

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.13648 OF 2018
(Ajay s/o Jagannathrao Patil Vs. Kashinath s/o Hari Patil)

Mr.B.K.Patil, Advocate for the petitioner.
Mr.R.B.Dhakane, Advocate for the respondent.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 22/01/2019

PER COURT :

1. A short issue is raised in this petition with reference to the impugned order dated 06/09/2018. The petitioner is the original defendant in RCS No.5/2010 who has tendered his affidavit in lieu of examination in chief at Exh.87. Subsequently he has moved an application Exh.88 seeking leave to withdraw the said affidavit and file a fresh affidavit, Exh.92. By the impugned order, the application Exh.88 & 92 filed by him have been rejected.

2. Learned Advocate for the respondent/original plaintiff submits that the petitioner's prayer is restricted to prayer clause "C" and as such, no other prayer orally put forth can be considered and this petition be dismissed.

3. The issue raised in this petition has been now settled by this

Court in the matter of Digambar Ramchandra Bawaskar Vs. Soma Prabhu Pawar and others [2018(1) Mh.L.J. 169 = 2018(2) AIR Bom. R. 346] and in Banganga Co.op.Housing Society Vs. Vasanti Gajanan Nerurkar [2015(5) BCR 813]. The conclusions of this Court are found in paragraph Nos.10 and 11 in the case of Banganga (supra) and in paragraph No.15 in the case of Digambar Bawaskar (supra).

4. It is, therefore, crystallized that once an affidavit in lieu of examination in chief is tendered in the Court after having been duly sworn before the Authority competent to administer the oath, it would become a part of the record and cannot be retracted. Before the cross examination commences, such a litigant would have the opportunity of stepping into the witness box and lead further examination in chief or can tender an affidavit in lieu of examination in chief which would be considered as a continuation of such an examination with its origin in the first affidavit.

5. The Trial Court has therefore concluded that this petitioner cannot withdraw his first affidavit. In my view, the second affidavit already filed can therefore be read in continuation of the first affidavit. The impugned order, therefore, cannot be branded as being perverse.

6. The contention of the plaintiff that this Court should not grant any relief beyond the prayers put forth, need not be entertained in view of the settled position of Law.

7. This petition, being devoid of merit, is therefore, dismissed. The plaintiff can proceed to cross examine the defendant on both the affidavits filed.

(Ravindra V.Ghuge, J.)