

SHEPHALI

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 93 OF 2016
IN
TESTAMENTARY SUIT NO. 99 OF 1999
IN
TESTAMENTARY PETITION NO. 830 OF 1999**

Mr. Claude Dominic Murzello ...Plaintiff
Versus
Mrs. Hilda Neval John & Another ...Defendants

Mr. Denzil D'Mello, *with Ms. Geeta Sonawane, for the Applicant/
Plaintiff.*
Mr. S.K. Dubey, *for the Defendant.*

CORAM: G.S. PATEL, J
DATED: 7th June 2016

PC:-

1. This Notice of Motion filed by the Plaintiff has two prayers. The second prayer is to allow the Plaintiff to prove the execution of the Will in question in accordance with the provisions of Section 71 of the Indian Evidence Act by filing an Additional Affidavit of Evidence or leading further evidence. No special leave is required for this purpose. The Plaintiff is always at liberty to lead such

evidence as it is necessary for the purposes of proving the Will. That liberty and right is always available to the Plaintiff.

2. Prayer (a) to the Notice of Motion, one that seeks leave to lead the evidence of the Plaintiff himself, has something of a history. While the attesting witness, one Olaf Pontes, was being cross-examined in Court, I had noticed that the Plaintiff was also present in Court. At that time, this was pointed out to Mr. D'Mello. The Plaintiff immediately left the courtroom. I recorded an observation about this on that day in the notes of evidence. The result was, I noted, that the Plaintiff could, as a result, not be permitted to lead evidence. Mr. D'Mello did on that very day seek leave to allow the Plaintiff to lead evidence. I thought it more appropriate to direct the Plaintiff to file a Notice of Motion so that the Defendant had an opportunity of putting in a reply. The present Notice of Motion comes to be filed in these circumstances.

3. I have before me an Affidavit in Reply and now also an Affidavit in Rejoinder. I have heard Mr. D'Mello and Mr. Dubey.

4. It is true that the Plaintiff was present in Court on that day and it is equally true that I did observe that the Plaintiff would not be allowed to give evidence. I imagine that this is a convention or rule of some antiquity, one that harks back to a time and an age when trials were conducted on a day to day basis, and continued without interruption, so that the evidence of the next witness was taken immediately after the evidence of the previous witness was completed. In that time and age, there was no question of filing

evidence on Affidavit. The examination-in-chief was taken in Court. In earlier times, notes of evidence were usually made available at the end of the day. During the day itself, the examination-in-chief of one witness was taken, followed immediately by his or her cross-examination, then a re-examination if any, followed immediately by the examination-in-chief of the next witness. This preserved the purity of the trial process and in and of itself demanded the distancing of each successive witness from the previous one.

5. The avowed purpose of not allowing the Plaintiff or the next witness to be present while the previous witness is being examined is in fact entirely lost. One reason for not allowing the next witness to remain present is to prevent them from giving any hints to the witness under cross. The more apparent reason is to ensure that the next witness does not improve on the case and fill in any lacunae in the evidence of the previous witness. But this assumes that the trial will be mounted and carried in such a way that the transition from one witness to the next is continuous and seamless, and that there is in fact no break in the cross-examination of the witness at all.

6. All this is now lost and is very much a thing of the past. It is never followed. Now, Affidavits of Evidence are prepared in lawyers' chambers and I have no doubt that this is an almost always a broad consultative process that includes not only the witness and the Advocate but also one or more of the parties. Trials do not continue on day to day basis. Often, they do not continue for the whole day to the conclusion of the cross-examination of one particular witness. Even the cross-examination of a single witness is sometimes spread over several sessions with long breaks in between.

7. We do not have — and have never had — any practice or system of ‘sequestering’ a witness the way some jurisdictions do jurors. As a result of the change in the way we manage trials now, it is always possible for a party to meet his witness during one of those interruptions. Further, the notes of evidence are always made available at the end of each of these abbreviated cross-examination sessions, and nothing prevents a party from studying those and discussing the future trajectory of the evidence with that witness outside court. This is not a matter of right. This is simply part of the cold, cruel truth about the systematic dismembering of our trial system and the way we have reduced it to a poor, stumbling shadow of what it once was and what it ought to be.

8. The salutary self-imposed restrictions and conventions are now almost entirely ineffective. To persist in these is to delude ourselves: nothing prevents a party or person from speaking to a witness when a cross-examination is adjourned after being partly completed. The allegations in the Affidavit in Reply that the persons were discussing details outside the court hall are surely irrelevant given the manner in which we conduct these proceedings anyway. This is not to suggest, I hasten to add, that a party or the next witness should be permitted to remain present when his witness is being cross-examined or that he has right to remain present. The other aspect, of preventing the witness from taking hints from the party’s expressions or reactions, is sound. But when there is, as been in this case, a slip up on the part of the lawyer, one that was caught in time, and when no demonstrable damage was done, it would be unduly harsh, in my view, to completely shut out the Plaintiff for such an infraction.

9. I must also accept what Mr. D'Mello says to me today and what I recollect from the previous occasion, viz., that this was entirely due to an oversight on his part. I do not see why the Plaintiff should be penalized. He could not have been expected to know better. Everyone makes mistakes. The challenge does not lie in being relentlessly unforgiving of each one of those, but to find a way to balance equities and achieve a just course for the trial. I am inclined to allow the Plaintiff some room for his Advocate's admitted error.

10. The Notice of Motion is made absolute in terms of prayer clause (a).

11. Mr. D'Mello seeks time to file an Affidavit of further Examination in Chief. He may do so. That Affidavit is to be filed and served on or before 24th June 2016.

12. List the matter for directions on 5th July 2016. It is understood that if on that day the Plaintiff is producing any further documents, these will be taken up for marking on that very date irrespective of the caption under which the matter is listed.

13. The Notice of Motion is disposed of in these terms with no order as to costs.

(G. S. PATEL, J.)