

Priti Ganesh Nagrare,
Aged about 42 years, Occ. Household,
R/o. Plot No. 57, Phoolmati Layout,
Opp. Lakhan Steel Fabrication Works,
Beltarodi Road, Nagpur

... PETITIONER(S)

// VERSUS //

Arvind Nilkhantrao Thulkar,
Aged about 63 years, Occ. Private,
R/o. R/177, Kukday Layout, Nagpur

.... RESPONDENT(S)

Shri A. Chaudhari a/w Shri K. Mandpe, Advocates for the
Petitioner

CORAM : M.S. JAWALKAR, J.
MARCH 18, 2025

ORAL JUDGMENT:-

(1) In spite of service and though represented by an Advocate, the Respondent has chosen to be absent. Heard learned Counsel for the Petitioner.

(2) **RULE.** Rule made returnable forthwith.

(3) The present Petition is filed by the Petitioner challenging the order dated 10/10/2023 passed by the learned 2nd Joint Civil Judge Senior Division, Nagpur in Special Civil Suit No. 196/2020 below Exhibit 32 whereby the evidence on affidavit of the Petitioner is discarded. The evidence on affidavit is filed by the Petitioner/Defendant No. 2 on 13/03/2023. The record shows that it was verified on 12/07/2023. It appears that thereafter, the matter was posted on 24/07/2023. On that date, the Defendant No. 2 and his Counsel were present. The next date for hearing was granted on 18/09/2023. However, on the said date, though the Counsel for Defendant No. 2 was present, the Defendant No. 2 was absent. The matter was posted on 10/10/2023. When the matter was called out, the witness and his Counsel were absent. Later on, on the same day, the Defendant No. 2 through junior Counsel was present and filed an Application at Exhibit 33 for setting aside the order passed below Exhibit 32.

(4) On perusal of the record, it appears that there is no order passed below Exhibit 32 of 'no evidence'. However, it appears that there is an order discarding the evidence on affidavit of the Petitioner as the witness and his advocate were absent. On the same day, the Counsel for the Defendant No. 2 filed an Application for setting aside the order passed below Exhibit 32. However, the same came to be rejected on the ground that the witness is not present and has not signed the said Application.

(5) Learned Counsel for the Petitioner relied on the judgment of this Court at Aurangabad Bench in **Writ Petition No. 06959/2017 (Shrimant Amrut Rohokale & others vs. Bhaskar Shrimant Rohokale) dated 29/11/2017** wherein this Court, in Paragraph No. 8, held as under:-

“o8. Defendant no.04 filed his affidavit in chief and in fact, it was read and recorded after verification by the trial court. Therefore, when it has become part of evidence, it cannot be so discarded for which there is no specific provision. When it was enquired with the learned Counsel for the respondent, as to under which provisions of law said application Exhibit 49 has been submitted, initially he pointed out Order XVIII of the Code of Civil Procedure

[For short, "C.P.C."] and then submitted that if there is no specific provision, then it should be considered under Section 151 of the C.P.C. I do not agree with this submission. Order XVIII of the C.P.C. deals with hearing of the suit and examination of witnesses. The provision is made in respect of right to begin, statement to be made, order of recording evidence and how evidence shall be in appealable cases, etc. There is absolutely no provision to discard a piece of evidence which has been admitted. The respondent cannot lay his hand on Section 151 of the C.P.C. which is in respect of inherent powers of the court. In fact, the said section can be invoked in order to prevent abuse of process of the court and not to abuse it. After the affidavit of examination in chief of defendant no.04 was read and recorded, it had become part of the evidence and, therefore, such part of the evidence cannot be discarded. In Banganga Cooperative Housing Society Vs. Vasanti Gajanan Nerurkar & others [2015 (5) Bom.C.R. 813], this Court has held that the affidavit cannot be withdrawn as it has become part of the record. Similarly, it cannot be discarded when it has become part of the record."

(6) In view of the above judgment, after the affidavit of examination-in-chief is read and recorded, it becomes part of the evidence, and therefore, such part of the evidence cannot be discarded. Similar facts are involved in the present matter.

(7) Hence, I proceed to pass following order:-

ORDER

(a) The Writ Petition is **allowed**.

(b) The order dated 10/10/2023 passed by the learned 2nd Joint Civil Judge Senior Division, Nagpur below Exhibit 32 as well as the Exhibit 33 in Special Civil Suit No. 196/2020 are hereby quashed and set aside.

(c) The learned 2nd Joint Civil Judge Senior Division, Nagpur is hereby directed to grant opportunity to the Petitioner to lead evidence.

(d) The witness shall appear before the learned 2nd Joint Civil Judge Senior Division, Nagpur on 27/03/2025 for cross-examination.

The Petition stands **disposed of** in the above terms. Pending Application(s), if any, stand(s) **disposed of**.

(M.S. JAWALKAR, J.)