

MHBU040000662020



Order Below Exh.47

(Passed on 30/11/2023)

1. This petition is filed under Section 25 of the Guardian and Wards Act, 1890, by the petitioner / father claiming as a natural guardian of his minor children i.e. respondent No.2 and 3 for the return of their custody from his wife respondent No.1. In this petition, respondents appeared and filed their written statement. After framing of issues, petitioner has filed his affidavit of evidence vide Exh.45. Respondents have filed present application Exh.47 praying that some portion of affidavit of examination in chief are beyond pleading and it may be strike out.

2. Petitioner has resisted the application by filing detailed reply at Exh.48.

3. Mr. K.C.Bhate learned advocate for the respondents has submitted that the petitioner vide Exh.45 filed his affidavit of evidence as examination in chief and in which in paragraphs No.2, 7, 45 and 65 has given evidence which is beyond his pleading which is shown in paragraph No.2 (a) to 2 (e). It is submitted that without pleading said evidence can not be adduced. Therefore, it is necessary

to struck out those portions of affidavit of evidence of petitioner. Hence, he urged to allowed the application.

4. Mr. K.C.Bhate learned advocate for the respondents has relied upon the following authorities :-

- [1] **Smt.Ramkanya Wd/o Sitaram Soni Vs. Smt. Anju Wd/o Lavkesh Soni, and others** in Writ Petition No.75/2017 in which the Hon'ble Bombay High Court Bench at Nagpur vide Judgment dated 29.01.2019 observed that, “ in the present case, the learned trial Judge has kept the issue open for consideration at the time of appreciation of evidence, observing that the plaintiff may not cross examine the defendant No.1 on the pleadings which according to the plaintiffs are not admissible . This approach of the learned trial Judge adds to the peril.” Further it is observed that, “ I have examined the pleadings of the defendant No.1 and the affidavit filed on behalf of the defendant No.1 in lieu of examination in chief. I find that the starting part of paragraph No.3 “Defendant No.4 is younger brother was constructed by my husband Lavkesh along with his partner” is not supported by pleadings in the written statement and,therefore, it has to be deleted. Similarly, part of paragraph No.15 “ In fact Lavkesh was a Director in a Company..... and plaintiff also claimed interest in respect of three shops in the said sankul” is required to be deleted as it is not supported by pleadings in written statement.
- [2] **Mrs. Mahabanoo Narvroz Kotwal Vs. Piloo Fali Bomanji and Anr. 2015 (3) ABR 151** in which the Hon'ble Bombay High Court held that , “ In my view, the objections thus raised by the plaintiff in respect of the part of the evidence highlighted in affidavit in support of chamber summons has merits and thus such part of affidavit deserves to be ignored while recording of evidence of Dr. Navroze Kotwal with a clarification that plaintiff need not cross examine the said witness in respect of such part of deposition referred in the schedule to the chamber summons.

5. On the other hand, Mr. Ashwin Duggal learned advocate for the petitioner has argued and submitted written notes of argument at Exh.55. He submitted that respondents have filed present application to delay the cross examination and the trial with malafide intention. He submitted that the affidavit of petitioner under Order 18, Rule 04 is an evidence as soon as it affirmed. The contents to be strike off can only be adjudicated during the final hearings and the objections to the same may be recorded in writing and the same has to be adjudicated during the final hearings. He submitted that this Court for all purposes is a deemed Family Court under the Family Court Act 1984 for trying the suit under the Guardian and Wards Act. He submitted that Section 7, 10, 12, 14 & 16 are the major Sections under the Family Court Act, which belies that the application moved by the respondent striking out defence is absolutely frivolous in nature. This Court has inherent powers u/s 14 and 16 of the Family Court Act, to receive evidence that may in its opinion assist it to deal with the dispute effectually whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act. He submitted that that Paragraph No.2 (a) of the application for striking out defence of the affidavit is plain relevant facts in circumstances of the case and is a developing fact which has culminated into the petitioner being evicted from the house at Goregaon. This is a circumstantial fact and has relevance to the proceedings under dispute. He submitted that entire paragraph 2 (b),(c),(d) of the application for striking out contents of the affidavit are absolutely only part of the submissions and relevant to the dispute on hand. He submitted that entire paragraph 2 (e) of the application for striking

out contents of the application are absolutely relevant to the dispute on hand. The reports of the doctors submitted are a part of the prosecution in the charge sheet and are also a part of the pleadings. He submitted that respondents can certainly not look back and ask for the Hon'ble Court to strike these part of evidence especially when the evidence itself is submitted by the respondent. He further submitted that once affidavit in lieu of examination in chief is filed it partakes the character of examination in chief. There is no provision under the said code under which the Hon'ble Court can order for deletion of any portion of examination in chief. The attention of the witness may be brought to the portions during cross. Hence, he urged to reject the application.

6. On the other hand, Mr.Ashwin Duggal learned advocate for the petitioner in support of argument relied upon the following authorities :-

- [1] **Brij Prakash Gupta Vs Ashwini Kumar CM(M)650 2019** in which the Hon'ble Delhi High Court vide Judgment dated 6 February 2020 held that when an affidavit by way of evidence is filed,if an objection is raised regarding the same being beyond the pleadings etc.,the trial would not be halted but the objection would be recorded and decided at the final stage. Cross-examination too would be permitted, subject to the said objections.
- [2] **Harakchand Gulabchand Dhoka Vs. Kashinath Narsing Marathe** in Writ Petition No.180 of 2010 in which the Hon'ble Bombay High Court vide Judgment dated 15 January 2010 held that once the affidavit in lieu of examination-in-chief is filed it partakes the character of the examination-in-chief of the concerned witness .There is no provision under the said 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. Moreover, the attention of the witness examining him can be always invited to said portion while cross. If there are irrelevant statements in the affidavit in lieu of examination-in -chief and if there are statements which are beyond the scope of the pleadings ,the rival party can always record his objections in writing to the objectionable portion of the affidavit.

7. I have considered the submissions of both sides. Perused the application and reply. I have gone through the record and proceeding of this case.

8. The record shows that petitioner/husband has filed this petition for return the custody of his minor children respondent No.2 & 3 from his wife respondent No.1. In this proceeding, respondents appeared and filed written statement. After framing of issues, petitioner has filed his affidavit as examination -in- chief vide Exh.45. After perusal of application Exh.1 and the affidavit Exh.45 filed by the petitioner, it shows that the contents in affidavit in Para No.2, some portion of Para No.7, Para No.45 and para No.65 are beyond pleading. It is principle to plead first and then lead the evidence.

9. As per authority cited by the learned advocate for petitioner, the portion in affidavit of evidence which is beyond pleading can be appreciated by the Court while deciding the main matter. Therefore, it is not necessary to struck out those portions. On the contrary, in the light of observation in the authority cited by the learned advocate for respondents portion in affidavit of evidence

which is beyond pleading can be strike out. I have respect to the observation in the authorities cited by the petitioner .When there are both views and considering this proceeding u/s 25 of the Guardian & Wards Act regarding the custody of minor children as well as the petitioner has filed his affidavit of evidence in total 60 pages it would be necessary to curtail irrelevant facts and evidence. For that purpose it is necessary to strike out those portions at this stage. If it is not strike out then certainly there will be lengthy cross examination and which will be very irrelevant. Moreover, the portion as mentioned above in affidavit of petitioner is beyond pleading.

10. So far as the provisions regarding Family Court are concerned, those cannot be applicable to this Court because the provisions of Family Court are attracted only to the Family Court. I think that it would be just and proper to discard those portions which are mentioned in application in Para No.2 (a) to (e). If it is strike out then the cross examination will be curtailed and it will be helpful for proper adjudication to the controversy of the matter. Hence, in the light of above reason and discussion, the application deserves to be allowed. In result, I pass following order :-

ORDER

- 1] Application Exh.47 is allowed as prayed.
- 2] The portion in para No.2 (a) to (e) as referred in this application regarding para No.2,7,45 and 65 of the affidavit (Exh.45)of the petitioner shall be strike out and respondents are not necessary to cross examine on that point.

Sd/-

(G.B.Jadhav)

Dt.30/11/2023

District Judge-1, Khamgaon.

Certificate

I affirm that the contents of this P.D.F. file order are same word for word as per original order.

Name of Steno : Mrs.Nishat Anjum Mohd.Rafique.

Name of Court : District Judge – 1, Khamgaon, Dist. Buldana.