

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.153 OF 2016***

in

TESTAMENTARY SUIT NO.92 OF 2000

in

TESTAMENTARY PETITION NO.838 OF 1999

Kanhaiyalal L.Pujari

..Applicant/Plaintiff

vs

C.L.Pujari & ors

.. Defendants/Respondents

WITH TESTMENTARY SUIT NO.92 OF 2000

in

TESTAMENTARY PETITION NO.838 OF 1999

Smt Sheela A.Karnik

.. Plaintiff/Petitioner

vs

C.L.Pujari & ors

.. Respondents

Ms.Sowmya Srikrishna a/w Mr.H.J.Engineer

I/b M/s Gordhandas & Fozdar for Applicant/Plaintiff

Mr.Shishir S.Joshi with Ms.Bhakti Jogal for Defendant no.1

..

CORAM: K.R.SHRIRAM, J

DATE: 8 FEBRUARY 2017

P.C.

1. The Plaintiff is seeking by this Chamber Summons recall of PW 1, relying upon Order 18 Rule 17 of the Code of Civil Procedure, 1908.

2. The Plaintiff filed a Petition for grant of Probate of the Will of one late Linganna Puttal Pujari who expired on 14 May 1999. The Petition was originally filed by daughter of the deceased who was also an Executor but later the daughter did not wish to continue based on which the present Plaintiff-Kanhaiyalal Linganna Pujari who was earlier the Defendant but supporting the original Petitioner was transposed as the Plaintiff pursuant to an order dated 29 October, 2014. Issues were also re-cast but, before the Plaintiff got himself transposed as the Plaintiff, an affidavit dated 16 October 2009 of one of the attesting witness-Dattatraya Vishwanath Kulkarni (PW 1) under Order 18 Rule 4 of the Code of Civil Procedure, 1908 was filed (the said affidavit). Thereafter, PW 1, Dattatraya Vishwanath Kulkarni presented himself in Court on 17 February 2015 and recording of his evidence commenced. During Examination-In-Chief, the counsel asked following two questions and they were answered as under :-

10. "Q: What are the circumstances in which you signed this document ?

Ans: Mr.Pujari called me to his residence. I do not remember the exact

date. He signed the Will in my presence.

11. Q: Was anybody else present at that time? (Mr.Joshi, learned Advocate for the Defendant objects. He says that the question is an attempt to fill up the lacunae. He also says that the answer to this question is implicit in the previous answer. **Objections over-ruled.** The witness is directed to answer the question.)

(The witness hesitates before answering).

Only he and I were present at that time.”

3. In view of the answers, counsel for the Plaintiff sought leave of the Court to cross-examine her own witness which leave was granted pursuant to an order passed by the Court on 10 April 2015. It will be useful to reproduce Question Nos. 14,15,16,17 and 18 and Answers thereto. The same are as under :

14. “(Shown Evidence Affidavit dated 12th August 1999).

Q:Is this your Affidavit ?

Ans: Yes

15. Q: Are you familiar with English?

Ans: To a great extent.

16. Q: Do know what is stated in this Court Affidavit ?

Ans: No. I signed what the Advocate told me to sign.

17. Q: Was this Affidavit interpreted and court explained to you before you affirmed it ?

Ans: No. I was told what it contains.

18. Q: Did you agree what you were told before you signed it?

Ans: I do not now remember exactly. It was 15 years ago.

Witness volunteers: I would not have signed a false

Affidavit. I was told by the Advocate that this was the procedure that was required.

No further examination-in-chief.”

Following that Mr.Joshi learned Counsel for the Defendant no.1 cross-examined the witness and evidence of the witness has been closed.

It should be noted that there is no reference to the said affidavit in the subsequent evidence recorded. No further evidence has been recorded.

4. The Plaintiff has subsequent thereto taken out the present Chamber Summons seeking recall of witness PW 1- Dattatraya Vishwanath Kulkarni. According to the Plaintiff, the Plaintiffs were not aware of the said Affidavit having been filed and in paragraph 6 of this Affidavit in support of Chamber Summons, it is stated that *“after the witness evidence was recorded, I learnt from the previous Advocate on record that his Affidavit of Examination-in-chief was already prepared and filed in Court. After taking inspection from the Court, I came across his affidavit of Examination-in-chief dated 16.10.2009.”*

5. The learned Counsel submitted that in this Affidavit in lieu of Examination-in-Chief, PW 1 has stated that when the Will was signed by the Testator, PW 1 as also other attesting witness

was present. In other words, all the three were present together and at the same time when they had put their respective signatures. The Counsel submitted that in the evidence that was recorded in Court on 17 February 2015 the witness has stated that only the witness and the Testator were present at the time of signing the Will. The counsel states that since there is a contradiction, it is necessary to re-call the witness to clarify on this point. The counsel also submitted that this Court in *MADHUBHAI AMTHALAL VS AMTHALAL NANALAL*¹ has held that the powers of the Court to act under Order 18 Rule 17 of the Code of Civil Procedure, 1908 are very wide and if the Court, while considering the evidence finds that there is any ambiguity on the face of the record or an omission which wants clearing up, the Court can, in a proper case, re-call a witness who had given evidence, for that purpose. The counsel also submitted that it is also settled law that the Court, under Order 18 Rule 17 of the Code of Civil Procedure, 1908, either on its own motion or on an application of any party can re-call a witness.

6. Mr. Joshi learned Counsel for the Defendant no.1 at the outset submitted that he agrees with the legal proposition as submitted by the Counsel for the Applicant/Plaintiff but, at the

1 A.I.R.(34) 1947 Bombay 156

same time submitted that the Court should not allow an application of a party to re-call a witness to fill up any lacunae in their evidence and who has also made in-correct statements in the Affidavit-in-support.

7. This Suit has been filed for propounding a Will. The Petition is filed seeking the Court's imprimatur to perform a duty created by a Will and for recognition as a Testamentary Trustee. The role of the Court is to see whether the Will has been validly executed in writing as per section 63 of the Indian Succession Act and execution of the Will has been proved in accordance with section 68 of the Indian Evidence Act, 1872. The jurisdiction of the probate Court is limited being confined only to consider the genuineness of the Will.

8. The witness PW 1 in his said Affidavit dated 16 October 2009 which is already on record has stated that all the three persons were present at the time when the Will was signed by the Testator and the Attesting witnesses. But, in the evidence that was recorded in Court, the witness has stated that only Mr.Pujari and he were present. Even if we keep aside the application for a moment, it is for the Court to understand correctly what was the correct position, i.e., whether all three persons were

present at the same time or only two of them were present. Therefore, in my view, there is no lacunae but, certainly there is an inconsistency, which requires to be clarified. Therefore, the two Judgments relied upon by Mr.Joshi learned counsel for the Defendants in **RASIKLAL MANIKCHAND DHARIWAL vs M.S.S.FOOD PRODUCTS² and K.K.VELUSAMY VS N.PALANISAMY³** does not really help the case of the Defendants because, it is this Court's conclusion that there is no lacunae but, only inconsistency which requires to be clarified for the benefit of the Court to come to a correct conclusion at the hearing of the matter.

9. As stated in **MADHUBHAI AMTHALAL VS AMTHALAL NANALAL** (supra) the wording of Order 18 Rule 17 of the Code of Civil Procedure, 1908 is so wide that if the Court finds that there was an ambiguity on the face of record or if there is an omission which wanted clearing up, the Court can re-call a witness who had given evidence for that purpose. In this case, the Plaintiff has only brought to the notice of the Court the ambiguity. In **MADHUBHAI AMTHALAL** (supra) the Court has also held that it is a discretionary power and in an appropriate case the Court can

² (2012) 2 SCC 196

³ 2011 AIR(SCW) 2296

exercise the discretion.

10. In the circumstances, the Chamber Summons is allowed. Costs to be costs in Suit.

11. At this stage, Mr.Joshi learned counsel for the Defendant No.1 prays for stay of this order.

Stay refused.

12. Registry to issue witness summons to PW 1- Dattatraya Vishwanath Kulkarni returnable on **7 March 2017** at 11 A.M.

{K.R.SHRIRAM, J}

