

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

WRIT PETITION NO.11847 OF 2023

Rukhmanabai W/o Ukhaji Dubele
Age: 83 years, Occ.: Nil,
R/o: Padegaon, Tq. and Dist. Aurangabad
(Unable to Understand things and meaning thereof)
Through De-facto Guardian and Daughter
Kadubai W/o Tahmaji Harne
Age: 50 years; Occ. Household
R/o: Galli No.1, Hari Siddhi Devi road,
Harsool, Aurangabad.

... Petitioner
(Ori. Plaintiff)

VERSUS

- 1] Siddharth Ashram School,
Chowka, Tq. and Dist Aurangabad.
Through its Headmaster
- 2] Mhatma Phule Shikshan Prasarak Mandal,
Nanded, Through its Chairman,
Nagesh S/o Vittalrao Sawant,
Age: 58 Years; Occ. Chairman
R/o. Rajgruh., Pilwali Girni, Ashirwad Nagar,
Ganesh Nagar Road, Nanded

... Respondents
(Orig. Defendants)

.....
Shri. N. S. Muthiyan, Advocate for the Petitioner
Shri. N. T. Tribhuwan, Advocate for the Respondent Nos. 1 & 2
.....

CORAM : NEERAJ P. DHOTE, J.
RESERVED ON : NOVEMBER 26, 2025
PRONOUNCED ON : DECEMBER 12, 2025

FINAL ORDER :-

. This is the Writ Petition under Article 227 of the Constitution of India against the Order dated 26.07.2023 passed by the learned 7th Jt.

Civil Judge, Junior Division, Aurangabad below Exh.29 (evidence of the Plaintiff) in Regular Civil Suit No.689/2016.

2. Heard the learned Advocate for the Petitioner and the learned Advocate for the Respondents. Perused the papers on record with the assistance of the learned Advocates for both the sides.

3. The Petitioner is the Orig. Plaintiff and the Respondents are the Orig. Defendants in the aforesaid civil suit. The said civil suit is for injunction and possession of the suit property. The suit is contested by the Respondents by filing their Written-statements. The Respondent No.1 filed Counter Claim in the said civil suit, to which the Petitioner filed her Written-statement. Issues were framed. The Petitioner filed her evidence Affidavit and was cross-examined. The cross-examination was part-heard. Thereafter, the Respondent No.2 appeared and got himself impleaded in the suit and filed his Written-statement. The Petitioner filed her evidence Affidavit for further Examination-in-chief in view of the addition of Respondent No.2. The learned Advocate for the Petitioner then filed the Application for declaration that the Petitioner was incompetent to testify in the matter in view of the extreme old age. The said Application was rejected by the learned Trial Court. The learned Advocate for the Petitioner filed the *pursis* that the matter cannot be dismissed. Being aggrieved by the impugned order, the Writ

Petition is filed.

4. The impugned order dated 26.07.2023 reads thus:

“ORDER

The plaintiff appeared before the court and she stated that she has no know knowledge about the oath she had not taken the oath considering this circumstances, it appears that the plaintiff is not willing to proceed with the matter. Therefore her evidence is discarded. However the adv. for defendant can use the admission elicited during cross if any. Considering all these circumstances as the plaintiff is not giving her evidence the matter is kept for dismissal order.”

5. The learned Advocate for the Petitioner cited the decision of this Court in *Banganga Cooperative Housing Society Ltd and Ors vs. Vasanti Gajanan Nerurkar and Ors*, MANU/MH/1020/2015, wherein the question of law was relating to affidavits in lieu of examination-in-chief filed under Order-XVIII, Rule-4 of the Code of Civil Procedure, 1908 (for short, ‘CPC’). The relevant paragraph no.22 from the said Judgment reads thus:

“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.

(b) The Evidence Affidavit cannot contain matter that is irrelevant, inadmissible or both; or is in the nature of arguments, submissions or prayers. This is not 'evidence' as required by law. Were it to be attempted from the witness box, it would not be permitted; and hence it cannot be allowed to creep in merely because it happens to be placed on affidavit.

(c) It is permissible, and in fact often necessary, for a Court, with a view to expedition and to avoid a needlessly protracted cross-examination on irrelevancies and matter that is not 'evidence' to order that any such material that does not constitute evidence be struck off or be ordered or directed to be ignored without fear of adverse consequence.

(d) Where an Evidence Affidavit is filed and the witness or deponent, though otherwise available, is not made available for cross-examination, the well-established consequences in law will follow. Specifically, the opposite party will be entitled to submit that an adverse inference be drawn against such a witness or the party who fails to produce that witness for cross-examination; and, further, that should that evidence contain any admissions, these may be used by the other party; but so much of the evidence as is against the party entitled to cross-examination but which has gone untested for want of production of the witness will be liable to be ignored."

6. The learned Advocate for the Respondents submits that, one Regular Civil Suit No.55/2001 was filed by the Petitioner against one Shri. B. V. Gaikwad for Perpetual Injunction and the same was withdrawn stating that, the suit was filed without her knowledge by her Advocate by misusing the authority given by her and the said suit was disposed off as withdrawn in February-2018. He submits that, the Petitioner, without there being incapacity to submit herself for cross-examination, tactfully refused to subject her to the cross-examination and therefore, the learned Trial Court was justified in passing the said order. However, he fairly submits that, there cannot be dismissal of the suit on that ground. On the other hand, according to the learned Advocate for the Petitioner, whatever evidence has come on record can be considered.

7. On going through the impugned order and the observations in the above referred Judgment, particularly sub-para (d) of para no.22, the impugned order calls for interference only to

the extent of keeping the matter for dismissal. The Petitioner may lead other evidence, if available and the matter can proceed further without the same being dismissed in terms of the impugned order. Rest of the impugned order calls for no interference. Hence, the following order.

ORDER

- (i) The Writ Petition is partly allowed.
- (ii) The impugned Order dated 26.07.2023 passed below Exh.29 in Regular Civil Suit No.689/2016 is set aside to the extent it speaks of keeping the mater for dismissal order.
- (iii) The Petition stands disposed off.

(NEERAJ P. DHOTE, J.)

GGP