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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 89 OF 2015
IN
TESTAMENTARY SUIT NO. 70 OF 2012
IN
TESTAMENTARY PETITION NO. 737 OF 2012

Olga Rodrigues & 2 Ors. ...Plaintiffs
Versus
Christopher Pinto & 15 Ors. ...Defendants

Mr. Zubin Behramkamdin, *i/b Mr. M.G. Gawde, for the Plaintiff.*
Ms. Sonal, *with Mr. Shushrut Desai, i/b M/s. Thakore Jarimala*
Associates, for Defendants Nos. 1 to 6, 14 & 15.
Ms. Rajani Iyer, Senior Advocate, *with Ms. Geeta Sonawane, i/b*
Mr. Denzil D'Mello, for Defendant No. 13A.

CORAM: G.S. PATEL, J
DATED: 11th August 2015

PC:-

1. This is an application by the Plaintiffs for leave to lead evidence of two further witnesses. The first of these is the 3rd Plaintiff Mr. Percy D'Souza. The second is one Sandip Pawaskar,

an Accountant in the offices of M/s. Wadia Ghandy & Co., Solicitors.

2. The application is unusual. Ordinarily, it was unnecessary. It was filed in quite extraordinary circumstances and because I indicated that the Plaintiffs should do so, in order that the Defendants could have an opportunity of contesting the application. This was in the context of what transpired in the Court during the cross-examination of the Plaintiffs' first witness, Mr. Noshir Sethna, an attesting witness to the Will being propounded, a Solicitor of this Court and a partner of M/s. Wadia Ghandy & Co. The Defendants' case is that the cross-examination of Mr. Sethna is such that the present application can only be in order to lead further evidence to undo the effect of that cross-examination. Ms. Sonal, learned Advocate for the Defendants other than Defendant No. 13A, and Ms. Iyer, learned Advocate for Defendant No. 13A, point out that this is a matter in which the Plaintiffs have in fact filed Affidavits in lieu of examination-in-chief under Order 18 Rule 4 of the Code of Civil Procedure, 1908 ("**CPC**") not only of Mr. Sethna but also of five other witnesses. Mr. Percy D'Souza and Mr. Sandip Pawaskar are not among these five. One of the five witnesses cited is Mr. Percy D'Souza's own spouse Ms. Joanna D'Souza. It cannot be accident, Ms. Sonal and Ms. Iyer say, or mere coincidence that the application came to be made only after the cross-examination of Mr. Sethna, at a most critical juncture of the trial.

3. Ms. Sonal submits that the provisions of Order 16(1)(3) of the CPC require that when a list of witnesses has been submitted, a party can call a person not on the list only if sufficient cause is

shown for that omission. In the present case, she submits, other than claiming inadvertence no cause whatsoever is shown. Order 16(1)(3) is, in her submission, mandatory. Merely claiming inadvertence is insufficient cause. For her part, Ms. Iyer draws attention to Order 18 Rule 3A of the CPC. While she acknowledges that in view of the decision in *Walter D'Souza v Anita D'Souza*,¹ in a contested testamentary proceeding such as this, an attesting witness's evidence must be led first. There is no reason at all why these two names did not feature in the list of five names given earlier. The Plaintiffs had legal advice. On that legal advice, they entered the Affidavits of Evidence of Mr. Sethna and the other five witnesses but not the Affidavits of Evidence of Mr. Percy D'Souza or Mr. Sandip Pawaskar. These two names are now being introduced only in order to somehow subvert the process of this Court, the trial that is ongoing and to undo the effects of the cross-examination of Mr. Sethna. Ms. Iyer also says out that this is a matter where the stakes are substantial and the properties are being dealt with while the trial is being prolonged.

4. As regards the properties, Mr. Behramkamdin, learned Advocate for the Plaintiffs, points out that a statement has already been made that there are no dealings with the properties. His instructions are to reiterate that statement today. His submission is that the provisions of Order 16 Rule 1 of the CPC only apply in a case where the Court's assistance is necessary in gathering and marshalling evidence and not otherwise.²

¹ 2015(2)ABR90

² *Mange Ram v Brij Mohan & Ors.*, (1983) 4 SCC 36

5. It is his submission that it is now well settled that no Court should shut out the evidence unless the introduction of that evidence is a patently an abuse of the process of the Court. Merely because one particular cross-examination has been, in view of the Defendants, successful, that does not by itself mean that the introduction of further evidence is an abuse of the process of the Court. He points out that a denial of the relief to the Plaintiffs is more than just disallowing this or that witness to lead evidence. It amounts to shutting out evidence altogether and effectively closing a party's case at least in part or on some aspects that fall for consideration.

6. Things might have been very different had the Plaintiffs, following the cross-examination of Mr. Sethna, sought an amendment to the Petition to undo the effect of the cross-examination of Mr. Sethna. That might conceivably be held to be an abuse of the process of the Court.

7. But that is not the same as objecting to an application to allow the Plaintiffs to lead evidence on the petition as it stands. In the present case, there is no doubt that Mr. Pawaskar is attesting witness. The other witness whose evidence is now sought to be introduced is Mr. Percy D'Souza, Plaintiff No. 3. I do not see how the evidence of either of these witnesses can possibly be kept out at this stage. There is no manner of doubt in my mind that the Defendants will have the fullest latitude in the cross-examination of not only of these witnesses but of all other witnesses as well. They will also be entitled at the time of arguments to make their submissions on the evidentiary value of the testimonies of the

witnesses called by the Plaintiffs. All of this is, however, well into the future. This is not the time or the stage to decide this question. To do so now would be to prejudice the entire suit even before all the evidence has been taken. Mr. Behramkamdin is, in my view, correct in his submission that the rule requiring a party to adduce his best evidence is one by which he is trying to abide, *inter alia* by leading the evidence of the second attesting witness and one of the Plaintiffs.

8. I am, however, mindful of the timing of this application as Ms. Sonal says. While it is true that I cannot shut out the Plaintiffs' evidence, I am also not prepared to allow them a completely free run in terms of adding to the Affidavits of Evidence that have already been filed by the five witnesses whose names have been provided in a list. It will not be open now, i.e., beyond this point onward, for the Plaintiffs to add any supplementary Affidavits of Evidence in lieu of examination-in-chief for the five witnesses who were so cited before the cross-examination of Mr. Sethna commenced. No further examination-in-chief will be permitted except with the leave of the Court conducting the trial.

9. Finally, as an essential safeguard, I would venture to suggest that appropriate directions be obtained that the trial of this matter be conducted in Court and not be referred to a Commissioner for recording evidence. The reason for that is simple. Before a Commissioner, there will be no question of deciding any objection and all manner of material will enter the record. This will only prolong and delay the final disposal of the Suit.

10. The Plaintiffs shall file and serve Affidavits of Evidence of both Mr. Percy D'Souza and Mr. Sandip Pawaskar on or before 17th August 2015. In respect of these two witnesses also, there will be only one Affidavit in lieu of examination-in-chief and no further examination-in-chief will be permitted at the trial except with the leave of the Court.

11. The Notice of Motion is disposed of in these terms. There will be no order as to costs.

12. List the Suit for directions on 19th August 2015.

(G. S. PATEL, J.)