

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***T. & I. J.*****NOTICE OF MOTION NO. 21 OF 2017****IN****TESTAMENTARY SUIT NO. 5 OF 1999****IN****TESTAMENTARY PETITION NO. 806 OF 1998****ALONGWITH****NOTICE OF MOTION NO. 19 OF 2017****IN****TESTAMENTARY SUIT NO. 12 OF 1999****IN****TESTAMENTARY PETITION NO. 1087 OF 1998****Dilip Kumar Anand****..... Applicant
(Org.Defendant)****IN THE MATTER BETWEEN****Pradeep Kumar Anand****..... Plaintiff****VERSUS****Dilip Kumar Anand****..... Defendant****Mr.Zuben Behramkamdin, i/b. Mr.M.G.Gawde for the Plaintiff.****Mr.Mayur Agarwal, i/b. Ms.Chhaya Pandya for the Defendant.****CORAM : R.D. DHANUKA, J.****DATE : 14th JUNE, 2017****P.C.****Notice of Motion No.21 of 2017 not on board. Taken on board.**

2. Learned counsel appearing for the applicant seeks leave to amend the notice of motion and seeks recall of the order dated 9th January,2017 passed by this court in Testamentary Suit Nos. 5 of 1999 and 12 of 1999. Amendment to be carried out within one week from today.

3. I have perused the affidavit in support of the notice of motion and also the orders passed by this Court on 22nd July, 2017 and on 9th January,2017. The applicant has not complied with the order dated 22nd July, 2016 and thus by an order dated 9th January,2017 passed by this court, this court has directed the parties to proceed with the suit for arguments.

4. Learned counsel for the applicant states that his client would now file affidavit of evidence along with documents and thus an opportunity be granted to the defendant to lead evidence and order passed by this court on 9th January,2017 be recalled on such terms as this Court may deem fit.

5. Mr.Behramkandin, learned counsel for the plaintiff submits that the defendant is gross negligent in not filing affidavit of evidence as well as documents. He submits that the non-compliance of the order passed by this court is not properly explained by the defendant in the affidavit in support.

6. Though the defendant has not satisfactorily explained the reasons for not complying with the orders passed by this Court and as a result thereof, the evidence of the defendant is treated as closed, in view of the assurance given by the learned counsel for the defendant that his client would file affidavit in lieu of examination in chief and the documents and would not ask for further extension, in the interest of justice, I am inclined to recall the order dated 9th January,2017 on the condition that the defendant files affidavit in lieu of examination in chief of the first witness alongwith documents within three weeks from today and pays cost of Rs.50,000/- which shall be paid within two weeks from today as a cost condition precedent.

7. It is made clear that if the cost of Rs.50,000/- is not paid by the defendant to

the plaintiff, the evidence of the defendant will not be taken on record and would be treated as closed. I, therefore, pass the following order :-

(a) Order dated 9th January, 2017 passed by this court is recalled on the condition that a cost of Rs.50,000/- is paid by the defendant within two weeks from today and the affidavit of evidence of the first witness along with the documents shall be filed within three weeks from today and a copy thereof shall be served upon the plaintiff's advocate simultaneously.

(b) The defendant shall also file list of other witnesses proposed to be examined by the defendant within two weeks from today.

(c) The plaintiff shall file statement of admission and denial in respect of such documents within one week from the date of service of the documents by the defendant.

(d) It is made clear that if the aforesaid order is not complied with, the evidence of the defendant shall be treated as closed. No further extension would be granted.

(e) Place the matter on board for marking of the documents of the defendant's first witness after two weeks of the plaintiff filing statement of admission and denial of documents. Notice of motion is disposed of in the aforesaid terms.

(R.D.DHANUKA, J.)