

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7874 OF 2017

M/s.Renuka Exports Private Ltd. ... Petitioner

Vs.

The Union of India & Ors. ... Respondents

Mr.A.N. Pange with Rahul Total for the Petitioner
Dr.G.R. Sharma with D.P. Singh for Resp. No.1
Ms.V.R. Bhilare with Pavitra Manesh and Dinesh Masurkar for
Resp. No.2

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 14, 2017**

P.C. :

1. Rule. By consent of the parties, Rule made returnable forthwith and heard finally.
2. This petition is directed against the order dated 6.7.2017 passed below exhibit 10 and also the order dated 12.7.2017 in Suit No.8544 of 1995. The suit is filed by the Union of India for encashing bank guarantee amount for non-performance of the contract. In the said suit, admittedly, the respondent/plaintiff Union of India has filed affidavit in chief on 4.1.2017 which is marked exhibit 5. Thereafter, on 6.7.2017, the respondent Union of India

filed application below exhibit 10 for withdrawal of the previous affidavit in chief and the list of documents with liberty to file afresh on the next date.

3. It is the contention of the petitioner that on that day, the defendants were not heard and a copy of the said application was not served on them. However, the learned Judge has allowed the said application with liberty to file fresh evidence affidavit and list of documents. It is contended by the learned Counsel for the petitioner that once the affidavit in chief is filed, it cannot be allowed to be withdrawn as it forms the evidence before the Court. In support of his submissions, the learned Counsel relied on the judgment of a learned Single Judge of this Court in the case of **Banganga Cooperative Housing Society Ltd. vs. Vasanti Gajanan Nerurkar¹**.

4. The learned Counsel for the respondent No.2 Bank supported the submissions made by the petitioners.

5. Per contra, the learned Counsel for the contesting Respondent/Union of India, has submitted that the trial Court has not allowed to withdraw the said affidavit in chief but the plaintiff

¹ Chamber Summons (L) No.1678 of 2014 in Suit No.1373 of 1992 decided on 15th June, 2015

did not press the evidence of the plaintiff i.e., the PW1.

6. In order to clear the confusion, the order dated 6.7.2017 is reproduced as follows:

“As plaintiff not pressed PW evidence affidavit and list application is allowed with liberty to file fresh evidence affidavit and list of documents. Matter Adjd. for filing affidavit of evidence to 10.07.2017.”

7. From the order, it is clear that the trial Court has allowed to withdraw the affidavit in chief filed by the witness for the plaintiff and also the affidavit of list of documents with liberty to file a fresh evidence affidavit and list of documents. There is no question whether the party who files the affidavit in chief presses it or not. As soon as the affidavit in chief is filed, it forms a part of the record and it is to be taken as evidence. Therefore, it is made clear that the affidavit in chief filed earlier marked as exhibit 5 and the subsequent affidavit in chief which is marked exhibit 11 both shall remain on record and constitute affidavit in chief i.e., the evidence of the witness for Plaintiff. Both the petitioner and respondent No.2 are allowed to cross-examine the said witness.

8. Thus, the order dated 6.7.2017 allowing not to press the affidavit in chief of the witness for Plaintiff is hereby set aside and the remaining order allowing further affidavit in chief alongwith the list of documents i.e., exhibit 11, 12 and 13, is hereby maintained. The Suit is of the year 1995. The trial Court is therefore directed to expedite the same. The parties shall cooperate and the witness shall remain present on the next date. It is noted that a copy of the further affidavit in chief is hereby furnished to the learned Counsel for Respondent No.2.

9. Rule made absolute in the aforesaid terms.

(MRIDULA BHATKAR, J.)