

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

**APPEAL NO. 23 OF 2017
IN
TESTAMENTARY SUIT NO. 94 OF 2015**

Ms. Anita Tukaram Bohane
(Now Smt. Anita Bhagwant Ghate)

... Appellant.
(Org.Plaintiff)

V/s.

Mr. Desmond A. D'Souza 2 & Ors.

... Respondents.

Ms. Eventa A. Gonsalves, Advocate for the Appellant.
Mr. Tejas Vora i/by G. K. Vora, D. R. Mishra, Advocate for
Respondent No.1.
Mr. Suesh Barve, Advocate for Respondent No.2.

**CORAM : V. M. KANADE AND
P.R. BORA, JJ.
DATE : 27th FEBRUARY, 2017**

P.C. :

1 Heard the learned counsel appearing on behalf of the Appellant (Org. Plaintiff), the learned counsel appearing on behalf of Respondent No.1 and the learned counsel appearing on behalf of Respondent No.2.

2 The Appellant had filed a petition for letters of administration of the Will Annexed dated 5th August, 2009. The said petition was converted into a suit, wherein the parties led evidence, the attesting witnesses were already examined and

the appellant /plaintiff was under cross-examination. At this stage, Respondent No.1 - Mr.D.A.D'Souza has filed another petition, claiming that a later Will was executed by his brother. Respondent-Mr. D'Souza produced the second Will dated 5th August, 2009 and filed a Testamentary Petition No. 1853 of 2016. It was contended that since the Respondent relied upon the subsequent Will, in view of the provisions of section 17 of the Act, the Testamentary Suit No. 94 of 2015 may be stayed.

3 Learned single Judge accepted the said contention and stayed further trial in Testamentary Suit No. 94 of 2015 and clubbed the Testamentary Petition No. 1853 of 2016. The learned counsel appearing on behalf of the Appellant/Plaintiff submitted that the trial in Testamentary Suit No. 94 of 2015 was at the fag end and only Plaintiff's cross-examination was remained to be recorded. She submitted that cross-examination of the Plaintiff may be concluded and the Judgment in the said case may not be pronounced till Testamentary Petition No. 1853 of 2016 is heard and disposed off.

4 On the other hand Shri Vora, the learned counsel appearing on behalf of Respondent No.1 submits that this would cause prejudice to the Respondents since the witnesses are the same. In our view, no prejudice would be caused to the Respondents if the cross-examination of the Plaintiff, the

Appellant herein, is completed and at that stage the trial is stayed.

5 We, therefore, modify the order passed by the learned single Judge. We are of the view that cross-examination of the Plaintiff may be completed. Learned counsel for the Appellant submits that she does not wish to cross-examine any other witness. After the evidence is recorded, the trial in the said Testamentary Suit No. 94 of 2015 is stayed and only after Testamentary Petition No. 1853 of 2016 is heard and disposed of, the first petition, if necessary, be heard. Needless to state that if Respondent No.1 succeeds in his Testamentary Petition No. 1853 of 2016, the earlier Will will stand revoked.

6 All contentions of the parties are kept open.

7 The Appeal is disposed of.

(P.R. BORA, J)

(V.M.KANADE, J)

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