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

924 WRIT PETITION NO. 698 OF 2020

**DEVIDAS BHANUDAS SURYAWANSHI AND OTHERS
VERSUS
SIDRAM PIRAJI SURYAWANSHI AND OTHERS**

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Mr Sushant B. Choudhari, Advocate for petitioners
Mr S. B. Gastgar, Advocate for respondent Nos.1 to 5
Mr Sachin Joshi, Advocate h/f Mr A. P. Yenegure, Advocate for
respondent Nos.6A and 6B

CORAM : PRAFULLA S. KHUBALKAR, J.

DATE : 24th June, 2025

PER COURT:

1. Heard Advocate Mr Choudhari, learned counsel for the petitioners, Advocate Mr Gastgar, learned counsel for respondent Nos.1 to 5 and Advocate Mr Sachin Joshi, holding for Advocate Mr Yenegure, learned counsel for respondent Nos.6A and 6B.

2. Challenge in this petition is to the order dated 29/08/2019, passed by the Court of 3rd Joint Civil Judge Junior Division, Omerga at Exhibit No.94 in Regular Civil Suit No.270/2012, by which, the Trial Court has permitted the plaintiffs (respondents herein) to withdraw the evidence on affidavit, which was filed at Exhibit 39 and consequently allowing the plaintiffs to substitute the evidence on affidavit, which was filed earlier.

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3. Advocate Mr Choudhari for the petitioners submits that the impugned order allowing the plaintiffs to substitute the first evidence on affidavit is unsustainable in law, since after the evidence on affidavit was filed, the plaintiffs had started their evidence and are not allowed to withdraw the affidavit. He vehemently submits that, in the instant matter, the Trial Court has failed to take into consideration the purport of provisions of the order XVIII Rule 4 of the Code of Civil Procedure and also the position of law settled in this regard. To buttress his submission, he relies upon the judgments in the matters of **Digambar Ramchandra Bawaskar Vs. Soma Prabhu Pawar and others, 2018 (2) ABR 346;** and **Banganga Co-operative Housing Society Ltd., Mumbai Vs. Mrs. Vasanti Gajanan Nerurkar, 2015 (4) ABR 639.**

4. Per contra, Advocate Mr Gastgar, learned counsel for respondent Nos.1 to 5 opposes the petition and justifies the impugned order. He vehemently submits that, after evidence on affidavit was filed, since the cross-examination had not begun, the plaintiffs are entitled to withdraw the evidence on affidavit and file their new evidence on affidavit. He also submits that, although first evidence on affidavit was filed at Exhibit 39, however, in view of certain vital facts,

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which were required to be brought on record, another evidence on affidavit was filed at Exhibit 95. By pointing out these affidavits, he submits that the plaintiffs wanted to bring on record the subsequent events related to the fact of the case, which demonstrate acts of mischief on the part of the parties, and therefore, the evidence on affidavit ought to have been permitted to be substituted.

5. It has to be noted that, undisputedly, the plaintiffs have filed the first evidence on affidavit at Exhibit 39 on 18/09/2015. The examination-in-chief of the plaintiffs was recorded based on this affidavit. It is, thereafter, the plaintiffs filed second affidavit on evidence dated 25/06/2019 and requested for permission not to press first affidavit. Pertinently, the application filed by the plaintiffs at Exhibit 94 seeking permission to substitute the evidence on affidavit does not mention any reasons necessitating the plaintiffs to substitute the evidence on affidavit, neither about subsequent developments nor about any acts of mischief.

6. While considering the application at Exhibit 94 filed by the plaintiffs, the Trial Court has observed that the plaintiffs are the owner of the suit and they have opportunity to prove their case. However, the purport of Order XVIII Rule 4 of the Code of Civil

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Procedure, cannot at all be ignored. It has to be seen that, once the evidence in lieu of examination-in-chief is tendered, the examination-in-chief of the deponents is supposed to have started. Thereafter, it is not permissible to withdraw the evidence on affidavit to substitute it with other affidavit. Position of law in this regard is clarified in the matter of **Banganga Co-operative Housing Society Ltd., Mumbai** (supra), of which paragraph Nos.7 and 8 are reproduced below :-

*“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., 2008\(3\), Mh LJ 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. Order dated 4th*

March 2015 in Testamentary Suit No. 65 of 2005, Aban Homa Petit and Anr. v. Naryosang D. Cassad.

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 Rasiklal Manikchand, 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?”

7. In the light of these factual and legal aspects and the position of law as clarified by the judgments referred above, it has to be held that, once evidence on affidavit is filed and the examination-in-chief has begun, the deponent is not permitted to withdraw the evidence on affidavit. It has to be noted that the plaintiff is at liberty to file any additional affidavit, if at all he wants to bring on record additional factual aspects and if permissible by provisions of Order XVIII of Code of Civil Procedure.

8. Having regard to the law laid down and after considering the factual aspects, the impugned order is unsustainable and it is liable to be quashed and set aside. Accordingly the order dated 29/08/2019, passed by Trial Court on application at Exhibit 94 in Regular Civil Suit

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No.270/2012 is quashed and set aside. The writ petition is allowed.

No order as to costs.

9. Considering the fact that the civil suit is of the year 2012 and the parties are of advanced age, the Trial Court is directed to expedite the suit and endeavour to decide it within a period of one year from today.

(PRAFULLA S. KHUBALKAR, J.)

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