2024:BHC-AUG:9736

**IN THE JUDICATURE OF HIGH COURT AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3763 OF 2024

Dalitmitra Sow. Nirmalatai Dattatraya Taware,
Janseva Foundation, Pachora,
Tq. Pachora, Dist. Jalgaon,
Through its Vice President
Narendra s/o Shankar Joshi,
Age 52 years, Occup.Service,
R/o vivekanand Nagar, Bhadgaon
Road, Tq. Pachora Dist. Jalgaon. **...Petitioner**

~ versus ~

1. The Deputy Charity Commissioner,
Jalgaon Region, Jalgaon.

2. Prataprao s/o Dattatraya Taware,
Age 66 years, occup. Retired,
R/o Deshmukhwadi, Pachora,
Tq. Pachora, Dist. Jalgaon.

3. Madhavi Prataprao Taware,
Age 56 years, occup. Household,
R/o As above. **...Respondents**

***APPEARANCE* :**

Advocate for the Petitioner : Mr. S. S. Gangakhedkar
AGP for Respndent No.1-State : Mrs. K. R. Jamdhade
Advocate for Respondent No.2 : Mr. S. S. Deshmukh

CORAM : ARUN R. PEDNEKER, J.
DATE : 06/05/2024

JUDGMENT :

1. Rule. Rule made returnable. With consent of the parties, heard finally.

2. By the present writ petition, the petitioner challenges the order passed below Exhibit 83 dated 19/03/2024, by the Deputy charity Commissioner, Jalgaon Region, Jalgaon in Change Application No.1184/2021, whereby the application requesting to exhibit documents filed at Serial No.14 and 15 of Exhibit 3 and Serial No.18 of Exhibit 18 is rejected by the impugned order on the ground that the proceedings are at a final stage of hearing and despite the ample opportunity, efforts were not made earlier by the petitioner to get the documents exhibited.

FACTS OF THE CASE :

3. The petitioner is a registered public trust Janseva Foundation, Pachora, Tq. Pachora, Dist. Jalgaon, and it provides for educational facilities by running hostels, cultural centers and schools in rural and urban areas of the society. The Change Report No.1184/2021 was submitted whereby new managing committee was elected from the term commencing from 2021-22 to 2025-26 for the period of five years. In the said meeting the reporting trustee was elected as Vice President of the Trust.

4. The Change Report is objected by respondents No.2 and 3 by submitting their objections on 01/11/2022. The said respondents disputed the documents annexed with the change and also contended that there was no election held on 24/10/2021.

5. The reporting trustee filed her affidavit in lieu of examination in chief on 29/11/2022. In the said affidavit, the petitioner referred to several documents. The petitioner was cross examined by the objector and her cross examination was concluded on 11/07/2023.

6. After the evidence of the respective parties was closed and the matter was posted for argument, the reporting trustee realised that the documents which were at Serial No.14 and 15 at Exhibit 3 and at Serial No.18 Exhibit 18, remained to be exhibited although filed with the affidavit in lieu of examination in chief. Thus, the reporting trustee moved an application at Exhibit 83 and prayed that documents at Serial No.14 and 15 at Exhibit 3 be marked in evidence. The said application was opposed by respondent No.3 on the ground that the evidence was closed, and as such, the application is not tenable.

7. The Deputy Charity Commissioner by order dated 19/03/2024, rejected the application on the ground that despite having ample opportunity to prove the list of members, the stage of marking exhibit to list of members is left far away, and dismissed the application. Being aggrieved by the order dated 19/03/2024, passed at Exhibit 83 by the Deputy Charity Commissioner in Change Report No.1184/2021, the petitioner filed the present writ petition.

CONTENTION OF THE PETITIONER :

8. It is the contention of the reporting trustee that she has filed the documents along with her affidavit in lieu of examination in chief. She was examined and has formally accepted the affidavit filed in lieu of examination in chief. She has been duly cross examined on the subject and she has also been cross examined on the documents by the defendant. As such, the learned Counsel for petitioner Mr. S. S. Gangakhedkar submits that marking the documents as exhibits was merely formal and it was the error of the Court in not marking the exhibits in evidence. Everything possible that could have been done with the documents i.e. filing the documents along with the affidavit in lieu of examination in chief was done by the reporting trustee. So also on being cross examined on the documents, it was the duty of the Court to mark the documents as exhibit. As far as reporting trustee is concerned, she had done everything within her limits to place the documents on record. It is mere formality of exhibiting documents.

CONTENTION OF THE RESPONDENTS :

9. Per contra, the learned Advocate Mr. S. S. Deshmukh appearing for the respondent No.2 submits that the reporting trustee stepped into the witness box and has given her examination in chief and it was necessary for her to produce the documents in examination in chief, and thereafter,

the documents were required to be exhibited in evidence. The respondents could have then got an opportunity to object to the admissibility of the evidence and that opportunity is lost. Further, the petitioner failed to apply to the Court within time to mark the documents as exhibits. The same is belated and cannot be marked as exhibit at this stage.

CONSIDERATION :

10. Having heard the learned Advocate for the parties. The first question arises for consideration is, whether the documents filed along with the affidavit in lieu of examination in chief has to be again tendered in evidence by the person whose affidavit is filed in lieu of examination in chief for it to be marked as exhibits and be read in evidence when the witness is available for cross-examination with respect to the documents and is in fact cross-examined on the document. The second question arises is, when the documents are marked in the affidavit in lieu of examination in chief and the witness enters the witness box for his examination in chief, whether it would be mandatory for him to depose as regards the documents marked along with the affidavit, so as to enable the opponents to object to the admissibility of the documents and in absence of deposing as regards the document, whether the affiant lost opportunity to mark the documents as exhibits in evidence.

11. While considering the above issue formulated, it is necessary to note the observations of the Deputy Charity Commissioner in the impugned order :-

> *"6. Perused the submissions of parties, relevant provisions of law and case law referred by reporting trustee. It is admitted fact that the evidence of both parties is closed. The opponent has argued finally. The reporting trustee has come with the case that he has referred the list of members at Sr.No.18 of Exh.18 in the evidence affidavit of reporting trustee at Exh.16. He pointed out paragraph 12 (j) of evidence affidavit Exh.16 and submitted that the list of members is necessary to be exhibited as that list is referred in the evidence affidavit. The reporting trustee has also relied on that list at Exh.19 of Exh.3. That copy of list of members is not denied by the opponent in his objection. Therefore he submitted to mark exhibit to the list of members."*

> *"7. I perused the list of members at Sr.No.19 of Exh.3 and Sr.No.18 of Exh.18. It seems that the list of members at Sr.No.19 of Exh.3 is not complete list. It bears only 8 names of persons and the list at Sr.No.18 of Exh.18 bears 16 names of persons. The opponent has objected in the cross examination the names of persons at Sr.No.03 to 07 of incoming members at Exh.1. Those names reflect at Sr.No. 10, 11, 14, 15 and 16 in the list at Sr.No.18 of Exh.18. Therefore the reporting trustee was under obligation to prove those members as legally enrolled in the trust."*

"8. The reporting trustee admitted that the list at Sr.No.18 of Exh.18 is not referred in the oral examination in chief. I perused the affidavit of evidence at Exh.16 and oral examination in chief therein. On perusing it, the reporting trustee has not referred list of member at Sr.No.18 of Exh.18 in the examination in chief which was taken orally before this authority. The reporting trustee has referred all other documents. That examination in chief is completed on 18-04-2023 and the evidence of reporting trustee is closed on 24-07-2023. There is no reason which explains why reporting trustee has not approached for marking exhibit till closing of his evidence."

12. The purpose of trial is to find out the truth and technicality should not come in the way of ascertaining the truth unless prejudice is caused to the opponent that he is not able to object or refute the document the opponent. In case of ***Digambar Ramchandra Bawaskar vs. Soma Prabhu Pawar and others, reported in 2018 (1) Mh.L.J., 169***, this Court relying upon the Judgment of the Supreme Court at paragraph No.11 and 12 has held that it is not even necessary for the witness to enter the witness box to formally approve the affidavit as long as he is available for cross-examination. Relevant paragraph No.11 and 12 of the Judgment are quoted below :-

*"11. However, the Honourable Supreme Court, in **Rasiklal Manikchand Dhariwal vs. M.S.S.Food Products, 2011 MhLJ Online (S.C.) 26 = (2012) 2 SCC 196**, has held that*

in paragraph Nos. 76, 77 and 78 as under:-

"76. The prejudice principle was accordingly applied and the Court said that: (Ammer Trading Corpn. Ltd. Case (2004) 1 SCC 702

> *"33. ....the Defendant would not be prejudiced in any manner whatsoever if the examination-in-chief is taken on an affidavit and in the event the Defendant desires to cross-examine the said witness he would be permitted to do so in the open court.*

77. For all this, it cannot be said that in ***Ameer Trading Corpn. Ltd. : (2004) 1 SCC 702****, it has been laid down as an absolute rule that in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be treated as part of the evidence unless the deponent enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature. Where the examination-in-chief of a witness is produced in the form of an affidavit, such affidavit is always sworn before the Oath Commissioner or the Notary WP/1539/2016 or Judicial Officer or any other person competent to administer oath. The examination-in-chief is, thus, on oath already.*

78. In our view, there is no requirement in Order XVIII Rule 5 that in appealable cases, the witness must enter the witness box for production of his affidavit and formally prove the affidavit. As it is such witness is required to enter the witness box in his cross-examination and, if necessary, re-examination. Since a witness who has given his examination-in-chief in the form of affidavit has to make himself available *for cross-examination in the witness box, unless Defendant's right to cross examine him has been closed, such evidence (examination-in-chief) does not cease to be legal evidence."*

"12. It is now, therefore, settled that even in appealable cases, examination-in-chief is permissible through an affidavit and such affidavit, once is sworn before the authority empowered to administer the oath, would not necessarily mandate the appearance of the affiant in the witness box for affirmation to formally prove the affidavit. He has to step into the witness box for further examination in chief or for cross examination as held in paragraph No.12 by this Court in the matter of Rajesh Varma Vs. Aminex Holdings and Investments [2008 (3) Mh.L.J.460]."

13. From the above Judgment of the Hon'ble Supreme Court in case of ***Rasiklal Manikchand Dhariwal*** (Supra) so also ***Ameer Trading Corporation*** (Supra) it is observed that the witness whose affidavit is sworn in lieu of his examination in chief need not enter into the witness box to formally approve the affidavit however, he should be available for cross-examination. It is further pertinent to note that in the case of ***Banganga Co-operative Housing Society vs. Vasanti Gajanan Nerurkar, 2015 MhLJ Online 53 = 2015 (5) Bom. C.R. 813,*** this Court has held that, *"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."*

14. The Hon'ble Supreme Court in case of ***Ammer Trading Corpn. Ltd*** (Supra) has held as under : -

> *"The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the Court in writing and in any event, the attention of the witness can always be drawn while cross-examination him. The defendant would not be prejudiced in any manner whatsoever the examination-in-chief is taken on an affidavit and in the event, he desires to cross-examine the said witness he would be permitted to do so in the open court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the court would not be wasted in examining such witness in open court."*

15. In the instant case, the documents are marked in affidavit filed in lieu of examination in chief, so also the witness was cross-examined. Thus, it was the duty of the Court to mark the document in evidence, and if there is objection to the admissibility of the documents, the same could have been raised by the defendant/respondent in writing to the affidavit in examination in chief. So also as held by the Hon'ble Supreme Court in the above Judgment of ***Ammer Tradiign Corpn. Ltd*** (Supra), that the

document can also put in cross-examination which is done in the instant case. The effect of the document would be the matter of assessment for the Court at the final stage. As such, the impugned order below Exhibit 83, dated 19/03/2024, passed by the Deputy Charity Commissioner, Jalgaon Region, Jalgaon in Change Application No.1184/2021 is set aside.

16. Application Exhibit 83 in Change Application No.1184/2021 is allowed to the extent that the Deputy Charity Commissioner, Jalgaon Region, Jalgaon is directed to mark documents which were produced along with the affidavit of the reporting trustee in lieu of examination in chief as exhibits.

17. I have not observed anything as regards the admissibility or the effect of the documents and it would be for the Charity Commissioner to decide the same. Rule is made absolute in above terms.

(ARUN R. PEDNEKER, J.)

vj gawade/-.