

AGK/GSP

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS (L) NO. 1678 OF 2014
IN
SUIT NO. 1373 OF 1992

Banganga Cooperative Housing Society Ltd.,
a Cooperative Housing Society registered under
the provisions of Maharashtra Cooperative
Societies Act, 1960 and having its registered
office at B-2, Banganga Cooperative Housing
Society Limited, Govandi, Station Road,
Deonar, Mumbai – 400 088 ... Plaintiff

versus

Mrs. Vasanti Gajanan Nerurkar,
of Bombay, Indian Inhabitant, residing at
“Tripti”, above Govandi Post Office, Govandi
Station Road, Govandi, Mumbai 400 088 ... Defendant

APPEARANCES

FOR THE PLAINTIFF **Mr. G.S. Godbole,** *with D.S. Patil,*
Siddhesh Pilankar, i/b Mr. Uday
Warunjikar.

FOR THE DEFENDANT **Mr. Vishal Kanade,** *i/b A.P. Rege.*

ALONG WITH

SUIT NO. 1488 OF 1980

Shamlal Tulsidas,

of Bombay,

Indian Inhabitant, residing at 636, Anand

Mansion, Khar, Pali Cross Lane,

Khar, Mumbai – 400 052

...

Plaintiff

Versus

1. Chetandas Verhomal,

(since deceased)

1A Mayavati Chetandas Jethwani

1B Murli Chetandas Jethwani

1C Dilip Chetandas Jethwani

1D Vandana Durgadas Jethwani

1E Pritish Durgadas Jethwani

1F Himesh Durgadas Jethwani,

all of Mumbai, Indian Inhabitants,

residing at Bhavan Mahal, 130, Swami

Vivekanand Road, Khar,

Mumbai – 400 052

2 Gangaram Gangadas

(since deceased)

2A Prakash Gangaram Jethwani,

legal heir and son of Gangaram

Jethwani, Defendant No.2

(since deceased)

2A(i) Chandra Prakash Jethwani

2A(ii) Vinta

2A(iii) Geetu

2A(iv) Girju

all of Mumbai, Indian Inhabitants,

residing at Bhavan Mahal, 130,

S.V. Road, Khar, Mumbai – 400 052

3 Govindram Gangaram (since deceased)

3A Jaswant Govindram Jethwani

- 3B Kumar Govindram Jethwani,**
all having address at c/o. G.G. Trading
Co., Box No. 201, Bin Tami Building,
Opposite Bank of Baroda, Dubai
(U.A.E.) and also at C/o. Govindram
Gangaram, 1st Floor, Kishore Building,
Opposite Edward Cinema, Kalbadevi,
Mumbai –
400 002
- 4 Choitram Verhomal,**
of Bombay, Indian Inhabitant, residing
at Bhavan Mahal, 130, Swami
Vivekanand Road, Khar, Mumbai –
400 052
- 5 Tejuma! Gangaram (since deceased)**
5A Sheela Tejuma! Jethwani,
of Mumbai, Indian Inhabitant, residing
at Sunflower Building, Cuffe Parade,
Mumbai.
- 5B Haresh Tejuma! Jethwani**
5C Raju Tejuma! Jethwani,
all of Mumbai, Indian Inhabitants,
having address at C/o. Govindram
Gangaram, 1st Floor, Kishore Building,
Opposite Edward Cinema, Kalbadevi,
Mumbai – 400 002
- 6 Daulatram Behrumal**
(since deceased)
- 6A Purshottam Daulatram Pahlajani**
6B Ghansham Daulatram Pahlajani
6C Mohan Daulatram Pahlajani,
all of Mumbai, Indian Inhabitants,
residing at Behrumal Bhavan, Mogul
Lane, Mahim, Mumbai – 400 016
- 7 Kotuma! Behrumal**

- 8 **Shankardas Behrumal**
- 9 **Devkishan Behrumal**,
all of Mumbai, Indian Inhabitants,
residing at 100, Jhaveri Bazaar,
Mumbai – 400 002
- 10 **Mulibai Behrumal**
(since deceased)
- 10A **Hariram Behrumal**,
legal heir and son of Smt. Mulibai
Behrumal, residing at Behrumal
Bhavan, Mogul Lane, Mahim, Mumbai
– 400 016
- 11 **Hiro Behrumal**,
of Bombay, Indian Inhabitant, residing
at 100, Jhaveri Bazaar, Mumbai – 400
002.
- 12 **Balram Tulsidas**
(since deceased)
- 12A **Shantidevi Balram**,
widow and legal heir of Balram T.
Hinduja.
- 12B **Vijay Balram Hinduja**,
son and legal heir of Balram T.
Hinduja.
- 12C **Anu Balram Hinduja @ Bhavna**
Asrani,
legal heir married daughter of Balram
T. Hinduja
- 12D **Mrs. Sangeeta Balram Hinduja**,
married legal heir daughter of Balram
T. Hinduja, all of above residing at
Building N, 7th Floor, Karachi City
Cooperative Housing Society Ltd.,
New Link Road, Andheri (W),
Mumbai – 58.

- 12E Smt. Renu @ Varsha Dhanesh Narang,**
 married daughter & legal heir of
 Balram T. Hinduja,
 R/at 15/E, Nirankar Society,
 Bhairavanath Road, Ahmedabad 380
 028
- 13 Dhanibai Verhomal,**
 of Bombay, Indian Inhabitant, residing
 at Bhavan Mahal, 130, Swami
 Vivekanand Road, Khar, Mumbai –
 400 052. ... Defendants

APPEARANCES

FOR THE PLAINTIFF	Mr. M.S. Doctor, Senior Advocate, <i>i/b M/s. Hariani & Co.,</i>
FOR DEFENDANTS NOS. 2A, 3 AND 5	Mr. S.H. Jagtiani, a/w Mr. A. Pimple, <i>i/b M/s. Shantilal & Co.,</i>

CORAM : G.S.Patel, J.

JUDGMENT RESERVED ON : 25th November 2014

JUDGMENT PRONOUNCED ON : 15th June 2015

JUDGMENT:

1. In these two suits, both of considerable vintage, a question of law arises relating to affidavits in lieu of examination-in-chief filed under Order 18, Rule 4 of the Code of Civil Procedure, 1908 (“CPC”). In Suit No. 1488 of 1980 I have heard Mr. M.S. Doctor, learned Senior Counsel for the Plaintiff and Mr. S.H. Jagtiani for the Defendants, and in Chamber Summons No. 1678 of 2014 in Suit No. 1373 of 1992 I have heard Mr. G. Godbole and Mr. V. V. Kanade

learned Counsel for the Plaintiff and the Defendant respectively. The submissions have not been on the merits of either of these two matters or, indeed, even on the contents of the Affidavits in lieu of Examination-in-Chief in either suit. The discussion has revolved around the question of the powers of a court when dealing with an Affidavit in lieu of Examination-in-Chief (“**an Evidence Affidavit**”) under Order XVIII Rule 4 of the Code of Civil Procedure, 1908 (“**the CPC**”).

2. Shortly stated, the question arose in Suit No. 1488 of 1980 when Mr. Doctor tentatively proposed not to offer the Plaintiff as a witness though his Evidence Affidavit was already filed. The only reason, Mr. Doctor said, was that the Plaintiff was very old and could not possibly withstand the rigour of a cross-examination. He hoped – and he put it no higher than that – to be able to complete the trial on the basis of documents. When it was pointed out that the documents were marked on the basis of the Plaintiff’s Evidence Affidavit, and that not tendering a witness could not possibly be without consequence, Mr. Doctor sought instructions. Later, he made it clear that he was not pressing his application.

3. In somewhat different circumstances, Mr. Godbole in Chamber Summons No. 1678 of 2014 in Suit No. 1373 of 1992 sought leave to withdraw an Evidence Affidavit already filed. Here again, the same question arose: whether such a ‘withdrawal’ is ever permissible, and, if so, under what circumstances and with what consequences.

4. On 13th October 2014, I heard learned Counsel briefly on the nature of the questions that might arise in this connection. Paragraphs 2 to 5 of the order passed that day read thus:

2. In all these matter a common question of law has arisen. It pertains to Order XVIII Rule 4 of the Code of Civil Procedure, 1908 (“**CPC**”) and some of the issues that arise in relation to affidavits in lieu of examination-in-chief. Some of these questions and issues are: Is it permissible for a Court to order the deletion or redaction of any portion of any such affidavit if that part is found to be inadmissible as evidence? If so, at what stage of the proceedings should this be done? Can a party ‘withdraw’ an evidence affidavit without consequence? Can an evidence affidavit, once filed, ever be ‘returned’? What are the consequences if an affidavit is filed and then it is found, perhaps a long time later, that the deponent of that evidence affidavit is either unavailable or cannot be tendered for cross-examination? Where documents are admitted in evidence on the basis of an evidence affidavit and the witness is then not made available or tendered for cross-examination, how are those documents to be treated? These, and other allied questions, all arise with regularity in suits.

3. I have briefly heard Mr. Godbole, Mr. Doctor, Mr. Jagtiani, and Mr. Kanade for the parties in these two matters. The arguments are by no means concluded. Indeed, it seems that there are possibly other questions that require to be addressed. Mr. Godbole, for instance, points to two: in his case, Suit No.1373 of 1992, the witness filed an evidence affidavit some time ago. He is now seriously unwell and cannot possibly withstand a cross-examination, even one taken *de bene esse*. Had this witness been required to wait till his examination-in-

chief was taken directly by oral testimony, there would have been no difficulty; for, had he been unable to depose at all, his examination-in-chief would never have been led by the Plaintiff in that suit, and there would have been no question of him being cross-examined. But the procedural requirement now is to file an evidence affidavit, and this puts the Plaintiff in an entirely intractable and possibly unfair position, one not of his making or design: that witness's evidence affidavit has been filed in compliance with directions following the statutory mandate. Now circumstances make it impossible for the witness to be tendered for cross-examination through no fault of his own, and without anyone alleging that the witness is being deliberately withheld. In such circumstances, says Mr. Godbole, there is no reason why the witness and the plaintiff should be prejudiced by, for instance, allowing an adverse inference to be drawn against them because the witness cannot physically undergo a cross-examination; nor should any part of the witness's evidence affidavit be allowed to be treated as admissions. It should, in such circumstances, be allowed to be disregarded. Mr. Doctor, learned Senior Counsel for the Plaintiffs in Suit No. 1488 of 1980, has a very similar situation: his witness, the Plaintiff in that case, is very old and will not be able to withstand a cross-examination.

4. Mr. Godbole also expresses a tentative view that the law regarding when a trial can be said to have started will need to be closely examined in this context as well. To this, Mr. Kanade responds by saying that that aspect is now firmly settled, including by a Division Bench of this court, a view that I myself have followed, as I was bound to do, in another case. However, whether or not that line of authorities, all in the context of Order VI Rule 17, regarding amendments, can or should be applied to

the present context has not been fully addressed, responds Mr. Godbole.

5. Both Mr. Godbole and Mr. Doctor point out that this difficulty of witnesses being unavailable is especially true when one of the parties is a company or a body corporate. A witness whose evidence affidavit is filed while that witness is in the employment of the company may not be finally available some months or years later when the witness is to be cross-examined. There are cases when the witness has left the company in less than amicable circumstances. The company ought not to be required to summon that witness for cross-examination in such a situation, nor should the company be prejudiced because it cannot tender that witness for cross-examination. Mr. Jagtiani submits that there is at least one decision of a High Court that clearly states that an evidence affidavit can never be returned or allowed to be withdrawn. It remains to be seen how far that view can be made applicable to the circumstances that Mr. Godbole and Mr. Doctor have mentioned.

5. The principal submission by Mr. Jagtiani and Mr. Kanade is that an Evidence Affidavit once filed cannot be withdrawn. It becomes a part of the record and it cannot be changed, altered or withdrawn by the party filing it. In *FDC Limited v Federation of Medical Representatives Association of India & Ors.*,¹ this Court took the view that in appealable cases, an Evidence Affidavit does not form part of the evidence unless the deponent enters the witness box and confirms that the contents of that Evidence Affidavit are correct; that the Affidavit bears his signature; and these statements are to be recorded on oath following the procedure under Order

¹ 2003 (3) Mh. L. J. 327

XVIII Rule 5 of the CPC. In non-appealable cases, the Court held, the Affidavit in lieu of Examination-in-Chief can be taken on record and be made part of the evidence by recording a memorandum of production of that affidavit under Order XVIII Rule 13 of the CPC. The ensuing cross-examination in appealable cases must follow the procedure in Order XVIII Rule 5, while in non-appealable cases, the provisions of Order XVIII Rule 13 will govern. Mr. Jagtiani and Mr. Kanade submit that this view was accepted and reaffirmed by the Supreme Court in *Ameer Trading Corporation Ltd. v Shapoorji Data Processing Limited*.²

6. In *Rasiklal Manikchand Dharwal & Anr. v MSS Food Products*³ the Supreme Court considered a submission by the appellants that the evidence led by the plaintiff was no evidence at all since the deponents of the Evidence Affidavits had never entered the witness box to confirm the contents of their Evidence Affidavits. Both *FDC Ltd* and *Ameer Trading* were cited in support of this submission.⁴ The two decisions were considered at length.⁵ The *Rasiklal Manikchand* court held that *Ameer Trading*, in agreeing with *FDC Ltd*, did not enunciate an invariable or absolute rule that in every appealable case, a witness or deponent must necessarily re-affirm his Evidence Affidavit from the witness box and confirm its contents and his signature on it. Indeed, where that statement is on oath or affirmation before a notary, judicial officer or oath commissioner (or anyone else empowered to administer oath), the examination-in-

² AIR 2004 SC 355

³ (2012) 2 SCC 196

⁴ Paragraph 63 of the SCC report.

⁵ Paragraphs 68 to 74 of the SCC report.

chief is already on affidavit. There is, the Supreme Court said, no requirement in Order XVIII Rule 5 that even in appealable cases a witness must enter the witness box for production of his affidavit and formally prove his affidavit. The witness is required in the witness box for cross-examination and re-examination if any; but he or she is not invariably or always required to step into the witness box for examination-in-chief.

7. The submission by Mr. Jagtiani and Mr. Kanade is well founded, and it has one immediate consequence for our present purposes: once an Evidence Affidavit is thus filed, and since there is no absolute requirement of it being required to be reaffirmed by the deponent from the witness box before that affidavit forms part of the evidentiary record, it follows that it is examination-in-chief as soon as it is affirmed (or, at any rate, affirmed and filed) and it is not thereafter possible to “withdraw” an Evidence Affidavit. Once an Evidence Affidavit is filed, the examination-in-chief of the deponent has, to all intents and purposes, begun. It may be permissible for the deponent to file a further affidavit, since Order XVIII Rule 4 does not limit itself to a single affidavit, and although there is some authority for the proposition that a witness may not continuously file fresh affidavits to keep improving his case, the view of our court is somewhat different, viz., that there is no impediment to the taking of additional Examination-in-Chief or the filing of a further or additional or supplemental Affidavit in lieu of Examination-in-Chief. This was the view taken by a learned single Judge of this Court (Khanwilkar, J., as he then was) in *Rajesh Varma v Aminex Holdings & Investments & Ors.*⁶ Not only am I in most respectful

⁶ 2008 (3) Mh.L.J. 460, paragraph 12.

agreement with that decision, but it binds me; and it is also the view that I took in a recent order.⁷

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. This position, following *Rasiklal Manikchand*, raises some subsidiary questions: (1) what are the consequences of a deponent filing an Evidence Affidavit but not making himself available to a cross-examination? (2) Is it permissible for a Court to order the expunging or redaction of any part of an Evidence Affidavit?

9. The first of these questions arises more frequently than one might suppose on a bare reading of the statute. Implicit in the CPC and its provisions regarding evidence is the assumption that a trial progresses without long gaps in time and with reasonable despatch. Our experience is different. The reasons are many, but perhaps the most obvious is the crowding of court dockets. This makes it impractical to take every single case in the timely fashion that it deserves. The result is that there is often a considerable time lag, sometimes of several years, between the filing of an Evidence Affidavit and the commencement of cross-examination. Time is unkind to us all; to litigants perhaps more than anyone else. By the time the trial begins, the deponent may not be in a position any longer to withstand the stress of a cross-examination. This is the situation in which Mr. Doctor's client, for instance, finds himself. At the time when he filed his Evidence Affidavit, some years ago, he

⁷

Order dated 4th March 2015 in Testamentary Suit No.65 of 2005, *Aban Homa Petit & Anr. v Naryosang D. Cassad*.

was prepared to undergo a cross-examination. For whatever reason, that did not happen. His age and failing health no longer permit him to withstand a cross-examination.

10. There are other situations too. A party may want to lead the evidence of a witness. That witness does file an Evidence Affidavit. But by the time the opportunity for a cross-examination finally comes around, that witness may longer be willing to give evidence. This is particularly noticeable in the case of companies and bodies corporate, independent juristic entities all, but who can only ever give evidence through individuals speaking on their behalf. Again, years after an Evidence Affidavit is filed, the witness is simply unavailable to that body corporate. This is of some significance in commercial disputes. It often happens that large corporations file an Evidence Affidavit of a serving officer. This is true of large government sector companies, insurance companies, as also private companies of varying sizes. Sometimes the deponent and the company part ways on less than amicable terms and the deponent is then longer available to be offered for cross-examination. Should the corporate then be required to summon the deponent, i.e., to compel his attendance, particularly where the corporate is conceivably placed at a very considerable disadvantage? For having parted ways unhappily, the deponent might well disavow his Evidence Affidavit earlier filed and give evidence against the body corporate. Or should the body corporate be permitted to 'substitute' the evidence of that witness with the evidence of another? After all, these are not situations of the parties' making, be they individuals or bodies corporate; they are the result of the delays endemic to our judicial system. Our practices seem to be out of step with our rules of

procedure and, consequently, with the provisions of substantive law such as the Evidence Act.

11. Broadly, there are two situations we must consider. First, where the witness is no longer physically available, i.e., he has expired between the time of filing of his Evidence Affidavit and the time for cross-examination.⁸ The law in this regard is, I believe, well-settled, and it is simply this: that where the testimony is incomplete by reason of death or incapacity of the witness before cross-examination, the evidence, admissible when given, does not cease to be so merely on account of that intervening factual circumstance. What probative or evidentiary value is to be attached to this evidence is another matter, and turns on the circumstances of each case. A court may seek independent corroboration of that evidence. It may accept it, albeit cautiously, and that is no infirmity *per se* in the final decision. This was the view of Mr. Justice H.R. Khanna as a learned single Judge of the Delhi High Court in *Krishan Dayal v Chandu Ram*⁹ and I am in most respectful agreement with that view.

12. The second situation is where, though available, and though an Evidence Affidavit has been filed, the witness is not tendered for cross-examination at all as a sort of litigation 'strategy'. Here, the party who led the evidence of a particular witness chooses to, as it were, take the high road. He files an evidence affidavit and then simply does not produce the witness for cross-examination. It is impossible to allow this without consequence. The right to cross-

⁸ I would include in this a situation where the witness is so ill or incapacitated that it is impossible to tender him for cross-examination.

⁹ (1969) ILR 1090

examination is a fundamental strut of our judicial process. It is a vital facet of the principles of natural justice.¹⁰ Generally speaking if a witness is not produced, the plaintiff cannot rely on any part of evidence, but the defendant is entitled to rely on admissions in that Evidence Affidavit that favour the defendant. In other words, and this stands to reason, where a witness is withheld and not offered for cross-examination, so much of that evidence as is against the other party is liable to be ignored, but so much of it as is in favour of the opposite party can be relied on as an admission. An opportunity must be given to the other side to test the evidence by cross-examination. Not doing so amounts to leading in evidence that which is inadmissible.¹¹ Indeed, our Courts have long held that where a party has not offered himself for cross-examination, it would give rise to a presumption under Section 114 of the Indian Evidence Act, 1872 that the case he sets up is incorrect.¹²

13. In this analysis, I am concerned only tangentially with the question of proof of documents. The reason this assumes some importance is that the documents are marked on the basis of testimony in an Evidence Affidavit. This necessarily requires testing by cross-examination, as we have seen. If, however, the deponent is not made himself available for cross-examination, would that mean

¹⁰ *Union of India v T.R. Varma*, AIR 1957 SC 882, para 10.

¹¹ *Des Raj Chopra & Ors. v Puran Mal & Ors.*, AIR 1975 Delhi 109; *Bhujanath Nathuji Daf v Ramkrishna Daulat Daf*, 2009 (1) Mh. L.J. 683; *Balasaheb Anantrao Bahirat v Rohidas Bapusaheb Tupe*, 2007 (3) Mh. L.J. 467

¹² *Ashok Udaram Pathrabe v Maharashtra Remote Sensing Application Centre*, 2007 (1) Mh. L. J. 519; *Ishwar Bhai Patel v Harihar Behera & Anr.*, (1999) 3 SCC 457; *Gurbaksh Singh v Gurdial Singh*, 29 Bom. L. R. 1392; *Pirgonda v Vishwanath*, AIR 1956 Bom. 251.

that the documents already admitted into evidence on the basis of that affidavit can later be rejected or removed from the evidentiary record? This seems to me to contemplate a situation where a document once marked in evidence can in some circumstances be later “unmarked”. Questions as to relevance and admissibility may required to be argued at an appropriate stage and they may also be urged in appeal. At the final hearing, if a witness is unavailable for cross-examination, this will undoubtedly be a factor to be considered while assessing the evidentiary value of the documents marked in evidence. But it does not seem to me correct to suggest that a document once properly introduced into evidence can then be expunged or excised from the record. Once again, the same principle must apply: viz., that in the absence of cross-examination, the person propounding that document may not be allowed to rely on it, but it may be used by other side as an admission. Mr. Jagtiani points out that the question of redacting a document as against returning it and ordering a deletion of parts of it was considered by a learned Single Judge of the Andhra Pradesh High Court in *Mohammed Abdul Ahad v Mohammed Abdul Gafoor*.¹³ This decision, however, does not consider the Supreme Court’s decision in *Rasiklal Manikchand Dhariwal*, although it does consider the Supreme Court’s decision in *Ameer Trading Corporation*. Despite this, I believe the decision is an authority for the proposition that there is no procedure known to our law for ‘unmarking’ a document once marked.

14. I do not think there is any authority for the proposition that no objection can be taken to any part of the Evidence Affidavit, and

¹³ 2013 AIR CC 745 (AP)

that the whole of it, irrespective of what it purports to contain, must be treated as 'evidence'. Indeed *Ameer Trading* and *FDC Ltd* both suggest the converse is true and this position at least is undisturbed even in *Rasiklal Manikchand*. The option available to the Court is to order a redaction of so much of the affidavit as does not constitute evidence properly so-called. This is self evident from the provisions of Order XVIII Rule 4, which reads as follows:

**“ORDER XVIII — HEARING OF THE SUIT AND
EXAMINATION OF WITNESSES**

1. ...

2. ...

3. ...

4. **Recording of evidence—** (1) In every case, the examination-in-chief of a witness *shall* be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:

(3) The Court or the Commissioner, as the case may

be, shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner, he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court of the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

The provisions of rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable shall apply to the issue, execution and return of such commission under this rule."

15. These provisions must also be read along with Order XIX Rule 3 of the Code of Civil Procedure, 1908, which reads thus:

“ORDER XIX — AFFIDAVITS

1. ...

2. ...

3. Matters to which affidavits shall be confined—

(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted:

Provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hear say or argumentative matter, or copies of or extracts from document, shall (unless the Court otherwise directs) be paid by the party filing the same.”

16. Too often we lose sight of the fact that the provisions but Order XVIII Rule 4 are a specially evolved *procedure*. There exists an inbuilt conflict between these procedural law and substantive law of the Evidence Act, which in Section 1, says:

“1. Short title, extent and commencement- This Act may be called the Indian Evidence Act, 1872.

It extends to the whole of India except the State of Jammu and Kashmir and applied to all Judicial proceedings in or before any Court, including Courts-martial, other than Courts-martial convened under the Army Act, the Naval Discipline Act or the Indian Navy (Discipline) Act, 1934 or the Air Force Act **but not to**

affidavits presented to any Court or Officer, nor to proceedings before an arbitrator.

And it shall come into force on the first day of September, 1872.”

(Emphasis supplied)

17. The Evidence Act has not been amended. Section 1 of the Evidence Act clearly includes an application of that act to evidence presented to any Court, officer or arbitral proceedings, but excludes its application to affidavits. If this is so, how then are we to read Order XVIII Rule 4 which clearly mandates that “evidence” in chief shall be by way of affidavit? The only way to harmonize these two provisions is perhaps to say that since Order XVIII Rule 4 is a procedural innovation aimed at expedition, the exclusion in Section 1 of the Evidence Act is not intended to apply to such affidavits but only to affidavits covered by some, but not all, procedural provisions such as those for interlocutory applications. Once again, we must remember that even Order XIX speaks of “proof”. This would undoubtedly indicate the applicability of the Evidence Act to affidavits contemplated by Order XIX. It is in this context, we must view the power of a Court in relation to needless material set out in an Evidence Affidavit, i.e., material that is not ‘evidence’ properly so-called.

18. Mr. Godbole submits that if a Court can strike out a pleading, which is the foundation of every case, an Evidence Affidavit can be placed on higher pedestal. He submits that under the provisions of Order VI Rule 17 and Order XVIII Rule 8 (inapplicable to Chartered High Courts) as also Section 151 of the Code of Civil Procedure, the

Court always has the power to return or strike out the entire Evidence Affidavit, if it is not in consonance with law. This is conceptually distinct from an application to 'withdraw' an Evidence Affidavit. The latter seeks to treat evidence already given as *non-est*, i.e., as if it did not exist at all. This is not the same as excluding, whether in exercise of inherent powers or otherwise, material that is not and cannot be evidence properly so called. *Rasiklal Manikchand Dharival* makes it plain that once an Evidence Affidavit is affirmed, it requires no further steps to constitute the testimony in chief of the deponent. It requires no further scrutiny by a Court in order to 'become evidence'. It is evidence as soon as it is affirmed. But *Rasiklal Manikchand Dharival* also proceeds on the *a priori* assumption that the Evidence Affidavit is fully in conformity with the Code of Civil Procedure and the Evidence Act, and that it contains no material that would be otherwise inadmissible had the same testimony or deposition be taken directly in Court. It cannot, for instance, be that hearsay material or material that does not satisfy the tests of relevancy and admissibility becomes evidence merely because it is on affidavit. It makes no difference in what form the examination-in-chief is rendered. Placing it on affidavit is merely a question of form not substance. It is a device of expedition, not a rewriting of substantive law. It is not intended and cannot be intended to override the substantive law, i.e., the Evidence Act, and to make admissible or relevant matters that are inadmissible, irrelevant or both. The form is irrelevant; it is the substance that is of consequence. The discussion by F.I. Rebello, J., as he then was, in *Shamrao Vishnu Kunjir v Suresh Vishnu Kunjir* is most instructive.¹⁴ It sets out at some length the *manner* in which a proper Evidence

¹⁴

AIR 2005 Bom 294

Affidavit should be drawn. The *Kunjir* court held that the amended O.18, R.4 only shifts the venue of recording evidence. Implicit in this reasoning is the finding that what is contained in an Evidence Affidavit can be no different than that which would be permissible in a direct deposition taken in Court.

19. It was on this basis that a learned Single Judge of this Court in *Late Shri Rajendra Singh, Chhatrasal Singh Kushwaha v Mr. Jitendra Singh Rajendra Singh Kushwaha*¹⁵ ordered the striking out of portions of an affidavit, invoking Order XVIII Rule 2 of the Code of Civil Procedure, 1908 in respect of material in the Evidence Affidavit which was found to be irrelevant. Mr. Justice Dhanuka in terms held that even had the deposition been taken directly and not in court, the witness would have not been allowed to give evidence that was irrelevant. Further, under Section 151 of the CPC, the learned single Judge held, the Court has inherent powers to strike out irrelevant evidence in order to avoid a needlessly protracted cross-examination. This decision was followed and its principles reiterated in *Mahabano Navroz Kotwal v Piloo Fali Bomanji*.¹⁶ In *Harish Loyalka & Anr. v Dileep Nevatia & Ors.*,¹⁷ I too followed *Khushwaha* in ordering the striking out of certain portions of an Evidence Affidavit found to be irrelevant or inadmissible.

20. Order XVIII Rule 4 requires two things: (1) what is stated must constitute examination-in-chief; and (2) it must be stated in

¹⁵ 2013 (6) Mh.L.J. 802

¹⁶ Judgment dated 10th June 2014 in Chamber Summons (L) No. 67 of 2014 in Testamentary Suit No. 26 of 1999; per R. D. Dhanuka, J.

¹⁷ 2014 (4) ABR 545

the form of an affidavit. Order XVIX tells us what an affidavit cannot contain and to what it must be restricted; and the Evidence Act tells us what can constitute examination-in-chief or evidence and what cannot. Therefore, if any portion of a purported Evidence Affidavit does not conform to these two exacting requirements, it is simply not examination-in-chief at all and cannot be allowed to pass into the evidentiary record of the trial. It would, in my view, not only be incorrect but wholly against legislative intent to suggest that merely because the material is in the *form* of an affidavit that the powers of a court are somehow denuded and that anything and everything stated in that affidavit automatically and without checks or balances passes into the realm of ‘evidence’, jettisoning in its passage every requirement of the substantive law of the Evidence Act. That simply cannot be, and this is the foundation of the Mr. Justice Dhanuka’s reasoning in *Khushwaha* and *Mahabanoo Kotwal* and my own earlier decision in *Harish Loyalka*.

21. As to what can or cannot be the subject matter of such an order, I do not think any absolute standard or rule can be set out. It may, in a given case, be that the evidence affidavit contains material that is relevant but is unsupported by pleadings. *Cesar Rego Fernandes & Ors. v Angela Ninette Oliveira Fernandes & Ors.*¹⁸ tells us that this is not the kind of material that can be ordered to be struck off. But material that is clearly irrelevant, or hearsay, in the nature of legal submissions, arguments, in the form of prayers or reliefs, or denials of the kind we find in pleadings has no place in an evidence affidavit. It may be possible to illustrate this with an example from testamentary law. A probate petition, it is well settled, does not

¹⁸

2008 (1) BCR 270

decide questions of title. Therefore, whether or not the testator had valid title to any given property mentioned in the will propounded is entirely irrelevant to that trial. This is the basis of the decision in *Khushwaha*, and testimony in that regard was therefore excluded. But in a given case, a witness may depose that it is to his (the witness's knowledge) that the testator was aware at the time of the making of the will that a certain property was not his. This may possibly be retained as being relevant to an issue of unsoundness of mind or undue influence. The distinction to be drawn, and drawn carefully, is whether the deponent says this as a matter of conjecture or personal knowledge. I would suggest that in a matter where there is the slightest doubt, then the material should be retained and not deleted or struck off. That power, while available to a court in its inherent jurisdiction, must be exercised cautiously and judiciously, and no cut-and-dried one-size-fits-all formulaic approach is possible.

22. The result of this discussion is that:

- (a) No Evidence Affidavit under Order XVIII Rule 4 of the CPC can be allowed to be 'withdrawn'. It is evidence as soon as it is affirmed.
- (b) The Evidence Affidavit cannot contain matter that is irrelevant, inadmissible or both; or is in the nature of arguments, submissions or prayers. This is not 'evidence' as required by law. Were it to be attempted from the witness box, it would not be permitted; and hence it cannot be allowed to creep in merely because it happens to be placed on affidavit.

- (c) It is permissible, and in fact often necessary, for a Court, with a view to expedition and to avoid a needlessly protracted cross-examination on irrelevancies and matter that is not 'evidence' to order that any such material that does not constitute evidence be struck off or be ordered or directed to be ignored without fear of adverse consequence.
- (d) Where an Evidence Affidavit is filed and the witness or deponent, though otherwise available, is not made available for cross-examination, the well-established consequences in law will follow. Specifically, the opposite party will be entitled to submit that an adverse inference be drawn against such a witness or the party who fails to produce that witness for cross-examination; and, further, that should that evidence contain any admissions, these may be used by the other party; but so much of the evidence as is against the party entitled to cross-examination but which has gone untested for want of production of the witness will be liable to be ignored.

23. In view of this discussion, in *Shamlal Hinduja*, since Mr. Doctor does not press his application, presumably the witness will be tendered for cross-examination, or an application made for recording his evidence *de bene esse*. If he is not produced, the consequences I have outlined earlier will follow. I must clarify that if any documents have been marked in evidence on the basis of that witness's testimony, and he is not produced for cross-examination,

it will be open to Mr. Jagtiani to contend that the documents so marked are insufficiently proved, or that they contain important unexplained admissions.

24. As regards the Chamber Summons filed by Mr. Godbole for leave to withdraw an Evidence Affidavit, in view of foregoing discussion, that portion of the prayer that seeks leave to 'withdraw' the Evidence Affidavit cannot be granted. Incidentally, I must note that Mr. Godbole candidly stated that the Evidence Affidavit sought to be withdrawn suffers from some infirmities and this is one of the reasons it is sought to be substituted. This is, indeed, another reason not to allow the relief for withdrawal. A party cannot constantly seek to improve on the evidence it leads. If Mr. Godbole elects not to offer the deponent of the Evidence Affidavit already filed for cross-examination, then that, too, will have the inevitable consequences. He will, however, be at liberty to lead the evidence of any other witness of his clients' choosing. Mr. Kanade will then be at liberty to use any contradictions between the two affidavits, and also to invite the drawing of an adverse inference. Whether or not the next witness can 'explain' or 'explain away' anything stated in the Evidence Affidavit of the first witness (and who is not proposed to be offered for cross-examination) will have to be examined at a later stage.

25. Both applications are disposed of in these terms. Suits to be placed before the benches to which they are assigned for directions.

(G.S. PATEL, J.)