



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST) NO. 97502 OF 2020

Mr. Desmond Joseph Therakan and Ors Petitioners.
V/s

Dolphin Developers Respondent.

Mr. Rajesh Singh a/w Mr. Akash Singh i/b Mr. Rajesh Singh &
Associates for the Petitioners.

Mr. Sanjiv A. Sawant for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 19, 2021

P.C.:-

1] Based on the development agreement dated 29/12/2010, a suit for specific performance is initiated by the Petitioner/Plaintiff in which Respondent/Defendant tendered his affidavit of examination-in-chief.

2] The Petitioner claiming that the said affidavit of examination-in-chief goes contrary to the pleadings as are raised in the defence, has sought discarding of evidence in the said affidavit of examination-in-chief before Defendant is entered into witness box.

3] The said Application-Exhibit-161 came to be rejected. As such,

this Petition.

4] The submissions of Mr. Singh, learned Counsel for the Petitioner are, Respondent/Defendant is placing on record the evidence in the form of affidavit in examination-in-chief in the absence of supporting pleadings in Written Statement and to that extent same needs to be discarded in view of the provisions of Order 18 Rule 4 of the Civil Procedure Code.

5] He has further invited attention of this Court to the fact that the Supreme Court has expedited the suit. However, with intention to prolong hearing of the suit, Respondent has come out with evidence contrary to the pleadings. He has drawn support from the judgment of the this Court in the matter of *Kalyan Singh Chouhan vs. C.P. Joshi* reported in **2011 AIR SCW 1061** so as to substantiate his claim that evidence in the absence of pleadings needs to be ignored. A support is drawn from the observations made in paras 16, 17, 18 and 24 of the said judgment. He has also placed reliance on the following judgments of this Court:-

(i) Judgment dated 22/6/2009 passed in High Court Suit No.376 of 2019 in the matter of *Atmaram N. Sukhthankar & Ors vs. Philips L. Kallath & Ors.*

(ii) *Shamrao Vishnu Kunjir vs. Suresh Vishnu Kunjir and Ors* reported in AIR 2005 Bom 294.

(iii) *Harish Loyalka and Ors. vs. Dileep Nevatia and Ors* reported in 2014(4) ABR 545.

(iv) *Banganga Cooperative Housing Society Ltd and Ors vs. Vasanti Gajanan Nerurkar and Ors*, reported in 2015(4) ABR 639.

(v) *Mahabanoo Navroz Kotwal vs. Piloo Fali Bomanji* reported in 2015(3) ABR 151.

6] The learned Counsel for the Respondent would urge that there are supporting pleadings and in any case if Court is of the opinion that evidence is brought on record in the absence of supporting pleadings, the Court has every power to discard the said evidence at the stage of final hearing. He would invite attention of this Court to the observations made by the Trial Court to that effect thereby reserving right of the Petitioner to the aforesaid extent and as such dismissal of the Petition is sought.

7] Considered rival submissions.

8] It is required to be noted that the Apex Court in the matter of *Ameer Trading Corporation Ltd vs. Shapoorji Data Processing Ltd* reported in 2003 DGLS (SC) 974 has observed as under:-

“In non-appealable cases, however, the affidavit in relation to examination-in-chief of a witness can be taken on record as forming part of the evidence by recording memorandum of production of such affidavit by taking resort to R13 of O.XVIII. The cross-examination of such deponent in case of appealable cases, will have to be recorded by complying the provisions of R.5, where as in case of non-appealable cases the Court would be empowered to exercise its power under R. 13” We agree with the view of the Bombay High Court.

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-examination him. The defendant would not be prejudiced in any manner whatsoever 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.

Applying the aforementioned principles of interpretation of statute, we have no doubt in our mind that Order 18 Rules 4 and 5 are required to be harmoniously construed. Both the provisions are required to be given effect to and as Order 18, Rule 5 cannot be read as an exception to Order 18 Rule 4.”

9] Once based on the Apex Court judgment, Trial Court has taken a view that objection of the Petitioner as is sought to be raised in the matter of prayer for discarding the evidence can be dealt with at the appropriate stage of the proceedings in the suit, I hardly see any reason which warrants interference in extraordinary jurisdiction.

10] This Court in the matter of *Mahabanoo Navroz Kotwal vs. Piloo Fali Momanji* reported in **2015(3) ABR 151** cited supra has observed that affidavit as provided under Order 19 is required to be confined to facts to the extent of knowledge of the deponent who can prove the same by entering into witness box. The Court further observed that such evidence which is irrelevant or beyond the pleading, the Trial

Court in such eventuality can direct the deponent to file fresh affidavit after deleting irrelevant part of evidence or can ignore such irrelevant part of evidence. Relying on the Judgment of Delhi High Court in the matter of *Amarjit Kaur & Ors vs. Kishan Chand* reported in **MANU/DE/0282/1979 : 17 (1980) Delhi Law Times 225**, it has been also observed that an omission to object to evidence which is not admissible under the Evidence Act does not make it admissible by natural course and judge of the court is duty bound to exclude inadmissible evidence even if it is not objected by the party to the suit by disallowing such evidence. The Apex Court in the matter of *Kalyan Singh Chauhan* cited supra had an occasion to deal with difference between trial of Election Petition and that of a civil court. In the said judgment, Apex Court has held that trial of Election Petition commences from its filing whereas in civil court it is from the point of framing of issues. It has been further held that there is no *ipso facto* applicability of Civil Procedure Code to the Election Petitions as the same is applicable “as nearly as may be”. As far as statutory requirement in election law is concerned, same is required to be strictly observed whereas certain latitude can be given to the proceedings under Civil Procedure Code. It is also observed that the

fact cannot be considered by the Court which is beyond pleading of the parties as there has to be appropriate pleading in support of the fact which is sought to be proved by adducing evidence. As such, in absence of pleading, the evidence if any produced by the parties cannot be considered and as such party cannot be permitted to travel beyond the pleading. The very object and purpose of pleading is to enable the adversary party to know the case it has to meet.

11] Apart from above, it is required to be noted that it is difficult for this Court at this stage to appreciate the pleadings of Defendant and the affidavit in examination-in-chief and to reach to a conclusion that there is absence of pleadings qua the evidence sought to be brought on record through affidavit of examination-in-chief. As the very interest of the Petitioner is already safeguarded in the impugned order, I see no reason which warrants interference in the order impugned.

12] Petition as such fails and same stands dismissed.

(NITIN W. SAMBRE, J.)