

(2009) 04 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 5388 of 2008

Prashant Chandrashekhar Gundawar and Others

APPELLANT

Vs

Municipal Council and Another

RESPONDENT

Date of Decision : 02-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4, 139
Constitution of India, 1950 — Article 226, 227

Citation : AIR 2009 Bom 144 : (2010) 4 BomCR 423 : (2010) 8 RCR(Civil) 2404

Hon'ble Judges : S.R. Dongaonkar, J

Bench : Single Bench

Advocate : A.S. Chandurkar, for the Appellant; A.A. Shelat and Kirti Satpute, for the Respondent

Judgement

S.R. Dongaonkar, J.—Heard Shri A.S. Chadurkar Adv; for the petitioners, Shri A A. Shelat, Adv. for Respondent No. 1 Miss. Kirti Satpute, Adv. for Respondent No. 2.

Rule.

Made returnable forthwith. Heard finally with the consent of the parties.

2. By the petition under Articles 226 & 227 of the Constitution of India, the petitioners are challenging the order passed by Civil Judge, Junior Division, Bhandrawati in R.C.S. No. 1/1998, below Exh. 156, an application preferred by the petitioners for adducing the evidence of a witness on affidavit sworn before the notary.

3. Impugned order reads thus:

ORDER PASSED BELOW EXHIBIT 156.

Perused the affidavit annexed herewith. It is sworn by one Manohar Narayan Pranale before a Notary.

As per Order 18, Rule 4 of C.P.C., the evidence affidavit of witness is to be sworn before Court machinery. If there would have been any other option to do so, legislature would have mentioned the same in the said provision.

The Hon'ble High Court has directed on 15-7-2008 to dispose of the matter within six months. The parties were asked to cooperate the Court and it goes to mean that parties should not seek adjournment. The plaintiff was given opportunity to clarify the position about notarized affidavit. But on one or the other count, he seeks adjournment.

The affidavit of evidence is to be sworn before machinery which is not done in respect of PW Manohar Pranjale. Hence no permission can be granted. Hence, application is rejected.

According to the learned Judge, the affidavit of the witness which is to be filed as an evidence in examination-in-chief in any suit or proceedings before the Court, has to be sworn before the Court, has to be sworn before the Court machinery i.e. Court officials. According to him, the affidavit sworn before the Notary cannot be taken on record as an affidavit of a witness for the purpose of evidence before the Civil Court. This order of rejection of permission is challenged in this petition.

4. Learned Counsel for the petitioners has submitted that the provisions of Section 139 of the C.P.C. read with relevant provisions of Order 18, Rule 4 of Civil Procedure Code, when read together, makes it amply clear that affidavit sworn before the Notary can also be treated as an evidence on affidavit of a witness which can be filed in the proceedings of the suit before the Civil Court. Therefore, he submitted that the impugned order of the learned trial Judge is incorrect at law and it is liable to be quashed and set aside by exercising extraordinary writ jurisdiction of this Court.

5. Learned Counsel for respondent No. 1 relying on the object of introducing amendment of Section 139(aa) of the Code of Civil Procedure, contended that the affidavit sworn before the Notary appointed under the Notaries Act can be treated as an affidavit in examination in chief, which can be accepted under Order 18, Rule 4 of C.P.C. in the proceedings before the Civil Court. Therefore, according to him, the impugned order is incorrect.

6. Learned Counsel for respondent No. 2 has however supported the order of the Court saying that the discretionary powers of the Civil Court has been correctly exercised by passing the impugned order of rejecting the application Exh. 156 by the learned trial Judge. She has also relied on the provisions of Order 18, Rule 4 to contend that the same suggest that Court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of particular witness for deposition. As such, the learned trial Judge was right in directing the petitioners to clarify the position as per his order dated 28-11-2008 and as the same was not done, the impugned order passed below Exh. 156 was correct.

7. In order to appreciate the rival contentions of the parties, it is necessary to

see the order passed by the learned trial Judge dated 28-11-2009, which reads thus:

Perused the application and the annexed evidence affidavit of witness Manohar Pranjale. It is seen that said affidavit is not sworn in Court, but before notary at Chandrapur though the witness is resident of Bhadrawati. In Order 18, Rule 4, there is no mention that notarize affidavit is allowed. The party to clarify the matter first.

8. It appears that the learned Counsel for the petitioners before the learned trial Judge did not clarify the relevant position and therefore, the impugned order was passed.

9. In this regard, the provisions of Order 18, Rule 4 need to be seen. The relevant rule reads thus:

4. Recording of evidence.--(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

Provided that where documents are filed and the parties reply upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

It does not exclude, in specific, the affidavits sworn before the notaries, nor the same direct that such affidavit could only be those sworn before the Court officials.

10. At this stage. It Is necessary to refer the provisions of Section 139 of C.P.C. The same reads thus:

139. Oath on affidavit by whom to be administered.--In the case of any affidavit under this code:

(a) any Court or Magistrate, or

[(aa) any notary appointed under the Notaries Act, 1952; or]

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court, which the State Government has generally or specifically empowered in this behalf.

may administer the oath to the deponent. It would be seen that Clause (aa) reads thus:

(aa) any notary appointed under the Notaries Act, 1952.

Therefore, any affidavit under this Code I can be sworn before any notary appointed under the Notaries Act.

11. At this stage, it would be useful to refer the objects and reasons, by which

this clause was inserted, u/s 139 of C.P.C. The relevant part of the objects and reasons reads thus:

Objects and Reasons--Clause 49.--"Notaries" have power to administer oath under the Notaries Act, 1952. In the absence of statutory provision, Courts refuse to accept affidavits sworn before the notaries. Section 139 is being amended to include a specific provision permitting the swearing of affidavits before notaries.

12. It is thus obvious that notaries have power to administer oath under the Notaries Act. In absence of statutory provision, the Courts were refusing to accept the affidavits sworn before the Notary. Section 139 was amended to include a specific provision permitting the swearing of such affidavits before the Notaries.

13. The provisions of Civil Manual, Chapter XXVI, para 506 read thus:

506. The person who may administer oaths to deponents must be duly authorised u/s 139 of the CPC to do so.

It would thus mean that the persons who may administer oath to the deponents are to be the persons who are authorized u/s 139 of C.P.C. to do so. Therefore, the result is obvious that the Notaries are authorized to administer oath to the deponents. The affidavits which are to be under the Code, can be sworn by on administering the oath to the deponents by any Notary appointed under the Notaries Act and under Order 18, Rule 4 of the C.P.C, there is no bar requiring to exclude the affidavits sworn before the Notaries for taking them on record as an examination in chief. Thus, such affidavits sworn before Notaries can be accepted as evidence by the Civil Court. The cumulative sequel would render the impugned order to be incorrect and illegal at law. As such liable to be quashed and set aside.

14. Adverting to the contentions that the petitioners had failed to clarify the position and therefore, for default, the impugned order is correct suffice it to say that the impugned order does not withstand the legal scrutiny. Therefore, merely because the petitioners had committed default in not "clarifying" the position, the impugned order cannot be held to be correct.

15. The impugned order is therefore, quashed and set aside. The affidavit filed by the petitioners of the witness is directed to be taken on record as an evidence of the said witness. After taking the same on record, the learned Civil Judge shall proceed with the suit in accordance with law.

16. As the suit appears to be of 1998, the learned trial Judge shall dispose of the same as early as possible, in any case within a period of six months from today.

Rule made absolute in above terms, petition disposed of. No order-as to costs.