



R.C.S.No.66/2007

Aadgonda Patil and others

Vs.Mahaveer Patil and others

CNR No.MHKO180001202007

ORDER BELOW EXH.128

(Passed on 07th December, 2021)

This is an application filed on behalf of defendant under Section 151 of Civil Procedure Code. (hereinafter shall be referred as CPC) It is contended by defendant that the plaintiff has filed evidence affidavit at Exh.77 and not pressed it without permission of Court. There is no provision of not pressing evidence affidavit. Thereafter plaintiff filed evidence affidavit through his power of attorney holder, which is again not permissible. Hence plaintiff has prayed that the evidence filed on record by plaintiff through power of attorney holder be discarded.

02. Plaintiff has filed say at Exh.130 and contended that application is not maintainable as per Section 151 of CPC. Defendant should have to file review application. Plaintiff has not pressed the examination in chief as he was not able to remain present in the Court. Plaintiff has not pressed his affidavit of evidence with permission of Court. Plaintiff is master of his suit and he has right to decide how to conduct his suit. The application is filed with intention to prolong the matter. On the grounds supra application deserves to be rejected.

03. Perused record. Heard both side.

04. The evidence affidavit of plaintiff is filed at Exh.77 on 30/12/2013 and he further not pressed the same on 30/01/2018. Plaintiff filed additional evidence affidavit at Exh.119 on 24/03/2017 and not pressed the same on 30/01/2018. Plaintiff has filed evidence affidavit on his behalf through his power of attorney holder at Exh.126 on 30/01/2018. Defendant has strongly opposed the application.

Defendant has relied upon following citations :-

1) 2017(3) ALL MR 497

(A) Order 18 Rule 4 of Evidence Act(1872) Section 3 - Oaths Act (1969) Sections 4(1)(a), 8- Affidavit in lieu of examination-in-chief- cancellation or withdrawal by Court- ot permissible- It would amount to withdrawal of oath taken by witness and hit the very sanctity of oath- No provision of law permits any Court to cancel a properly tendered evidence- only where the evidence is illegally tendered, Court can ignore the same.

(B) Evidence Act (1872), Ss.3, 115-Evidence of witness-Withdrawl or cancellation without there being any defect- Not permissible- Permitting Withdrawal or cancellation of properly tendered evidence would amount to giving nod to a witness to approbate and reprobate- Doctorine of election and Rule of estoppel applicable.

- 2018(1) Mh.L.J. 169 Digambar Ramchandra Bawaskar Vs Soma Prabhu Pawar and others

05. As per the ratio supra, affidavit once filed cannot be withdrawn and it amounts to withdrawal of oath which cannot be

permissible. So once the affidavit of plaintiff is filed on record, it cannot be withdrawn.

06. If at all plaintiff wants to examine any other witness before himself then he must seek permission under Order 18 Rule 3-A of CPC which is not sought in present case. Order 18 Rule 3-A says that party must first examine himself before examining any other witness. In present case power of attorney cannot be called as the plaintiff himself. Power of attorney is a witness for the plaintiff who will depose as per his information and knowledge. But the plaintiff Aadgonda Patil has filed affidavit but not appeared for cross-examination. As per the ratio supra, he cannot withdraw the affidavit and he must come forward to face the cross-examination. If at all it is the contention of the plaintiff that he is unable to attend the Court for cross-examination, there are other options in CPC for recording of cross-examination at the place of his residence by appointing commission. So other recourses can be opted for. But merely because, he does not want to face cross-examination, he cannot suddenly, come up and even without permission of the Court withdraw his own affidavit.

07. So plaintiff here not pressed or withdraw the evidence affidavit without permission of Court. Thus permission was not sought to withdraw the affidavit. Therefore withdrawal or not pressing of affidavit is not appropriate.

08. However the evidence affidavit of power of attorney holder cannot be discarded but the sequence of cross-examination

will have to be decided. He cannot be cross-examined, unless plaintiff is cross-examined. The power of attorney holder is witness for plaintiff. As per order 18 Rule 3-A, a witness has to be examined after the examination of plaintiff. So it is appropriate to direct the plaintiff to step into witness box for cross-examination under Order 19 Rule 2 of CPC. If plaintiff is unable to come for cross-examination, then he may take steps for appointment of Court commissioner or any other recourse available under law. The prayer in regard to withdrawal of evidence of power of attorney holder cannot be allowed for the same reason that it is on oath. As per the ratio supra the withdrawal of affidavit amounts to withdrawal of oath.

09. Similarly discarding of affidavit will amount to discarding of oath. So even that affidavit cannot be discarded. But his cross-examination can be conducted after the cross-examination of plaintiff. Therefore I proceed to pass the following order :-

ORDER

- 1) The application partly allowed.
- 2) The order on Exh.77 and 119 of not pressing dtd.30/01/2018 is called back.
- 3) Plaintiff is directed to step into witness box for cross-examination or take other steps for his cross-examination. After the cross-examination of plaintiff, cross-examination of his witness will be conducted.

Sd./-

(Shalaka S. Jambhale)
Civil Judge Junior Division,
Kurundwad

Date-07.12.2021.