

SHEPHALI

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 846 OF 2016
IN
SUIT NO. 2176 OF 2004**

Hawa Valves (India) Pvt. Ltd.	...Plaintiffs
<i>Versus</i>	
Hawa Engineers Ltd.	...Defendant

Mr. Ajit Anekar, *a/w Mr. Thomas James, i/b Auris Leyal, for the Plaintiffs.*

Mr. Dharam Jumanj, *Mr. Mahesh Mahale, and Mr. Manal Dhanani, i/b M/s. Ganesh & Co., for the Defendant.*

CORAM: G.S. PATEL, J
DATED: 19th October 2016

PC:-

1. The application from Mr. Anekar for the Plaintiffs is, as I have previously noted, to recall PW1 for further evidence and to allow him to lead further documents in evidence. This comes at the stage after the Plaintiffs' close their case, the Defendant has filed his Affidavit in lieu of examination-in-chief, but before the cross-examination of the Defendant is commenced. In fairness, Mr. Anekar states that the application is necessitated only due to inadvertence on the part of both his client and the legal team. As regards the first four documents marked as Exhibits "A1" to "A4"

to the Affidavit in Support of this Notice of Motion. The other documents are subsequent but are important to a determination of the real issues in the Suit.

2. Having regard only to the fact that the cross-examination of the Defendant is to begin, I am inclined to allow the application but on some terms. For, I must protect the Defendant's interest as well to ensure that the balance is maintained in the Suit. It is pointed out on behalf of the Defendant that at least the first four emails ought to have been disclosed earlier and there is no valid reason given for their non-disclosure and for not introducing them in evidence in a timely fashion. I will take this as a pointed criticism of both Mr. Anekar and his attorney but I will leave at that. At best, this will result in an order of costs, but certainly not in a shutting out of the evidence.

3. The Defendant must, I think, be permitted to withdraw his evidence Affidavit. The Plaintiffs will not be permitted to confront the Defendant with that Evidence Affidavit dated 6th August 2015 at any point and for any purpose. After the Plaintiffs have led their additional Evidence and their witness PW1 has been cross-examined, the Defendant will at liberty to decide whether or not it wishes to lead any evidence or not. The fact that it chooses not to lead any evidence is not to be misconstrued, nor will an adverse inference be drawn against the Defendant if the Defendant does not present a witness for cross-examination. It is for this reason that I am permitting a withdrawal of the 6th August 2015 Affidavit in its entirety. The Defendant is at liberty to decide whether or not it wishes to file an Affidavit thereafter.

4. The Plaintiff will file the additional Affidavit in lieu of examination-in-chief of PW1 and a separate compilation of documents on or before 18th November 2016. I am making it clear that there will be no further Evidence Affidavit on behalf of the Plaintiff and that any remaining evidence will be led through this witness, PW1, after which the Plaintiff will close its case. This too is necessary because otherwise it means that the entire trial effectively has to start afresh.

5. As regards the question of costs, I believe that an order of Rs. 7,500/- as costs payable by the Plaintiff to the Defendant is sufficient at this stage. These costs are to be paid on or before 18th November 2016.

6. List the matter for marking the Plaintiff's documents on 30th November 2016.

7. It is clarified that in PW1's further Evidence Affidavit, the Plaintiff will be at liberty to include all the material included in the Affidavit in Support of the Notice of Motion as also any other material that the Plaintiff wishes to include, keeping in mind that there will be no further Evidence Affidavit after this.

(G. S. PATEL, J.)