Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

MC (EP) No. 4 of 2024 with
MC (EP) No. 5 of 2024
MC (EP) No. 6 of 2024
MC (EP) No. 8 of 2024
MC (EP) No. 9 of 2024
MC (EP) No. 10 of 2024 in
EL Pet. No. 2 of 2023

Date of Decision: 28.11.2024

Shri Gavin Miguel Mylliem **… Applicant(s)**

Versus

Shri Titosstar Well Chyne
S/o R. Diantonath Khyllep
R/o Khliehshnong, Sohra
Opposite R.K.M. Mission Higher Secondary School,
East Khasi Hills District,
Meghalaya-793111 **… Respondent(s)**

Shri Gavin Miguel Mylliem **… Applicant(s)**

Versus

Jiedkupar Kynta
S/o Korbar Sing Lyndem
R/o 323 Sohra,
St. John Bosco Boys, Maraikaphon,
Cherrapunjee, East Khasi Hills District,
Meghalaya-793108 **… Respondent(s)**

Shri Gavin Miguel Mylliem **… Applicant(s)**

Versus

Biiosley Malngiang
S/o Biantimai Malngiang
R/o 193, Maraikaphon, Cherrapunjee,
East Khasi Hills District,
Meghalaya-793108 **… Respondent(s)**

Shri Titosstar Well Chyne **… Applicant(s)**

Versus

Shri Gavin Miguel Mylliem,
S/o Shri Winston Mark Simon Pariat, aged about 31 years,
R/o House No. 171, Umthli Village, Umthli,
S.O. East Khasi Hills District,
Meghalaya-793110. **.. Respondent(s)**

Shri Jiedkupar Kynta **… Applicant(s)**

Versus

Shri Gavin Miguel Mylliem,
S/o Shri Winston Mark Simon Pariat, aged about 31 years,
R/o House No. 171, Umthli Village, Umthli,
S.O. East Khasi Hills District,
Meghalaya-793110. **.. Respondent(s)**

Shri Biiosley Malngiang **… Applicant(s)**

Versus

Shri Gavin Miguel Mylliem,
S/o Shri Winston Mark Simon Pariat, aged about 31 years,
R/o House No. 171, Umthli Village, Umthli,
S.O. East Khasi Hills District,
Meghalaya-793110. **.. Respondent(s)**

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance: in MC (EP) No. 4 of 2024 with
MC (EP) No. 5 of 2024
MC (EP) No. 6 of 2024

For the Petitioner(s)/Applicant(s): Mr. A.S. Pandey, Adv. with
Mr. A.M Pala, Adv.

For the Respondent(s) : Mr. N. Jotendra Singh,Sr. Adv. with
Ms. A. Kharshiing, Adv.

Appearance: in MC (EP) No. 8 of 2024 with
MC (EP) No. 9 of 2024
MC (EP) No. 10 of 2024

For the Petitioner(s)/Applicant(s): Mr. N. Jotendra Singh,Sr. Adv. with
Ms. A. Kharshiing, Adv.

Mr. A.S. Pandey, Adv. with
Mr. A.M Pala, Adv.

i)	Whether approved for reporting in Law journals etc.:	Yes/No
ii)	Whether approved for publication in press:	Yes/No

JUDGMENT AND ORDER

1. This batch of Misc. applications arising out of the main Election petition being Election Petition No. 2 of 2023, substantially on the same issue i.e. the questions that have arisen from the evidence on affidavit filed by the election petitioner and supporting witnesses are being disposed of by this common order.

2. This Court in course of the proceedings in the main election petition by order dated 04.04.2024 after the list of witnesses had been filed on behalf of the parties had fixed 13.04.2024, for cross examination of 3 PWs and had directed that the evidence on affidavit

be filed before the next date. Thereafter, on the filing of the evidence on affidavit, the matter was fixed on 18.06.2024, but on that date before the commencement of the proceedings, the learned counsel on behalf of the election petitioner submitted that due to inadvertence, a wrong date had been entered in the evidence on affidavit and a prayer was made that the petitioner be allowed to file a proper application for withdrawal of the same and for filing of a correct affidavit. The prayer of the election petitioner was allowed, and it was provided that objections, if any were to be filed a week before the next date fixed. Accordingly, an application seeking leave to replace the statement was filed by the election petitioner and the same was registered as MC (El. Pet.) No. 8 of 2024. The other 2 witnesses also filed similar applications for corrections and the same were numbered as MC (El. Pet.) No. 9 of 2024 and MC (El. Pet.) No. 10 of 2024, respectively. To these applications, the respondents had filed objections/replies.

3. At this juncture, it is necessary to note that prior to the filing of applications for corrections of the evidence on affidavit by the petitioner, the respondents had filed an application under Section 379 Bharatiya Nagrik Suraksha Sanhita, 2024 (BNSS) r/w Section 193,

Indian Penal Code, 1860 r/w Section 229 Bharatiya Nyaya Sanhita, 2023 (BNS) r/w Section 528 Bharatiya Nagrik Suraksha Sanhita, 2024, with a prayer that criminal proceedings be initiated against the election petitioner by initiating an inquiry under Section 379 BNSS, 2024. This application was made for declaration that the election petitioner had prima facie intentionally given false evidence, for being used in judicial proceedings before this Court, and for other appropriate orders. This Misc. Case was registered as MC (El. Pet.) No. 4 of 2024, and similar applications against the 2 other witnesses were also filed and were numbered as MC (El. Pet.) No. 5 of 2024 and MC (El. Pet.) No. 6 of 2024, respectively.

4. With regard to the Misc. applications filed by the election petitioner for recall of the statement filed on affidavit, the reasons as set out have been given Para-3 of the said application, which is reproduced hereinbelow:-

> ***"3. That due to inadvertent and bona fide mistake, some errors have occurred in para No. 6 of the Statement (Examination-in-Chief) on affidavit of the Applicant/Petitioner i.e. P.W. No. 1 namely Shri Titosstar Well Chyne filed on 20/05/2024 while***

mentioning the date as "12/04/2023" instead of the correct date "11/04/2023" and one sentence is also omitted at the end of para No. 8 due to typographical and cut and copy paste by our typist/Clerk."

5. In support of the application, it has been submitted that the corrections which are sought to be incorporated has been made at the stage when only the statement (Examination-in-Chief) on affidavit of the election petitioner (PW No. 1) had been filed and that the same has not yet been taken up on record, inasmuch as, no exhibit has been marked so far by the PW No. 1 and that he has not yet appeared for the purposes of his cross examination. The confirmation or denial it is contended, of the contents of the affidavit of the election petitioner has not yet been recorded, which is necessary either to confirm or differ with the contents thereof, which shall then on being recorded form part of the evidence of the petitioner.

6. The learned Senior counsel in support of his submissions placed reliance on the following cases, wherein a similar situation has arisen: -

i) O.M. Prakash Agarwal vs. Smt. Sudha Agarwal (Jharkhand High Court) in Testamentary Suit No. 1 of 2017 with I.A. No. 10594 of 2019 decided on 18.01.2020.

ii) ***Sudir Engineering Company vs. NITCO Roadways Ltd.,*** reported in ***(1995) 34 DRJ 86 (Delhi High Court)***

7. It is submitted that by applying the ratio of the above judgments, this Court would have to appreciate that the matter is now at the first stage, inasmuch as, the Examination-in-Chief in the form of an affidavit by the petitioner and other witnesses, are yet to become part of the judicial record. As such, he submits the petitioner may be allowed to replace the statements (Examination-in-Chief) on affidavit of the election petitioner filed on 20.05.2024, by fresh corrected copies of statements (Examination-in-Chief) on affidavit, and that the other 2 witnesses be also allowed the same.

8. In reply to the submissions, Mr. A.S. Pandey, learned counsel for the respondent has submitted that there exists a prima facie case that the election petitioner and other witnesses, have given false evidence before this Court and that in the interest of administration of justice, they are liable to be prosecuted in accordance with law. Reverting to the chain of events, the learned counsel submits that the election petition was signed and the petition along with a verification

and affidavit was notarized on 11.04.2023, with the Instrument No. 205 by the Notary. However, he submits the Examination-in-Chief on affidavit filed on behalf of the election petitioner and 2 other witnesses states that they had come before the Oath Commissioner on 12.04.2023 and these affidavits, form the basis of the applications with regard to perjury/false evidence, for which the election petitioner should be prosecuted. In the affidavit he submits, a reading of the same would indicate that the election petitioner and the witnesses left Sohra for Shillong on 12.04.2023, that they had reached the Notary at about 2:00 P.M. where oath was administered and notarization effected, and that at about 3:00 P.M. of the same day, they entered the High Court premises for the purposes of presentation. The deposition he contends shows that all acts were undertaken on 12.04.2023, but however when the date was fixed for cross-examination, the counsel for the election petitioner requested that he be allowed to move an application to correct the false affidavit on the ground that the same was an inadvertent and bona fide mistake, wherein 12.04.2023 has been mentioned, instead of the correct date which is 11.04.2023.

9. It is submitted by the learned counsel that prima facie the ingredients of Section 191 of the IPC are present, inasmuch as, the witnesses have collectively deposed that the election petition was sworn and notarized on 12.04.2023, whereas the stamp/seal and noting made by Notary, clearly reveals that the act of notarization and preparation of the election petition happened on 11.04.2023. He further submits that the witnesses by seeking replacement of statements made in the evidence on affidavit, which is an admission that the entire exercise of tendering the evidence being a copy paste job, shows that the evidence given by the other witnesses is not bona fide and have been made on instructions of the election petitioner. Learned counsel has then referred to the order dated 31.10.2023 passed by this Court in MC (EP) No. 19/2023, which required the election petitioner to prove by way of evidence that the election petition was presented personally to the Stamp Reporter, and has submitted that instead, the election petitioner and the other witnesses have admittedly led false evidence in collusion with each other. The replacement applications, it is contended, has brought about a new version which is different from the already filed affidavits, wherein the witnesses have sworn that the entire events happened in one single day i.e. 12.04.2023, and as such

the replacement applications are irreconcilable with the existing narration of facts as contained in the affidavits already filed. The learned counsel has then placed Order 18 Rule 4 of the CPC, which details the procedure with regard to the recording of evidence, and submits that the Examination-in-Chief, must happen by way of affidavit and the remaining parts of the evidence i.e. cross-examination and re-examination must happen in attendance before the Court. As such, he submits once the Examination-in-Chief is recorded on affidavit after being sworn before the Oath Commissioner or Notary, then the same cannot be withdrawn as it becomes part and parcel of the evidence of that witness. In support of his arguments, the learned counsel has cited the following decisions: -

i) ***Rasiklal Manikchand Dariwal & Anr. vs. M.S.S. Food Products (2012) 2 SCC 196***

ii) ***Banganga Coop. Housing Society Ltd. vs. Vasanti Gajanan Nerurkar, 2015 SCC OnLine Bom 3411***

10. The learned counsel then submits that the above noted judgments have laid down the law that no evidence on affidavit can be allowed to be withdrawn, as it is evidence, as soon as it is affirmed. In

concluding his submissions, the learned counsel has asserted that the witnesses have adduced false evidence regarding a material question in issue, have resorted to collusion to make false statements, offered no explanation as to the falsehood, but instead have admitted the same and sought to replace the statements so made. As such, the fact that the election petitioner has not complied with the provisions of the RP Act, 1951 and the Gauhati High Court Rules in presenting the election petition being clear, he prays that appropriate action be taken by this Court in accordance with Section 379 of the BNSS and further pass orders that the witnesses have prima facie led false evidence in terms of Section 191 and 193 of the IPC.

11. On hearing the learned counsel, and on examination of the materials on record, the issues that arise for consideration before this Court are :-

(i) Whether the election petitioner and the other 2 witnesses are liable to be prosecuted in terms of Section 379 of the BNSS, 2023 read with Section 193 of the IPC, 1860 read with Section 229 of BNS, 2023

(ii) Whether the affidavit sworn before the Oath Commissioner/Notary Public and filed as Examination-in-Chief can be allowed to be replaced.

Before addressing the first issue as given hereinabove, the second issue which is of more importance, shall be discussed first. As the main issue revolves around Order 18 Rule 4 (1) of the CPC, the same for the sake of convenience is reproduced hereinbelow:-

> ***"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 rely upon the documents, the proof and admissibility of such documents which are filed alongwith the affidavit shall be subject to the orders of the Court."***

12. Order 18 Rule 4 stipulates that what is stated in the affidavit will constitute the Examination-in-Chief, and as such would normally mean that once an affidavit is affirmed, it requires no further steps for it to be considered the Examination-in-Chief of the deponent. However, this will necessarily be subject to the scrutiny of the Court for it to become evidence and in this regard, cannot override the

Evidence Act (BNA). At this juncture therefore, it would be expedient to examine and discuss the judgments that have been placed by the parties. In the judgment of ***O.M. Prakash Agarwal vs. Smt. Sudha Agarwal (supra)*** of the Jharkhand High Court which has been cited by the learned Senior counsel for the petitioner, this judgment had relied upon a judgment of the Andhra Pradesh High Court in the case of Sri Mohammed Abdul Ahmad vs. Sri Mohammed Abdul Gafoor @ Ahmed reported in 2013 AIR CC 745 (AP), wherein it was held that an affidavit is merely an affidavit and if the witness confirmed the affidavit, the affidavit would then become part of the statement made by the deponent before the Court. Taking this ratio, it was held that only when the concerned witness appears before the Court for the purposes of confirmation of his Evidence-in-Chief, that the same is said to have been taken on record. In the next judgment i.e. ***Sudir Engineering Company vs. NITCO Roadways Ltd.,*** (supra) the same speaks about three stages with regard to a document filed by either party before it is held proved or disproved. In the considered view of this Court the latter judgment, will have no application to the instant case, inasmuch as, the same relates to proving of documents which

have been filed by the parties, whereas in the instant case it is a question of a statement made on oath.

13. In the first judgment relied upon by the respondent i.e. ***Rasiklal Manikchand Dariwal & Anr. vs. M.S.S. Food Products*** (supra) the Supreme Court has outlined the objective of Order 18 Rule 4 of the CPC i.e. the speedy trial of a case to save the precious time of the Court and at Para-77 thereof, an extract which is quoted hereinbelow, it has been held as follows:-

> ***"……Where the examination-in-chief of a witness is produced in the form of an affidavit, such affidavit is always sworn before the Oath Commissioner or the notary or judicial officer or any other person competent to administer oath. The examination-in-chief is, thus, on oath already."***

The other judgment placed by the learned counsel for the respondents i.e. ***Banganga Coop. Housing Society Ltd. vs. Vasanti Gajanan Nerurkar*** (supra) which is a judgment of the Bombay High Court, wherein the decision rendered in ***Rasiklal Manikchand Dariwal*** has also been discussed, apart from other decisions, to the mind of this Court has great persuasive value. This is because the

issues that arise in relation to affidavits in lieu of Examination-in-Chief has been discussed minutely. In Para-5 of the said judgment these questions and issues have been given as follows:

> ***"5. In all these matter a common question of law has arisen. It pertains to Order XVIII Rule 4 of the Code of Civil Procedure, 1908 ("CPC") and some of the issues that arise in relation to affidavits in lieu of examination-in-chief. Some of these questions and issues are : Is it permissible for a Court to order the deletion or redaction of any portion of any such affidavit if that part is found to be inadmissible as evidence? If so, at what stage of the proceedings should this be done? Can a party 'withdraw' an evidence affidavit without consequence? Can an evidence affidavit, once filed, ever be 'returned'? What are the consequences if an affidavit is filed and then it is found, perhaps a long time later, that the deponent of that evidence affidavit is either unavailable or cannot be tendered for cross-examination? Where documents are admitted in evidence on the basis of an evidence affidavit and the witness is then not made available or tendered for cross-examination, how are those documents to be treated? These, and other allied questions, all arise with regularity in suits."***

14. The same judgment then goes on to discuss the ***Rasiklal Manikchand Dariwal*** case and at Para-10 and 12 has held as follows:-

> ***"10. In Rasiklal Manikchand Dhariwal v. MSS Food Products the Supreme Court considered a submission by the appellants that the evidence led by the plaintiff was no evidence at all since the deponents of the Evidence Affidavits had never entered the witness box to confirm the contents of their Evidence Affidavits. Both FDC Ltd. and Ameer Trading were cited in support of this***

submission. The two decisions were considered at length. The Rasiklal Manikchand court held that Ameer Trading, in agreeing with FDC Ltd., did not enunciate an invariable or absolute rule that in every appealable case, a witness or deponent must necessarily re-affirm his Evidence Affidavit from the witness box and confirm its contents and his signature on it. Indeed, where that statement is on oath or affirmation before a notary, judicial officer or oath commissioner (or anyone else empowered to administer oath), the examination-in-chief is already on affidavit. There is, the Supreme Court said, no requirement in Order XVIII Rule 5 that even in appealable cases a witness must enter the witness box for production of his affidavit and formally prove his affidavit. The witness is required in the witness box for cross-examination and re-examination if any; but he or she is not invariably or always required to step into the witness box for examination-in-chief.

12. What is not in doubt is that there can never be a withdrawal of an Evidence Affidavit just as there can never be a withdrawal of an examination-in-chief conducted directly in Court. This position, following Rasiklal Manikchand, raises some subsidiary question: (1) what are the consequences of a deponent filing an Evidence Affidavit but not making himself available to a cross-examination? (2) Is it permissible for a Court to order the expunging or redaction of any part of an Evidence Affidavit?"

However, notwithstanding the position as maintained above, it has been further held in Para-18 by taking recourse to Order 18 Rule 4 as follows:-

"18. I do not think there is any authority for the proposition that no objection can be taken to any part of the Evidence Affidavit, and that the whole of it, irrespective of what it purports to contain, must be treated as 'evidence'. Indeed

Ameer Trading and FDC Ltd. both suggest the converse is true and this position at least is undisturbed even in Rasikal Manikchand. The option available to the Court is to order a redaction of so much of the affidavit as does not constitute evidence properly so-called. This is self evident from the provisions of Order XVIII Rule 4……"

Though the interplay of Order 18 Rule 4 and Section 1 of the Indian Evidence Act has also been discussed, inasmuch as, Section 1, provides that the Act shall apply to all judicial proceedings as given therein, '*but not to affidavits presented to any Court or officer, nor to proceedings before an Arbitrator'*, this judgment has however clarified in Paras 26 and 27 as follows:-

"26. Order XVIII Rule 4 requires two things : (1) what is stated must constitute examination-in-chief; (2) it must be stated in the form of an affidavit. Order XVIX tells us what an affidavit cannot contain and to what it must be restricted; and the Evidence Act tells us what can constitute examination-in-chief or evidence and what cannot. Therefore, it any portion of a purported Evidence Affidavit does not conform to these two exacting requirements, it is simply not examination-in-chief at all and cannot be allowed to pass into the evidentiary record of the trial. It would, in my view, not only be incorrect by wholly against legislative intent to suggest that merely because the material is in the form of an affidavit that the powers of a court are somehow denuded and that anything and everything stated in that affidavit automatically and without checks or balances passes into the realm of 'evidence', jettisoning in its passage every requirement of the substantive law of the Evidence Act. That simply cannot be, and this is the

foundation of that Mr. Justice Dhanuka's reasoning in Khushwaha and Mahabanoo Kotwal and my own earlier decision in Harish Loyalka.

27. As to what can or cannot be the subject matter of such an order, I do not think any absolute standard or rule can be set out. It may, in a given case, be that the evidence affidavit contains material that is relevant but is unsupported by pleadings. Cesar Rego Fernandes v. Angela Ninette Oliveira Fernandes tells us that this is not the kind of material that can be ordered to be struck off. But material that is clearly irrelevant, or hearsay, in the nature of legal submissions, arguments, in the form of prayers or reliefs, or denials of the kind we find in pleadings has no place in an evidence affidavit. It may be possible to illustrate this with an example from testamentary law. A probate petition, it is well settled, does not decide questions of title. Therefore, whether or not the testator had valid title to any given property mentioned in the will propounded is entirely irrelevant to that trial. This is the basis of the decision in Khushwaha, and testimony in that regard was therefore excluded. But in a given case, a witness may depose that it is to his (the witness's knowledge) that the testator was aware at the time of the making of the will that a certain property was not his. This may possibly be retained as being relevant to an issue of unsoundness of mind or undue influence. The distinction to be drawn, and drawn carefully, is whether the deponent says this as a matter of conjecture or personal knowledge. I would suggest that in a matter where there is the slightest doubt, then the material should be retained and not deleted or struck off. That power, while available to a court in its inherent jurisdiction, must be exercised cautiously and judiciously, and no cut-and-dried one-size-fits-all formulaic approach is possible."

(Emphasis supplied)

And at Para-28, it has concluded as follows:-

"28. The result of this discussion is that:

(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 consequences.

(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."

15. In the backdrop of this legal position, in considering the facts of this case, what can clearly be seen is that the redaction or

recall of that part of the Evidence on Affidavit which has been sought for by the election petitioner is with regard to a statement that has been made on oath as to the date of the presentation of the Election Petition, which is in variance with the statements made in the body of the Election Petition. It is not a case where the statement made is of no relevance, or that the recall sought is of documents that are yet to be proved, but is a statement which touches the core issue in dispute. The Courts in such situations can well exercise discretionary powers to allow redaction or replacement or deletion, if the same in its considered view is of not much relevance. As all cases stand on their own peculiar footing or circumstance, a common yardstick in the exercise of this inherent power, is not available and this power necessarily will have to be judiciously exercised taking into consideration all relevant factors. In this particular case, the statement having been made on oath, in the considered view of this Court, the same being vital to the proceedings of the application under Order 7 Rule 11 CPC, the prayer of the election petitioner for replacement of the affidavit cannot be acceded to and is denied.

16. On the other issue i.e. whether the election petitioner and the other 2 witnesses are liable to be prosecuted in terms of Section 379 of the BNSS, 2023 read with Section 193 of the IPC, 1860 read with Section 229 of BNS, 2023, in the considered view of this Court the purported inaccurate statement i.e. the date of presentation will not amount to a misdemeanour or a transgression that requires inquiry or any further orders, as the same is a contradiction in facts which the election petitioner will have to overcome in the course of the proceedings. As such, the Misc. applications being Misc. Case (EP) No. 4 of 2024, Misc. Case (EP) No. 5 of 2024, Misc. Case (EP) No. 6 of 2024, Misc. Case (EP) No. 8 of 2024, Misc. Case (EP) No. 9 of 2024, and Misc. Case (EP) No. 10 of 2024 are closed.

17. Accordingly, as ordered above these Misc. Case (EP) No. 4 of 2024, Misc. Case (EP) No. 5 of 2024, Misc. Case (EP) No. 6 of 2024, Misc. Case (EP) No. 8 of 2024, Misc. Case (EP) No. 9 of 2024 and Misc. Case (EP) No. 10 of 2024 are disposed of.

JUDGE

Meghalaya
28.11.2024
"V. Lyndem PS"