

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 100 OF 2019
IN
TESTAMENTARY SUIT NO. 60 OF 2009
IN
TESTAMENTARY PETITION NO. 246 OF 2007
WITH
TESTAMENTARY SUIT NO. 60 OF 2009
WITH
CST NO. 157 OF 2011
WITH
NOTICE OF MOTION NO. 83 OF 2016**

Sudha Chowgule
vs
Jaya Patel & Anr.

...Plaintiff/Applicant

...Defendants

**AND
SUIT NO. 2435 OF 2005
WITH
NOTICE OF MOTION NO. 233 OF 2015**

Indu Parmanand Patel & Anr.
vs
Sudha Chowgule & Ors.

...Plaintiffs

...Defendants

Mr.Piyush Raheja I/b. Vigil Juris, for Plaintiffs in Suit No.2435 of 2005 and for Defendant No.1 in Testamentary Suit No.60 of 2009.

Mr.Navroz Seervai, Senior Advocate, with Ashish Kamat, Abhay Jadeja, Kunal Mehta, Varun Satiya and Snigdha Mankar I/b. Crawford Bayley & Co. for Defendant No.1 in Suit No.2435 of 2005; for Plaintiff in Testamentary Suit No.60 of 2009 and Applicant in NMT/100/2019. for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 30 APRIL 2019

P.C. :

This application is made under Order XVIII Rule 4 read with

Section 151 of the CPC seeking rejection of supplementary affidavit dated 17 May 2018 together with the additional compilation of documents filed therewith in lieu of further examination in chief by Plaintiff No.2 Jaya Patel.

2 Evidence in these two suits, namely, Testamentary Suit No.60 of 2009 and Suit No.2435 of 2005, is being recorded as common evidence. The first affidavit of evidence of Jaya Patel tendered on her behalf was her affidavit of 11 January 2016 (hereinafter referred to as “the main affidavit”). The second affidavit dated 28 April 2017 was tendered by way of a further affidavit. These two affidavits are already on record as examination in chief of Jaya Patel.

3 So far as the main affidavit is concerned, based on the orders passed by this court on 14 March 2018 and 11 April 2018, some portions of the affidavit have been deleted. At that stage, objections were raised on various grounds, such as want of relevance of some parts of the deposition as well as nature of hearsay evidence in respect of some and some as contrary or beyond the pleadings of the Plaintiffs. After dealing with these objections, as noted in the two orders referred to above, namely, orders of 14 March 2018 and 11 April 2018, the Plaintiffs have deleted some portions of the main affidavit. The Plaintiffs thereafter proposed to tender a third affidavit, affidavit dated 7 March 2018, which was neither finally tendered in the evidence nor taken on record as further examination in chief of Jaya Patel. Whilst the court was considering the Defendant's objections to the main affidavit, the Plaintiffs had proposed to tender two more affidavits as supplementary affidavit-1 and supplementary affidavit-2.

These were, respectively, dated 14 March 2018 and 26 March 2018. In the light of what transpired in the court and discussed in its order dated 14 March 2018, these two affidavits were withdrawn by learned Counsel for the Plaintiffs. As noted in the order of 11 April 2018, these two supplementary affidavits were not to be treated as examination in chief of Jaya Patel. The affidavits were, however, directed to remain on the record of the case. The suits were thereafter stood over for further marking of documents. Whilst awaiting this exercise of further marking of documents, the Plaintiffs have now tendered a new affidavit, termed as “supplementary affidavit-1” purportedly in substitution of the earlier tendered supplementary affidavit-2 dated 14 March 2018. (Supplementary affidavit-1, earlier sought to be tendered, was not taken on record, as noted above, since in view of the objections raised by learned Counsel for the Defendants, the Plaintiffs agreed to accept deletion of the offending portions from the main affidavit instead of filing the aforementioned supplementary affidavit.)

4 The Defendant opposes the new affidavit. Mr.Seervai, learned Senior Counsel appearing for the Defendant, submits that even if one were to grant that examination in chief of a witness can be supplemented by further examination in chief (and in keeping with it even an original affidavit in lieu of examination in chief can be supplemented by a further affidavit), it is not permissible to the party tendering the witness to keep changing or improving its case stated in its originally recorded deposition or original affidavit in lieu of examination in chief, as the case may be. Mr.Seervai submits that the new affidavit, presently tendered as supplementary affidavit-1, has the effect of completely changing and

impermissibly improving upon the original case stated in the main affidavit.

5 It is trite to say that an affidavit in lieu of examination in chief under the amended CPC really is another form of recording of examination in chief. Instead of a court of law, where examination in chief would be recorded, as was customary, the affidavit in lieu of examination in chief is prepared in the chambers of an advocate, sworn before an associate or a notary public and tendered in court and on application made to it, is accepted by the court as examination in chief of the witness. Just as in an ordinary examination of a witness in a court, when a proof tendered by the witness in support of any document is not accepted by the court as sufficient formal proof for admission of the document tendered, the witness may tender further proof by way of further examination in chief in support of the document and in that sense, improve upon the original proof sought to be tendered earlier, there is no reason why a witness, having filed his examination in chief in the form of an affidavit, cannot do so by filing a supplementary affidavit. So long as the party tendering the witness does not close its examination in chief, it is perfectly permissible to that party to tender further evidence through its witness by way of either further examination in chief or supplementary affidavit in lieu of such examination in chief. There is indeed nothing illegitimate about this *per se*. It is possible that whilst tendering further proof, and in that sense improving upon the original proof tendered, the witness may make statements, which may run counter to his earlier deposition. That, however, is no ground to reject his testimony outright. The testimony may well come in as the witness's own testimony, though its veracity and the confidence it inspires in the court

may well be impaired by reason of the contradictions made by the witness whilst tendering such deposition or affidavit, as the case may be. That is, however, no ground for the court to either refuse to record the evidence or take on record such further or supplementary affidavit in lieu of examination in chief.

6 The objections raised by Mr.Seervai to supplementary affidavit-1, now sought to be tendered by the Plaintiffs, are in the nature of further statements made towards proof of documents. Whether or not such further proof should be accepted and whether or not, on the basis of such proof, the documents should be marked in evidence, are indeed matters of trial. But, at this stage, we are not deciding these matters. We are concerned with, at the moment, whether or not to accept the supplementary affidavit of evidence tendered by the Plaintiffs and that, as I have explained above, cannot be seriously objected to.

7 Accordingly, the objections of the Defendant to taking on record of supplementary affidavit-1 in lieu of further examination in chief of Jaya Patel are overruled.

8 The second prayer in the notice of motion seeks the Plaintiffs' list of witnesses and directions for filing of affidavits of further witnesses. Mr.Raheja, learned Counsel for the Plaintiffs, submits that he should be given time upto 4 June 2019 for furnishing of the Plaintiffs' list of witnesses.

9 The matters are, accordingly, stood over to 7 June 2019, when

directions concerning the schedule of hearings for cross-examination of Jaya Patel and filing of affidavits of further witnesses can be considered.

10 Notice of Motion No.100 of 2019 is disposed of in the above terms.

(S.C. GUPTE, J.)