

MHAH180009422012



R.C.S.No.321/2012

Sarubai Karpe (Dead)

Vs.

Nanasaheb Karpe & Ors.

ORDER BELOW EXHIBIT-96

This application is filed by the plaintiff to not press the evidence affidavit (Exh.71).

2. It is the case of plaintiffs that the plaintiff had filed an evidence affidavit of the general power of attorney holder of the deceased Sarubai at Exh.71. The deceased plaintiff Sarubai died on 21/02/2020, and therefore, the general power of attorney executed by her has no effect after her death. Hence, the plaintiffs prayed to not press the evidence affidavit filed by the general power attorney holder of the deceased plaintiff Sarubai (Exh.71).

3. The learned advocated for the defendants filed say on the back leaf of this application. He prayed to reject the application.

4. Heard the learned advocates for both side and perused the record.

5. In this regard I place my reliance upon ***Banganga Cooperative Housing Society Ltd v. Vasanti Gajanan Nerurkar***¹. In this case there were two questions before the Court.(i) What are the consequences of a deponent filing an Evidence Affidavit but not making himself available to a cross-

¹ 2015 SCC OnLine Bom 3411

examination? And (ii) Is it permissible for a Court to order the expunging or redaction of any part of an Evidence Affidavit? In this regard, in para 22 of the judgment, the Hon'ble Bombay High Court held as follows.

(a) No Evidence Affidavit under Order XVIII Rule 4 of the CPC can be allowed to be 'withdrawn'.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.

7. In the light of case law cited *supra*, it is crystal clear that, the evidence affidavit cannot be withdrawn or substitute by another witness. However, if the witness has not made himself available for the cross-examination, then admissions given by said witness as favourable to the adverse party i.e. defendants, shall be taken into consideration and rest evidence shall be ignored. In view of this, the plaintiffs cannot substitute evidence affidavit filed by the G.P.A. holder of the deceased plaintiff Sarubai (Exh.71). But, they are at liberty to lead further evidence subject to conditions mentioned in case cited *supra*. Hence, this application is partially allowed. Resultantly, I pass following order.

ORDER

1. The application is allowed subject to conditions mentioned in *Para 7*.
2. The plaintiffs are at liberty to lead further evidence.
3. No order as to costs.

Date:02/12/2024

(Mayursingh D.Gautam)
2nd Jt. Civil Judge Junior Division,
Rahuri