the trial court framed two (2) additional issues on 21.02.2022 and permitted the Petitioner/plaintiff to adduce further evidence in relation to the additional issues.

10. As the matter stood thus, on 29.03.2022, the Petitioner herein filed a memo seeking to eschew her earlier chief examination affidavit and permission to file a fresh chief examination affidavit. The trial court *vide* a docket order dated 29.03.2022 granted relief as prayed. However, the said docket order was challenged before this Court in CRP No. 1388 of 2022 and CRP No. 1401 of 2022. This Court *vide* order dated 11.08.2022 set aside the docket order on the ground that relief as sought by the Petitioner herein/plaintiff cannot be granted based on a memo and can only be granted if an interlocutory application is filed. This Court granted liberty to the Petitioner herein to file an interlocutory application seeking the said relief and directed the trial court to consider the same in accordance with law.

11. The Petitioner thereafter, filed I.A. No. 339 of 2022 in O.S. No. 651 of 2006 and I.A. No. 341 of 2022 in O.S. No. 652 of 2006 seeking to file a fresh chief examination affidavit and praying that her earlier chief examination affidavit be eschewed. The Petitioner herein in the said interlocutory applications contended that as two additional issues were framed after filing of the defendant Nos. 2 & 3's written statement and as no prejudice will be caused, she may be permitted to file a fresh chief examination affidavit.

12. The trial court *vide* impugned orders dated 21.11.2022 dismissed the applications filed by the Petitioner herein. The court noted that evidence filed twelve (12) years back by the Petitioner herein cannot be eschewed and procedure does not permit one to give a go bye to earlier evidence. It was further noted that the Petitioner cannot go back on her earlier evidence, however, she can file an additional affidavit, if needed.

13. Aggrieved by the orders dated 21.11.2022 in I.A. No. 339 of 2022 in O.S. No. 651 of 2006 and I.A. No. 341 of 2022 in O.S. No. 652 of 2006, the Petitioner has filed the present civil revisions.

14. Heard Sri P. Venugopal, learned senior counsel appearing on behalf of Sri. S. Mallarao, learned counsel for the

petitioner/plaintiff, Smt D. Pramada, the learned counsel for the Respondent No.1. Sri. A. Venkatesh, learned senior counsel appearing for Ms. Manogna learned counsel for Respondent No.2, and Sri G. Arun, learned counsel appearing on behalf of respondents No.3 and 4.

15. The Petitioner herein contends that the trial court erred in passing the impugned orders dated 21.11.2022 as it failed to consider the subsequent events of framing of additional issues, impleadment of new defendants and the order dated 11.08.2022 of this Court in CRP No. 1388 of 2022 and CRP No. 1401 of 2022 granting liberty to the Petitioner to file an interlocutory application. It is further contended that as the Respondent No.2 had not objected to reopening of the Petitioner's evidence no prejudice would be caused to them if the Petitioner's chief examination affidavit was eschewed and she was permitted to file a fresh chief examination affidavit.

16. On the other hand, Respondent No. 2 contends that the evidence of the Petitioner was already eschewed on 31.12.2019 and the trial court *vide* order dated 23.11.2021 while taking into consideration that the Respondent No.2 had not objected to the

same, had reopened the Petitioner's evidence. It is contended that the Petitioner cannot take advantage and claim that by virtue of this order wherein the Respondent No.2 had not objected, the Petitioner would be permitted to file a fresh chief examination affidavit by eschewing the previous one, rather she was only permitted to lead further evidence. It is finally contended that, a witness whose evidence is already eschewed cannot be permitted to file a fresh chief examination affidavit.

17. I have heard the parties and perused the record.

18. The question which arises before this Court is whether the Petitioner herein can be permitted to file a fresh chief examination affidavit by eschewing her earlier chief examination affidavit on the ground of framing of additional issues and impleadment of new parties.

19. As stated above, the Petitioner had given her evidence by filing chief examination affidavit dated 05.12.2012. The said chief examination affidavit was eschewed by the trial court *vide* docket order dated 31.12.2019. Thereafter, the trial court re-opened the plaintiff's evidence on 23.11.2021. The Respondent No. 2 contends that the order reopening the plaintiff's evidence was only for the

purpose of leading further evidence and the same does not revive the eschewed chief examination affidavit of the Petitioner herein. Therefore, according to Respondent No. 2, the Petitioner herein cannot seek eschewing of evidence which was already eschewed and no fresh affidavit can be filed.

20. The contention of Respondent No. 2 raises the question whether re-opening the evidence of plaintiff No.1 revives her evidence which was eschewed on the ground of failure to subject herself to cross-examination. In other words, whether a party gets an opportunity to revive his/her eschewed evidence if the evidence is re-opened?

21. It is relevant to note that re-opening evidence and recalling witness is an inherent power of the court under Section 151 of the Code of Civil Procedure. The Supreme Court in ***K.K. Velusamy v. N. Palanisamy***¹ held that re-opening evidence is the discretion of courts and the same shall be exercised judiciously. In the interest of justice and where the parties show sufficient cause, the Court can re-open evidence or recall a witness.

¹(2011)11SCC275

22. According to this Court, evidence can be re-opened only in rare cases where it becomes necessary in the interest of justice. A party seeking to re-open evidence has to specifically state the reason and the purpose for which the evidence is sought to be re-opened. In other words, if a party seeks to re-open evidence by recalling a witness, such a party should specifically state the reason for such recalling and the details of the witness sought to be recalled. In the absence of a specific prayer in relation to re-opening of evidence, the court can only permit the party to lead further evidence and not to make good the earlier evidence or fill lacunae.

23. In the present case, the Petitioner herein filed an application to re-open the evidence in support of her case. She did not seek for setting aside of the order dated 31.12.2019 eschewing her evidence and also did not seek to subject herself to cross-examination. Therefore, the order dated 23.11.2021 re-opening the evidence of the plaintiffs does not revive the eschewed chief examination affidavit of the Petitioner herein. In other words, the Petitioner's evidence continues to be eschewed in light of the order dated 31.12.2019. Unless order eschewing evidence is specifically

challenged, such order continues and mere re-opening of evidence does not automatically set aside the order eschewing evidence.

24. At the cost of repetition, as the order dated 31.12.2019 eschewing the Petitioner's chief examination affidavit still continues to operate, the Petitioner cannot seek eschewing of her evidence. The Petitioner cannot seek eschewing of evidence which was already eschewed. Therefore, the relief sought by the Petitioner seeking eschewing of her chief examination affidavit cannot be granted.

25. *In arguendo*, a chief examination affidavit once filed cannot be eschewed on an application filed by a party. Eschewing of evidence means that the evidence given by a person is taken off the record. If a piece of evidence is eschewed, the same cannot be considered to adjudicate the disputes between the parties. In the present case, the Petitioner's request to eschew her chief examination affidavit is akin to a request of withdrawal. In other words, the Petitioner seeks to withdraw her chief examination affidavit dated 05.12.2012 and file a fresh chief examination affidavit. Thus the contention of the Petitioner for eschewing of

chief examination affidavit cannot be granted as it is not possible to withdraw a chief examination affidavit.

26. The Bombay High Court in *Banganga Cooperative Housing Society Ltd. v. Vasanti Gajanan Nerurkar*² held that a chief examination affidavit once filed cannot be withdrawn and a party cannot be allowed to improve his/her evidence. The relevant paragraphs read as under:

7. The submission by Mr. Jagtiani and Mr. Kanade is well founded, and it has one immediate consequence for our present purposes: once an Evidence Affidavit is thus filed, and since there is no absolute requirement of it being required to be reaffirmed by the deponent from the witness box before that affidavit forms part of the evidentiary record, it follows that it is examination-in-chief as soon as it is affirmed (or, at any rate, affirmed and filed) and it is not thereafter possible to "withdraw" an Evidence Affidavit. Once an Evidence Affidavit is filed, the examination-in-chief of the deponent has, to all intents and purposes, begun. It may be permissible for the deponent to file a further affidavit, since Order XVIII Rule 4 does not limit itself to a single affidavit, and although there is some authority for the proposition that a witness may not continuously file fresh affidavits to keep improving his case, the view of our court is somewhat different, viz., that there is no impediment to the taking of additional Examination-in-Chief or the filing of a further or additional or supplemental Affidavit in lieu of Examination-in-Chief. This was the view taken by a learned single Judge of this Court (Khanwilkar, J., as he then was) in *Rajesh Varma v Aminex Holdings & Investments & Ors.* MANU/MH/0025/2008 : 2008 (3) Mh.L.J. 460, paragraph 12 Not only am I in most respectful agreement with that decision, but it binds me; and it is also the view that I took in a recent order.

²2015 SCC OnLine Bom 3411

8. What is not in doubt is 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 directly in Court. This position, following RasiklalManikchand, raises some subsidiary questions: (1) what are the consequences of a deponent filing an Evidence Affidavit but not making himself available to a cross-examination? (2) Is it permissible for a Court to order the expunging or redaction of any part of an Evidence Affidavit?

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.

25. As regards the Chamber Summons filed by Mr. Godbole for leave to withdraw an Evidence Affidavit, in view of foregoing discussion, that portion of the prayer that seeks leave to 'withdraw' the Evidence Affidavit cannot be granted. Incidentally, I must note that Mr. Godbole candidly stated that the Evidence Affidavit sought to be withdrawn suffers from some infirmities and this is one of the reasons it is sought to be substituted. This is, indeed, another reason not to allow the relief for withdrawal. A party cannot constantly seek to improve on the evidence it leads. If Mr. Godbole elects not to offer the deponent of the Evidence Affidavit already filed for cross-examination, then that, too, will have the inevitable consequences. He will, however, be at liberty to lead the evidence of any other witness of his clients' choosing. Mr. Kanade will then be at liberty to use any contradictions between the two affidavits, and also to invite the drawing of an adverse inference. Whether or not the next witness can 'explain' or 'explain away' anything stated in the Evidence Affidavit of the first witness (and who is not proposed to be offered for cross-examination) will have to be examined at a later stage.

27. Further, in a similar case, the Bombay High Court in Digambar *Ramchandra Bawaskar v. Soma Prabhu Pawar*³ held that a chief examination affidavit cannot be withdrawn, however, a party can lead further evidence by filing an additional affidavit.

The relevant paragraphs read as under:

13. This Court in the matter of Arun BhikaMahale v. Ishwarlal Onkar Marathe - Writ Petition No. 6288 of 2013 has concluded by order dated 19.9.2013, that in some circumstances, where the party realizes some error in the affidavit in lieu of examination-in-chief, he is entitled to lead further examination-in-chief or can also file an affidavit. But the Court cannot order deletion of any portion of the said affidavit.

15. In the light of the above, I do not find that the impugned order could be termed as being perverse or erroneous. The petitioner cannot be permitted to withdraw his affidavit filed before the Court. However, considering the law laid down, the plaintiff would have the option of explaining the error in the affidavit by stepping into the witness box to lead further oral examination-in-chief or file an additional affidavit as a part of the examination-in-chief and clarify the mistake if any.

28. The Bombay High Court in *Amrut Rohokale v. Bhaskar ShrimantRohokale*⁴ held that once a chief examination affidavit is filed, it becomes part of evidentiary record and the same cannot be discarded. The relevant paragraph is as under:

³2017 SCC OnLine Bom 6751

⁴MANU/MH/3118/2017

8. Defendant No. 04 filed his affidavit in chief and in fact, it was read and recorded after verification by the trial court. Therefore, when it has become part of evidence, it cannot be so discarded for which there is no specific provision. When it was enquired with the learned Counsel for the respondent, as to under which provisions of law said application Exhibit 49 has been submitted, initially he pointed out Order XVIII of the Code of Civil Procedure [For short, "C.P.C."] and then submitted that if there is no specific provision, then it should be considered under Section 151 of the C.P.C. **I do not agree with this submission. Order XVIII of the C.P.C. deals with hearing of the suit and examination of witnesses. The provision is made in respect of right to begin, statement to be made, order of recording evidence and how evidence shall be in appealable cases, etc. There is absolutely no provision to discard a piece of evidence which has been admitted. The respondent cannot lay his hand on Section 151 of the C.P.C. which is in respect of inherent powers of the court. In fact, the said section can be invoked in order to prevent abuse of process of the court and not to abuse it. After the affidavit of examination in chief of defendant No. 04 was read and recorded, it had become part of the evidence and, therefore, such part of the evidence cannot be discarded. In Banganga Co-operative Housing Society v. Vasanti Gajanan Nerurkar & others [MANU/MH/1020/2015 : 2015 (5) Bom.C.R. 813], this Court has held that the affidavit cannot be withdrawn as it has become part of the record. Similarly, it cannot be discarded when it has become part of the record.**

29. Similarly, the Delhi High Court in *SharatDass and Associates v. Rameshwar Singh*⁵ held that an affidavit once filed cannot be withdrawn.

30. The Andhra Pradesh High Court in *PailaRegarao vs. Pragada Rama Rao*⁶ dealt with a situation where the plaintiff

⁵MANU/DE/2923/2021

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sought to file a fresh affidavit on the ground of typographical errors the Court held that earlier affidavit cannot be eschewed and the plaintiff on oath can state the errors. The relevant paragraph is extracted below:

13. In view of the foregoing discussion, the revision petition can be allowed modifying the impugned order, dated 16.10.2019, to the effect that the witness can be permitted to state on oath about the error crept in the affidavit already filed and allow him to make his own statement about the said fact, and proceed thereafter for cross-examination instated of eschewing the affidavit already filed and taking a fresh affidavit.

31. In the light of the above position of law, the Petitioner herein cannot be permitted to eschew her earlier chief examination affidavit and file a fresh chief examination affidavit.

32. It is true that after the filing of her chief examination affidavit, new parties were impleaded, additional issues were framed and the plaint was amended. However, the same cannot be a ground to eschew a chief examination affidavit and permit filing of a fresh affidavit. The Petitioner herein is always at liberty to file an additional affidavit in relation to the subsequent developments in the suit i.e., framing of two (2) additional issues.

33. Thus, this court is of the considered view that the order of the court below dated 22.11.2021 in rejecting the application filed

by the petitioner for eschewing her earlier evidence affidavit does not suffer from any infirmity for being interfered in exercise of supervisory jurisdiction vested on this Court under Article 227 of the Constitution of India. However, since the respondent had fairly conceded to the fact of the petitioner right to adduce evidence on additional issues framed on 22.02.2022, this court is of the view that the order of the court below can be clarified as permitting the petitioner to lead evidence on the additional issues framed as indicated hereinabove, but not by allowing the petitioner to lead evidence afresh altogether.

34. Subject to the above clarification this court is of the view that the present civil revision petitions are devoid of merit and are accordingly dismissed.

35. Consequently, pending miscellaneous applications if any shall stand closed. No costs.

T. VINOD KUMAR, J

27th January, 2023.
vsv/mrkr

THE HON'BLE SRI JUSTICE T. VINOD KUMAR

CRP. No.2999, 3000 of 2022

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