

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.

WRIT PETITION NO.160 OF 2015

(Shri Subhash s/o Eknathrao Mohod ..vs.. Shri Mukund s/o Eknathrao Mohod and others)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

CORAM : Z.A. HAQ, J.

DATED : 16-10-2015

Heard Shri S.S. Alaspurkar, learned Advocate for the petitioner and Shri A.M. Sudame, learned Advocate for the respondent No.1.

None appears for the other respondents though the notices for final disposal of writ petition have been served.

2. The petitioner/original defendant No.1 takes exception to the order passed by the trial Court, rejecting the application (Exhibit No.139) by which the petitioner/defendant No.1 prayed that he be permitted to examine the witness who has attested the will, before he himself enters the witness box. The petitioner/defendant No.1 has also challenged the subsequent order passed on 06-08-2014 discarding the affidavit of the petitioner/defendant No.1 as it came to be filed after the evidence on behalf of the defendant No.1 came to be closed.

3. The learned trial Judge has rejected the application (Exhibit No.139) on the ground that no

reason is stated in the application as to why the defendant No.1 wants to examine the witness who has attested the will, before he himself enters the witness box. On perusing the application (Exhibit No.139) filed by the defendant No.1, I find that the learned trial Judge is right in observing that the defendant No.1 has not stated the reason for examining the witness who has attested the will, before he himself enters the witness box, however, the observations recorded in the order passed on 23-01-2014 show that the reason was disclosed at the time of hearing and it has also been recorded in the order.

4. Shri S.S. Alaspurkar, learned Advocate for the petitioner has relied on the provisions of Section 68 of the Indian Evidence Act, 1872 and has submitted that the examination of the witness who has attested the will, is necessary before the defendant No.1 enters the witness box. Reliance is also placed on the judgment given by this Court in the case of **Walter D'Souza v. Miss Anita D'Souza and Ors.** reported in **2015(2) ABR 90**.

5. Shri A.M. Sudame, learned Advocate for the respondent No.1/plaintiff has supported the impugned order. The learned Advocate for the respondent No.1/plaintiff has relied on the judgment given in the case of **N.C. Kaladharan v. Kamaleswaran and others** reported in **AIR 2000 Kerala 354** and has submitted that the

request made on behalf of the petitioner/defendant No.1 to examine the witness who has attested the will, before the defendant No.1 enters the witness box, cannot be considered.

6. Be that as it may, as the petitioner has not given any explanation in the application (Exhibit No.139) justifying his request for examining the witness who has attested the will, before he himself enters the witness box and because of which the respondent No.1 is deprived of the opportunity to oppose the request made on behalf of the petitioner, in my view, it would be appropriate to pass the following order to sub-serve the ends of justice.

- (i) The order passed on application (Exhibit No.139) on 23-01-2014 is set aside.
- (ii) The petitioner/defendant No.1 is permitted to file fresh application reiterating his request.
- (iii) If the appropriate application is filed by the petitioner/defendant No.1, the trial Court shall decide the application, after considering the objections of the other parties to the civil suit, according to law.
- (iv) As the order passed on the application (Exhibit No.139) is set aside, the subsequent order passed by the trial Court on 06-08-2014 is also set aside. The trial Court shall consider the point of acceptance of the evidence of the

defendant No.1, at appropriate stage, after deciding the application which may be filed by the defendant No.1.

The petition is disposed in the above terms. In the circumstances, the parties to bear their own costs.

JUDGE

pma