

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

WRIT PETITION NO. 3355 OF 2026

Patel Engineering Ltd.,

..Petitioner

Versus

United Estate Pvt. Ltd.

...Respondent

Mr. Rohaan Cama, Ms. Nandini Singh Modi, i/b Bachubhai
Munim & Co., for the Petitioner.

Mr. Sanket Mungale, for the Respondent.

CORAM : N. J. JAMADAR, J.

DATE : 24th MARCH 2026

ORDER :

1. Heard the learned Counsel for the parties.
2. Having regard to the limited nature of the controversy, the petition was taken up for final disposal.
3. The challenge in this petition is to an order passed by the learned Judge, City Civil Court on an application (Exh. 21) preferred by the petitioner/defendant to strike out the portions of affidavit in lieu of examination-in-chief of the plaintiff's witness (PW-1), whereby the said application came to be rejected with costs.
4. The background facts can be stated as under:-

4.1 The Respondent/plaintiff and petitioner/defendant are corporate entities. On 13th March, 1995 a Memorandum of Understanding and Allied Agreements were entered into by and between the plaintiff and defendant in relation to development of the plots of land bearing CTS No. 220/2, 220/4, 220/5 and 511/2 situated at Jogeshwari, Mumbai.

4.2 In the wake of the disputes, the Respondent instituted SC Suit No. 2987/2002 against the petitioner - defendant in the City Civil Court, Mumbai, seeking multifold reliefs.

4.3 Eventually, on 21st January, 2026, the plaintiff filed an affidavit in lieu of examination-in-chief of Mr. Imran Maknoja (PW-1). In the said affidavit, the defendant contends, the said witness has made statements and assertions which do not fall within the ambit of evidence and were, thus, required to be excluded from the evidentiary record and ordered to be struck off or directed to be ignored for all purposes.

4.4 The plaintiff resisted the said application.

4.5 By the impugned order, the learned Judge, City Civil court was persuaded to reject the application opining *inter alia* that, *prima facie* the assertions in the affidavit in lieu of examination-

in-chief of PW1 did not appear to travel beyond the pleadings. The learned Judge observed that, in view of the decision of the Supreme court in the case of *Ameer Trading Corporation Ltd. Vs. Shapoorji Data Processing Ltd.*¹, even if the statements in the affidavit in lieu of examination-in-chief appeared to be beyond the pleadings, the defendant was at liberty to raise such objections in writing or attention of the witness could be drawn while cross-examining the said witness.

4.6 Being aggrieved the defendant has invoked the writ jurisdiction.

5. Mr. Rohaan Cama, the learned Counsel for the petitioner, would submit that, the learned Judge, City Civil Court has not at all bestowed consideration on the nature of assertions in the affidavit in lieu of examination-in-chief of PW-1 which the defendant claimed were required to be struck off. The learned Judge, City Civil Court has proceeded to reject the application by ascribing general reasons and in a mechanical manner. Taking the Court through the portions of the affidavit in lieu of examination-in-chief of PW-1, which according to Mr. Cama, do not constitute evidence in the strict sense of the term and/or

1 (2004) 1 SCC 702

are in the nature of prayers, legal submissions and, at best, argumentative in nature, Mr. Cama would urge that, in view of the decisions of this Court in the cases of *Harish Loyalka & anr. Vs. Dileep Nevada & ors.*², and *Banganga Co-operative Housing Society Ltd., Mumbai Vs. Vasanti Gajanan Nerurkar*³, the learned Judge, City Civil Court ought to have examined the aspect whether the objected portions of the affidavit in lieu of examination-in-chief of PW-1 could be admitted as evidence or were required to be struck off.

6. In contrast to this, Mr. Sanket Mungale, the learned Counsel for the Respondent/plaintiff, would support the impugned order. It was submitted that, the learned Judge, City Civil Court has, after perusal of the pleadings and the evidence in the form of affidavit in lieu of examination-in-chief of PW-1, has recorded the satisfaction that, the evidence does not travel beyond pleadings. Thus, such a procedural order cannot be interfered with in exercise of the supervisory jurisdiction.

7. In any event, Mr. Mungale would urge, in view of the decision of the Supreme Court in the case of *Ameer Trading*

2 2014 SCC OnLine Bom 5083

3 2015 (4) ABR 639

Corporation Ltd. (supra), and a judgment of the learned Single Judge of this Court in the case of *Harakchand Gulabchand Dhoka Vs. Kashinath Narsingh Marathe*⁴, which has followed the decision in the case of *Ameer Trading Corporation Ltd. (supra)*, the Civil Court has no power to strike off certain portions of the affidavit in lieu of examination-in-chief.

8. Order XVIII of the Code of Civil Procedure, 1908 ('the code') contains a fasciculus of provisions under the heading, 'Hearing of the suit and examination of witnesses'. Rule 4 of Order XVIII regulates the procedure of recording of evidence. Rule 4 of Order XVIII came to be substituted by the Civil Procedure Code Amendment Act, 2002. Sub-Rule (1) of Rule 4 now provides that, in every case, the examination-in-chief of a witness shall be on an affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence. The unamended Rule 4 of Order XVIII mandated that, the evidence of witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

4 (2010) 4 AIR Bom R 31

9. Rule 4 of Order XVIII came to be amended with the avowed object of curtailing the time in recording the examination-in-chief of the witness, in Court. Rule 4 however ushers in the change in the mode of recording the examination-in-chief of the witnesses. What has still to be recorded is the evidence. Rule 4 of order XVIII thus altered the form of recording evidence and did not tinker with the substance of the matter; the relevancy and admissibility of evidence to be adduced. Under the provisions of the Evidence Act, evidence can be adduced of facts in issue and relevant facts, only.

10. Keeping in view the aforesaid foundational premise, a reference is required to be made to the decisions cited on behalf of the parties. In the case *Ameer Trading Corporation (supra)*, a three-Judge Bench of the Supreme Court considered the question of the import of Rule 4 and 5 of Order XVIII of the Code, in the context of rejection of the application of the defendant therein to direct the plaintiff to examine himself in chief, before the Court.

11. In the aforesaid context, the Supreme Court held that Rule 4 and 5 of Order XVIII were required to be harmoniously construed. Both the provisions were required to be given effect

to as Order XVIII Rule 5 could not be treated as an exception to Order XVIII Rule 4. While deciding the inter-play between Rule 4 and 5 of Order XVIII, the Supreme Court made the following observations :

“33. 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-examining him. The defendant would not be prejudiced in any manner whatsoever if 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.”

(emphasis supplied)

12. In the case of ***Harakchand Dhoka (supra)***, where the petitioner therein had filed an application raising objections to certain portions of the affidavit in lieu of examination-in-chief on the ground that, those statements were required to be

deleted (like the case at hand), a learned Single Judge of this Court, after following the judgment in the case of ***Ameer Trading Corporation (supra)*** held that, there is no provision under the Code under which the Court can direct deletion of any portion of an examination-in-chief. Nevertheless, an objection can always be taken by the rival party in writing to any objectionable portion of the affidavit. If any evidence is tried to be adduced which has no foundation in the pleadings, the Court always has the power to discard such evidence *while finally deciding the suit or proceeding*.

13. It is imperative to note that, in the case ***Harakchand Dhoka (supra)*** ultimately, this Court directed that the application made by the petitioner therein shall be treated as objection in writing raised by the petitioner. Such objection shall be considered *at the time of final hearing of the suit*. (italisized by this Court)

14. The aforesaid pronouncement in the case of ***Harakchand Dhoka (supra)***, if correctly construed, enunciates that, a party is entitled to raise objection to admissibility of certain portions of the affidavit in lieu of examination-in-chief, on the grounds permissible in law, including that the evidence sought to be

adduced is beyond pleadings. However, such objection ought to be decided at the stage of final adjudication of the suit and the objectionable portion cannot be struck off at the stage of recording of evidence.

15. *Harish Loyalka & anr. (supra)*, on which reliance was placed by Mr. Cama, in fact, considered the judgment of the Supreme Court in the case of *Ameer Trading Corporation (supra)* and this Court in the case of *Harakchand Dhoka (supra)*.

16. The learned Single Judge, in the case of *Harish Loyalka & anr. (supra)*, distinguished the said judgments, especially the decision in the case of *Harakchand Dhoka (supra)* by observing that, in the said case this Court was dealing with the issue of relevancy and adduction of evidence without the necessary foundation in the pleadings.

17. The observations of this Court in the case of *Harish Loyalka & anr. (supra)*, in regard to the import of the judgment in the case of *Harakchand Dhoka (supra)*, read as under : -

“5. The decision in Harakchand Gulabchand Dhoka ((2010) 4 AIR Bom R 31) is also of no assistance to Mr. Nevatia. There, too, the Court was dealing with the issue of relevancy and of

material sought to be introduced in the evidence affidavit but without a foundation being laid in pleadings.

6. *Before the Harakchand Dhoka ((2010) 4 AIR Bom R 31) Court, reliance was placed on a decision of another learned Single Judge of this Court in Cesar Rego Fernandes v. Angela Ninette Oliveira Fernandes, (2007) 6 ALL MR 499 : (2008) 1 BCR 270 : (2008) 2 Mah LJ 159 : ((2008) 3 AIR Bom R 310). Before the writ court in Cesar Rego Fernandes, the challenge was to an order by which the Civil Judge directed deletion of certain portions of the affidavit in evidence, again on the footing that there was no foundation laid for these statements in the pleadings. The case was decided on this narrow issue of relevancy. For the same reasons that I have discussed earlier, this decision does not advance Mr. Nevada's cause."*

18. The learned Single Judge thereafter proceeded to examine the aspect of redaction of the portions of the affidavit in lieu of examination-in-chief which did not constitute evidence or were in the nature of legal submissions, reiteration of pleadings and surmises. The observations of this Court in Paragraphs No. 13 to 16 are material and hence extracted below : -

"13. Generally speaking, matters of relevancy can be deferred to the stage of arguments; indeed, they must be. It is not always possible to say at the stage of examination-in-chief whether a given

statement is or is not relevant. Some statements may be ex facie entirely irrelevant; these might stand on a different footing, as the Rajendra Singh ((2013) 6 AIR Bom R 812) Court said. Therefore, unless the material is ex facie entirely and demonstrably irrelevant, the affidavit evidence must retain the material provided it is a deposition of some fact that is to the deponent's knowledge. Matters of surmise, conjecture, arguments and in the nature of legal submission or in the nature of pleadings attempting to controvert what is stated in the plaint or the written statement are not evidence. They are, therefore, not examination-in-chief.

14. The decisions on which Mr. Nevatia relies only say that it is not permissible for a Court to delete portions of an affidavit in lieu of examination-in-chief. That proceeds on the footing that what the witness has stated in that affidavit is in fact in the nature of examination-in-chief and not otherwise. Where the statements made on affidavit cannot possibly be in the nature of examination-in-chief, it would defeat the manifest legislative intent and purpose of expedition and saving of judicial time that lies at the heart of Order 18, Rule 4 of the CPC to permit al manner of extraneous material to be stated on affidavit and to disguise that affidavit as an affidavit in lieu of examination-in-chief. The argument that it "saves time" to allow any and every statement in such an affidavit and that it

increases the work of the court to sift through an affidavit at a preliminary stage is without substance. If material that is argumentative and other inadmissible under the Evidence Act is allowed in, this would necessitate a needlessly extended cross-examination. The Court would then have to spend time during the cross-examination or, worse yet, at the final hearing, in analysing all this material directed to matter irrelevant and inadmissible. I expect this would increase a court's work and time expenditure by several orders of magnitude.

15. It is perhaps best to illustrate the legal position in the context of the evidence affidavits that are now before me. Mr. Nevatia's evidence affidavits contain material that fall in the following categories : (i) matters that are relevant and to his personal knowledge; (ii) matters that are possibly relevant but not to his personal knowledge; (iii) matters that are neither relevant nor to his personal knowledge; and (iv) statements in the nature of legal submissions, arguments and pleadings.

16. So far as the last of these is concerned, such submissions, arguments and contentions are clearly not "examination-in-chief". They may be used in oral or written arguments at the final hearing, but they cannot possibly form any part of the witness's testimony. Had Mr. Nevatia been in the witness box and had he attempted to make

any of these submissions and arguments, they would have been excluded and not entered the record. There is no reason why material that would not have been allowed in evidence should be permitted merely because the requirement is that an 'affidavit' be filed."

(emphasis supplied)

19. This Court has, in terms, held that, where the statements made in the affidavit cannot possibly be in the nature of examination-in-chief, it would defeat the manifest legislative intent and purpose of expedition and saving of judicial time. Such argumentative and inadmissible material, if allowed, would necessitate a needlessly extended cross-examination. It was specifically ruled that, statements in the nature of legal submissions, arguments and pleadings are clearly not, 'examination-in-chief'.

20. The decision in the case of ***Banganga Co-operative Housing Society Ltd. (supra)***, which elaborately considered the aspect of adduction of evidence by way of affidavit in lieu of examination-in-chief in a multitude of situations, puts the controversy at rest. It would suffice to extract the observations of the learned Single Judge in Paragraph No. 21 and the

relevant conclusions culled out in Paragraph No. 22, which read as under : -

“21. As to what can or cannot be the subject-matter of such an order. I do not think any absolute standard or rule can be set out. It may, in a given case, be that the evidence affidavit contains material that is relevant but is unsupported by pleadings. Cesar Rego Fernandes and Ors. v. Angela Ninette Oliveira Fernandes and Ors., 2008 (1) BCR 270 : (AIR 2008 (NOC) 1696 (Bom)) tells us that this is not the kind of material that can be ordered to be struck off. But material that is clearly irrelevant, or hearsay, in the nature of legal submissions, arguments, in the form of prayers or reliefs, or denials of the kind we find in pleadings has no place in an evidence affidavit. It may be possible to illustrate this with an example from testamentary law. A probate petition, it is well-settled, does not decide questions of title. Therefore, whether or not the testator had valid title to any given property mentioned in the will propounded is entirely irrelevant to that trial. This is the basis of the decision in Khushwaha, and testimony in that regard was therefore excluded. But in a given case, a witness may depose that it is to his (the witness’s knowledge) that the testator was aware at the time of the making of the will that a certain property was not his. This may possibly be retained as being relevant to an issue of unsoundness of mind or

undue influence. The distinction to be drawn, and drawn carefully, is whether the deponent says this is a matter of conjecture or personal knowledge. I would suggest that in a matter where there is the slightest doubt, then the material should be retained and not deleted or struck off. That power, while available to a court in its inherent jurisdiction, must be exercised cautiously and judiciously, and not cut-and-dried one-size-fits-all formulaic approach is possible.

22. *The result of this discussion is that:*

(a)

(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."*

.....

(emphasis supplied)

21. The enunciation in the aforesaid judgment that, the evidence affidavit cannot contain matters that are irrelevant, inadmissible, argumentative or are in the nature of arguments, submissions or prayers, can hardly admit of duality of opinion. As noted above, the change enshrined by 2001 Amendment to Rule 4 of Order XVIII is only in the mode of adduction of evidence and not the substance of the evidence. If certain portions of the affidavit *ex facie* do not constitute evidence, the cause of expeditious conclusion of the trial would be better advanced by directing redaction of those portions of the affidavit. For that purpose, there is no need to defer the said consideration to the stage of final adjudication of the suit, as the mischief that may occur on account of continuation of the irrelevant and inadmissible assertions/statements in the affidavit in lieu of examination-in-chief is more than that would arise by the redaction of such inadmissible material before the commencement of the cross-examination.

22. On the aforesaid touchstone, reverting to the facts of the case, the submissions of Mr. Cama, the learned Counsel for the petitioner, in regard to the objectionable portions of the affidavit in lieu of examination-in-chief, deserve consideration. Mr. Cama took the Court through the affidavit in lieu of examination-in-

chief and made an endeavor to impress upon the Court that, the assertions/statements in the later part of the Paragraph Nos. 21 and the initial part of Paragraph No. 35, and those in Paragraph Nos. 33, 40, 41 and 42, in their entirety, deserved to be struck off.

23. I have perused those assertions/statements in the abovenumbered paragraphs. I am unable to persuade myself to agree with the submissions of Mr. Cama that, the assertions and contentions in the later part of Paragraph No. 21 and the initial part of Paragraph No. 35 and entire Paragraph No. 33 do not constitute evidence. The witness has put oath behind the statements which appear to be relevant for the determination of the controversy at hand. Those assertions/statements can neither be said to be wholly irrelevant, completely inadmissible or otherwise in the nature of arguments or surmises. The Court must test the prayer for redaction on the principle that, if there is a slightest doubt about the relevancy of the material, it would be appropriate to allow such evidence to be adduced rather than redacted or struck off.

24. In regard to the assertions in the Paragraph Nos. 40, 41 and 42 of the affidavit in lieu of examination-in-chief, the

objection on behalf of the petitioner appears sustainable. *Prima facie*, the statements in Paragraph Nos. 40, 41 and 42 appear to be in the nature of reiteration of pleadings. At best, the assertions in Paragraph Nos. 40 and 41 can be said to be in the nature of the arguments as to what the plaintiff is entitled to, and, conversely, the defendant is not entitled to.

25. Mr. Mungale, the learned Counsel for the respondent, attempted to salvage the position by canvassing a submission that, the objection to the statements in Paragraph No. 42 which are essentially in the nature of prayers, may be sustained. However, the statements in the Paragraph Nos. 40 and 41, according to Mr. Mungale, are in the nature of factual contentions as regards the entitlement of the parties. I am afraid to accede to the submission of Mr. Mungale.

26. Suffice to note that, in Paragraph No. 40, the PW-1 has asserted that, the plaintiffs are fully entitled to and in Paragraph No. 41, the PW-1 affirms, the defendants are not entitled and have no right to;..... . The statements in Paragraph Nos. 40 and 41 are clearly in the nature of contentions, arguments and submissions. By no stretch of imagination, such statements can constitute 'evidence'.

27. The upshot of aforesaid consideration is that, the learned Judge, City Civil Court was in error in not examining whether the statements in Paragraph Nos. 40, 41 and 42 constitute evidence. Resultantly, the petition deserves to be partly allowed.

28. Hence, the following order:-

:: O R D E R ::

- i) The Writ Petition stands partly allowed.
 - ii) The impugned order stands quashed and set aside.
 - iii) The application preferred by the petitioner/defendant stands partly allowed.
 - iv) Paragraph nos. 40, 41 and 42 of the affidavit in lieu of examination-in-chief of Mr. Imran Maknojia (PW-1) stand redacted.
- No costs.

[N. J. JAMADAR, J.]