

\$~33

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 28th October, 2021

+ **W.P.(C) 12292/2021 and CM APPLs. 38585/2021, 38587/2021**

M/S SHARAT DASS AND ASSOCIATES Petitioner

Through: Mr. Sarthak Manan, Mr. Bhumit Solanki, Mr. Onkareshwar Kandpal & Mr. Ayush Bhist, Advocates.

versus

RAMESHWAR SINGH AND ANR Respondents

Through: Mr. Manoj Joshi, Advocate for R-1.
Ms. Richa Sharma, present in person.
Mr. Shadan Farasat, ASC, with Ms. Hafsa, Advocate for GNCTD.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J.(Oral)

1. This hearing has been done through hybrid mode.
2. The present petition challenges the impugned order dated 7th October, 2021, passed by the Authority under the Payment of Gratuity Act, 1972 (*hereinafter*, "Act") (District South), by which the witness of the Claimant/ Respondent, who was under cross-examination, has been permitted to withdraw his affidavit of evidence, and file a fresh affidavit of evidence.
3. The case of the Petitioner in the present petition is that once the affidavit of evidence was filed by the Claimant/ Respondent's witness, and the cross-examination was also taking place, such permission and liberty could not have been granted by the Authority under the Act.
4. Mr. Manan, Id. Counsel for the Petitioner, submits that in fact the claim of the Claimant/Respondent was earlier even decreed in his favour on

the basis of the said affidavit, which is now sought to be withdrawn, and now a fresh affidavit of evidence has been permitted to be tendered, which is contrary to law.

5. Ms. Richa Sharma, Id. Counsel appearing for the Claimant/ Respondent submits that during cross-examination, some questions were put in respect of certain records and the claimant wished to file certain documents in response to those questions. It is due to the said fact that a further affidavit has been permitted by the Authority under the Act.

6. Heard Id. Counsel for the parties and perused the record.

7. The impugned order reads as under:

“Present Sh. Bhumit Solanki Counsel of respondent filed moved an application Under Section 151 of CPC to take off the record the documents filed by the workman alongwith its Evidence affidavit. The evidence/documents alongwith affidavit was supplied by the claimant on 20/02/2020 and the copy of the same was also received physically by the respondent on 20/09/2021. Heard both parties on the application filed today. The application does not carry any merit same is dismissed. The cross examination of the claimant to continue. Cross examination was done and the witness was deferred. The claimant witness withdraws its evidence affidavit and wants to file fresh evidence. The counsel for the respondent objects to the same. In the interest of justice one opportunity is granted to claimant to rely upon relevant documents by filing a fresh affidavit of evidence. Next date fixed for 11/10/2021 at 10:30 A.M.”

8. As per the above order, it is clear that the evidence by way of affidavit filed by the Claimant was on record and the cross-examination had commenced. While the cross-examination was continuing, the Claimant had

made a statement that he wishes to withdraw the evidence and file a fresh affidavit. The same has been permitted by the Authority under the Act vide the impugned order.

9. In the opinion of this Court, this would not be permissible. The Bombay High Court in ***Banganga Cooperative Housing Society Ltd. and Ors. v. Vasanti Gajanan Nerurkar and Ors.*** [2015 (5) Bom CR813], has categorically held as under:

“8. 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.”

Accordingly, once an affidavit is filed and the witness is being cross-examined on the same, the Court or the authority concerned cannot permit the witness to withdraw his affidavit of evidence in this manner.

10. If in response to any questions put in cross-examination in respect of any documents, the witness wishes to produce any documents, the witness can say so when the cross-examination commences, on the next date of hearing.

11. Accordingly, the impugned order is set aside, and the following directions are issued:

- i) The original affidavit by way of evidence, on which the cross-examination was taking place, shall be brought back on record.
- ii) The part cross-examination already recorded shall also be considered as being part of the record.
- iii) Further, cross-examination shall continue on the basis of the old affidavit itself.

- iv) If the witness wishes to rely on any documents in response to any questions put in cross-examination, he shall say so at the outset, on the next date, when the cross-examination is to recommence.
- v) The Authority shall consider the said statement of the witness and if the documents are relevant in context of the question asked, the said documents shall be taken on record, as per law.

12. At this stage, Mr. Manan, Id. Counsel submits that cross-examination was in fact concluded on 7th October, 2021, but the Authority has recorded to the contrary that the same was deferred and is to be continued.

13. This Court has perused the cross-examination conducted before the Authority under the Act, which has been filed before this Court. After perusing the same, it is clear that the cross-examination has not concluded, and various questions relating to various records have in fact been put to the Workman.

14. In view of the same, the above directions shall be complied with, in accordance with law.

15. The present writ petition, and all pending applications are disposed of in the above terms.

भारतमेव जयते

PRATHIBA M. SINGH
JUDGE

OCTOBER 28, 2021

Rahul/Ak