

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 16930 OF 2024

Aspi Jal S/O Jal Bejon Jal And Anr

... **Petitioners**

Versus

Ratilal Bhikhabhai Gandhi (Decd.) Thr. Lrs.

Mr. Yogesh Ratilal Gandhi And Ors

... **Respondents**

Mr. Jamsheed Master *i/b Ms. Natasha Bhot for Petitioners.*

Ms. Divya D. Jain *for Respondents.*

CORAM : SANDEEP V. MARNE, J.

DATE : 21 NOVEMBER 2024.

P.C. :

1) The Petition challenges Order dated 5 October 2024 passed by the Learned Judge of the Small Causes Court on application filed by the Defendants (Exhibit 365). The learned Judge has directed that the examination in chief of PW6 recorded before the Court Commissioner in respect of affidavit of evidence of PW6 dated 20 February 2023 as well as documents produced along with the said affidavit be struck off.

2) It appears that examination in chief of PW6 initially commenced before the Small Causes Court and instead of remaining

present before the Court for recording lengthy examination in chief, PW6 sought to file affidavit of evidence dated 20 February 2023 in the middle of recording of his examination in chief. The Court did not permit this course of action and refused to take on record the said affidavit of evidence. It appears that the Court however permitted further examination in chief of PW6 be recorded by Court Commissioner. It appears that along with the said affidavit of evidence dated 20 February 2023, PW6 had sought to produce total 34 documents.

3) Though the Court had specifically rejected the request for taking on record the affidavit of evidence of PW6 by Order dated 19 April 2023, the Court Commissioner erroneously allowed question Nos. 24 and 25 relating to the said affidavit of evidence. The Court has therefore rightly directed striking off such part of examination in chief of PW 6, which refers to the said affidavit of evidence. However, reference made by the Court to "documents produced alongwith application" while directing striking off in the order dated 5 October 2024 creates an apprehension in favour of the Plaintiff that the Court has discarded even all the 34 documents that PW6 has produced.

4) In my view, the only clarification that is necessary in the peculiar facts and circumstances of the case is that while the Trial Court is right in discarding the affidavit of evidence, all that it needs to do is to mark all such documents produced by PW6, which are proved by way of oral testimony recorded before the Court as well as before the Court Commissioner. It is however clarified that in case, any of the

documents are found to be not proved by way of oral testimony, the Court shall not mark the documents as exhibited.

5) With the above clarification, the Writ Petition is **disposed of**.

[SANDEEP V. MARNE, J.]