

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 9491 OF 2024
IN
T.E. & R. SUIT NO. 5/6 OF 2008**

1. Leonard Holding & Trading Pvt. Ltd.

And Ors.

}Petitioners

: Versus :

1. Satish Dhirajlal Vithlani and Ors.

}Respondents

Mr. Sharan Jagtiani, Senior Advocate a/w. Ms. Apurva Manwani and Mr. Anjal Amin i/by. M/s. Amin & Co., for the Petitioners.

Mr. Y.S. Jahgirdar, Senior Advocate a/w. Ms. Prabha Rathod, Ms. Laxmi Thakur, Ms. Jinal Bhanushali and Mr. Suraj Shah, for Respondent Nos.1, 3 and 4.

Coram : SANDEEP V. MARNE, J.

Dated : 15 JULY, 2024.

ORAL JUDGMENT :

1) **Rule.** Rule, made returnable forthwith. With the consent of the parties, petition is taken up for final disposal.

2) The procedural impropriety highlighted in the present petition is to permit the Plaintiffs to conduct re-examination of P.W.1 by

filing Affidavit in-lieu of re-examination instead of conducting re-examination by examining the said witness in the Court. There is no dispute to the position that by virtue of judgment and order dated 12 January 2024 passed by this Court in Writ Petition No. 1534 of 2022, Plaintiffs have been permitted to re-examine P.W.1. It appears that before passing of the judgment and order dated 12 January 2024, in anticipation of grant of re-examination of P.W.1, Affidavit in-lieu of re-examination of P.W.1-Satish Dhirajlal Vithalani was already filed in the Court. The only issue that needs consideration in the present petition is whether re-examination of a witness can be conducted by permitting such witness to file Affidavit in-lieu of re-examination. Order 18 Rule 4 of the Code deals with recording of evidence and provides thus :

O18. R.4 (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 alongwith 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 or 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.]

3) Thus, under sub-rule (1) of Order 18, examination-in-chief of every witness must be on Affidavit. However, when it comes to cross-examination and re-examination of the witness who has filed Affidavit of examination-in-chief, the same has to be necessarily taken either by the Court or by the Commissioner appointed by it. There is no provision in the Code which permits filing of Affidavit-in-lieu of examination by a witness. Legislature has made conscious distinction between examination-in-chief on one hand and cross-examination and re-examination on the other in sub-rule (2) of Rule 4 of Order 18. It specifically provides that witness whose evidence (examination-in-chief) is recorded by Affidavit, his/her cross-examination and re-examination has to be taken by the Court itself or by Commissioner appointed by it. Thus, cross-examination and re-examination (which are classified together as a distinct group than examination-in-chief) can never be on Affidavit. In short, re-examination by a witness has to be taken by the

Court itself or by the Commissioner appointed by the Court and the re-examination cannot be conducted by filing an Affidavit.

4) The Small Causes Court though has taken note of provisions of Order 18 Rule 4 of the Code, has erroneously permitted filing of Affidavit-in-lieu of re-examination by citing the reasons of (i)saving valuable time of the Court and (ii) opposite party having every opportunity to cross-examine the witness and (iii) 21 Advocates representing the Defendants and (iv) non-cause of irregularity or illegality if the Affidavit is accepted. In my view, all the four reasons recorded by the Small Causes Court are clearly erroneous. In absence of any specific provision permitting filing of Affidavit of re-examination and on contrary, in light of the specific provision under sub-rule (2) of Rule 4 of Order 18 directing conduct of re-examination by the Court or by the Commissioner appointed by it, the Small Causes Court could not have permitted Plaintiffs to file Affidavit-in-lieu of re-examination. In that view of the matter, the impugned order dated 2 July 2024 passed by the Small Causes Court rejecting the application filed by the Petitioners seeking direction to conduct oral re-examination of P.W.1 appears to be clearly erroneous.

5) It appears after the impugned order was passed by the Small Causes Court on 2 July 2024, the Petitioners were quick enough in challenging the said order by filing the present petition on/or about 3 July 2024. However, because of repeated directions for expediting hearing of the suit, the hearing of the suit has proceeded on day-to-day basis on account of which on 6 July 2024, Petitioners were left with no alternative

but to proceed with further cross-examination of P.W.1 in relation to re-examination conducted through his Affidavit. Now that re-examination of P.W.1 will have to be conducted orally before the Court by discarding the Affidavit filed by him, his further cross-examination, limited to the oral re-examination, will have to be conducted afresh by Petitioner Nos.1 and 2, as well as, those Defendants who are covered by order dated 3 December 2021. Consequently, the order dated 2 July 2024 passed by the Small Causes Court on application at Exhibit-1379 is set aside and the application filed by the Petitioner at Exhibit-1379 is allowed in terms of prayer clause (a). With the above directions, the Writ Petition is **allowed**. Rule is made absolute. There shall be no order as to costs.

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SAWANT

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[Sandeep V. Marne, J.]