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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION

CHAMBER SUMMONS NO.154 OF 2016
IN
TESTAMENTARY SUIT NO.28 OF 2001
IN
TESTAMENTARY PETITION NO.953 OF 1997

- | | | |
|--|---|-----------------|
| 1. Mr.Howard Miranda, |) | |
| through his Constituted Attorney |) | |
| Ms.Phyllis Miranda |) | |
| |) | |
| 2. Mr.Roy Miranda |) | |
| |) | |
| 3. Ms.Arlene Miranda, |) | |
| |) | |
| All residing at "Roma", 36, Perry Road, |) | |
| Bandra (W), Mumbai – 400 050 |) | |
| |) | |
| 4. Ms.Ginnette Fernandes nee |) | |
| Miranda residing at B-12, Gyandeep, |) | |
| 17 th Road, Santacruz (West), |) | |
| Mumbai – 400 054 |) | |
| |) | |
| |) | ...Applicants / |
| |) | Ori.Defendants |
| |) | |
| <u>IN THE MATTER BETWEEN :</u> |) | |
| |) | |
| 1. Mrs.Agnes Miranda of Mumbai |) | |
| Indian Inhabitant, residing at |) | |
| BSR Diagnostic Limited at "Roma" |) | |
| 36, Perry Road, Bandra (West) |) | |
| Mumbai – 400 050. |) | |
| |) | |
| 2. Ms.Jullien Miranda of Mumbai |) | |
| Indian Inhabitant, residing at |) | |
| BSR Diagnostic Limited at "Roma" |) | |
| 36, Perry Road, Bandra (West) |) | |
| Mumbai – 400 050. |) | |
| |) | |

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|--|---|-----------------|
| |) | |
| 3. Mr.Savio Miranda having address |) | |
| at 7/22 B, Arabi Street, Sandringham, |) | |
| Auckland – 1041, New Zealand |) | |
| |) | |
| |) | |
| 4. Ms.Avril Rodrigues of Mumbai |) | |
| Indian Inhabitant, residing at |) | |
| BSR Diagnostic Limited at “Roma” |) | |
| 36, Perry Road, Bandra (West) |) | |
| Mumbai – 400 050. |) | |
| |) | |
|Versus.... |) | |
| |) | |
| 1. Mr.Howard Miranda |) | |
| through his Constituted Attorney |) | |
| Ms.Phyllis Miranda |) | |
| 2. Mr.Roy Miranda |) | |
| |) | |
| 3. Ms.Arlene Miranda, |) | |
| |) | |
| All residing at “Roma”, 36, Perry Road, |) | |
| Bandra (W), Mumbai – 400 050 |) | |
| |) | |
| 4. Ms.Ginnette Fernandes nee |) | |
| Miranda residing at B-12, Gyandeep, |) | |
| 17 th Road, Santacruz (West), |) | |
| Mumbai – 400 054 |) | |
| |) | ...Defendants / |
| |) | ...Respondents |

Mr.Aditya Bapat with Ms.Shilpan Gaonkar and Mr.Subodh Kurdukar
i/b Kurdukar & Associates for the Applicants / Original Defendants.

Mr.Nimay Dave with Mr.Ayaz Bilawala and Ms.Sidhi Doshi i/b
Bilawala & Co. for the Respondents / Original Plaintiffs.

CORAM : R.D. DHANUKA, J.
DATE : 3RD JULY, 2017.

ORAL JUDGMENT :-

1. By this chamber summons, the applicants (original defendants) seek recall of the witness no.1 examined by the applicants i.e. Ms.Ginnette Fernandes nee Miranda for the purpose of proving and accepting the documents in evidence annexed as Exhibits 1 to 5 to the affidavit in lieu of examination in lieu of witness no.2 (DW-2) i.e. Ms.Nisha Menon, proposed to be examined by the applicants whose affidavit in lieu of examination in chief has been already filed by the applicants. Some of the relevant facts for the purpose of deciding this chamber summons are as under :

2. It is the case of the original petitioner - Joseph Miranda in Testamentary Petition No.953 of 1997 (converted into Testamentary Suit No.28 of 2001) that Robert Miranda had executed a Will on 10th January, 1980, who died on 10th May, 1991. It was also the case of the original petitioner that the original petitioner was one of the two executors named in the said Will. The first executor Kevin Miranda alleged to have been named in the said Will died on 1st September, 1995. According to the original petitioner, the said deceased died leaving behind two daughters viz. Mrs.Loretta Peter Fonseca and Mrs.Joan Alec Monterio and one son by name Mr.Joseph Miranda (original petitioner to the testamentary petition). The original petitioner – Joseph Miranda claiming to be one of the legatee is also alleged to have been named in the said Will. After the demise of Mr.Joseph Miranda, his legal heirs have been brought on record.

3. On or about 27th October, 1997 the said Mr.Joseph Miranda filed Testamentary Petition bearing No.953 of 1997 *inter-alia* praying for Probate of the alleged last Will dated 10th January, 1980 alleged to have been executed by Mr.Robert Miranda.

4. In view of the caveats filed by the five parties on whom citations were served, the testamentary petition was converted into suit on 22nd June, 2001.

5. After considering the petition and the affidavits in support of the caveat, this Court framed the following issues on 5th July, 2011 :

- 1). Whether the last Will and Testament of the deceased Robert Miranda dated 10th January, 1980 was validly executed ?
- 2). Whether the said Will was executed upon the domination of the plaintiff/petitioner and his brother ?
- 3). Whether the deceased was in a sound state of mind at the time of the execution of the Will ?
- 4). What relief, if any, the plaintiff is entitled to ?

6. In the year 2014, the testamentary petition was converted into a suit for Letter of Administration with the Will annexed in view of the death of the alleged executors under the said alleged Will.

7. On 13th September, 2011, the plaintiffs tendered affidavit of evidence and compilation of documents of their first witness. The cross-examination of the plaintiffs' witness was completed in the month of April, 2015. On 13th April, 2015, the original defendant no.1 Mrs.Phyllis Miranda died. On 22nd April, 2015, this Court recorded that the evidence of the plaintiffs was closed and directed the defendants to file affidavit of evidence of their first witness along with compilation

of documents and affidavit of the documents on or before 15th June, 2015. The defendants however, belatedly filed the affidavit of the first witness i.e. Mrs.Ginnette Fernandes – defendant no.4 in the suit. On 20th April, 2016, cross-examination of the first witness of the defendants commenced. On 21st July, 2016, cross-examination of DW-1 was concluded. There was no re-examination of the said witness by the defendants.

8. On 10th August, 2016, this Court directed the defendants to file affidavit of evidence of the handwriting expert within one week from the date of the said order. On 23rd August, 2016, the defendants filed affidavit in lieu of examination in chief of DW-2 i.e. Ms.Nisha Menon, the forensic expert. Along with the said affidavit, the defendants placed reliance on several documents. This Court passed an order on 23rd November, 2016 and observed that DW-2 could have validly referred to the documents already on record or to admitted documents. The documents sought to be relied upon by DW-2 were not proved. Those documents were not even referred in the affidavit of documents already filed by the defendants. This Court held that the first defendant will have to explain how those documents came into her possession now and from whom and how. She will have to prove not only the signature but the documents in full.

9. It is held that till all this was done, the report submitted by DW-2 could not be accepted fully and her cross-examination could only be conducted on her report but without any reference to the additional documents provided by the defendants or to any portions of them that she may have used. At that stage, the defendants sought leave to file a formal application to recall DW-1, to disclose additional

documents and to lead them in evidence. It is accordingly held that the defendants may file and move that application if permissible in law. It was clarified that this Court had not granted leave to the defendants to file any such application and the defendants would have to make out a case that they were entitled to maintain such an application. All the contentions were kept open. Pursuant to the said order passed by this Court on 23rd November, 2016, the defendants have filed this chamber summons.

10. Mr.Bapat, learned counsel appearing for the applicants invited my attention to the affidavits in support of the caveats filed by his clients including the affidavit in support of the caveat filed by the original defendant no.1 – Mrs.Phyllis Miranda dated 19th April, 2000. He submits that in each of the affidavits in support of the caveat, the defendants have disputed the execution of the alleged Will propounded by the original petitioner. The original petitioner and his brother had used their position of trust to coerce the deceased into signing the purported Will at a time when the deceased was not capable of making any testamentary disposition. He submits that the original defendant no.1 had also specifically referred to certain application forms signed by the deceased. The original defendant no.1 was daughter in law of the deceased.

11. It is submitted by the learned counsel that in view of the disputes raised by the defendants in the affidavits in support of the caveat, this Court had framed specific issue at serial no.1 i.e. “Whether the last Will and Testament of the deceased Robert Miranda dated 10th January, 1980 was validly executed ? He submits that it is thus clear that the Will allegedly executed by the deceased

Robert Miranda dated 10th January, 1980 was executed by him or not is a specific issue which is required to be adjudicated upon by this Court in this suit.

12. It is submitted by the learned counsel that when the affidavit in lieu of examination in chief of the first witness of the defendants dated 9th October, 2015 was filed on behalf of the defendants, the said witness had not filed any documents along with her affidavit in lieu of examination in chief as at that time she was not in possession of any documents. He submits that during the cross-examination of DW-1, Mrs.Loretta Fonseca, daughter of late – Mr.Robert Miranda handed over two letters i.e. original letter dated 28th July, 1980 and photocopy of the letter dated 3rd July, 1980 bearing the signatures of late Mr.Robert Miranda to DW-1.

13. Learned counsel invited my attention to various questions and answers in the cross-examination of DW-1 and more particularly question nos.163 to 166. He submits that DW-1 was specifically asked a question by the learned counsel for the plaintiffs as to who had approached Ms.Nisha Menon to give evidence on behalf of the defendants in this matter. DW-1 deposed that she had approached Ms.Nisha Menon for the purpose of verifying the signature of the deceased and decipher the writing of the second witness. DW-1 was asked whether she had provided any documents for such purpose to said Ms.Nisha Menon. DW-1 answered in affirmative and deposed that she had provided a copy of Will and some other letters signed by deceased Mr.Robert Miranda to the said Ms.Nisha Menon. She further deposed that those letters did not form part of the present proceedings as of now because they were of personal in nature. He

submits that DW-1 was thereafter asked as to when and how she came into possession of those alleged letters of her deceased grandfather, DW-1 answered that they were given to her by her aunt Mrs.Loretta Fonseca a couple of months ago.

14. Insofar as the other three documents i.e. applications signed by the deceased are concerned, it is submitted that those documents were discovered by DW-1 from the suit-case lying on the loft which belonged to her late mother – Mrs.Phyllis Miranda (original defendant no.1). He submits that DW-1 had visited the residence of her mother i.e. “Roma” on 23rd July, 2016 for ascertaining the cause of leakage in the loft of her mother's residence and to repair the same. He submits that DW-1 discovered three original documents described in paragraph 8 of her affidavit in support of the chamber summons. He submits that DW-1 had handed over those documents to Ms.Nisha Menon being forensic expert for the purpose of obtaining an expert opinion for the purpose of verification of the signature and initials of late Mr.Robert Miranda. He submits that those five documents are annexed to the affidavit in lieu of examination in chief of Ms.Nisha Menon (DW-2), the forensic expert as Exhibits 1 to 5 respectively.

15. It is submitted by the learned counsel that the said DW-1 can identify the signature of Mr.Robert Miranda on the documents annexed to the examination in chief of Ms.Nisha Menon. He submits that the applicants in the aforesaid circumstances could not produce the documents when her affidavit in lieu of examination in chief of DW-1 was filed and even before conclusion of her cross-examination. He submits that since the applicants have disputed the signatures of

the deceased on the alleged Will, the production of these five documents would be most essential to prove the case of the applicants that the deceased had not executed the alleged Will in question. He submits that it is therefore, in the interest of justice that the applicants be permitted to recall DW-1 for further evidence and to prove those five documents.

16. It is submitted that this Court has ample power to permit the parties to recall any witness at any stage. He submits that the cross-examination of the second witness of the applicants is not commenced. No prejudice would be thus caused to the plaintiffs if DW-1 is recalled for proving the documents and the signatures of the deceased Mr.Robert Miranda thereon and that the signature on the alleged Will is fabricated. In support of this submission, learned counsel for the applicants placed reliance on the judgment of the Supreme Court in case of **Salem Advocate Bar Association, T.N. vs. Union of India (2005) 6 SCC 344** and in particular paragraph 13 and also in case of **K.K. Velusamy vs. N. Palanisamy (2011) 11 SCC 275** and in particular paragraphs 3, 9, 11, 13 to 15, 18 and 18.

17. Mr.Dave, learned counsel appearing for the plaintiffs on the other hand submits that there is no dispute about the proposition of law that the Court has power to permit additional evidence or to permit recall of the witness under section 151 of the Code of Civil Procedure, 1908 in appropriate cases if the case is made out. He however, submits that such discretion can be exercised by the Court only if such party who seeks recall of the witness for the purpose of leading additional evidence shows that inspite of his due diligence he could not produce such evidence earlier when the same ought to

have been produced. He submits that in this case, the defendants have not come to this Court with clean hands and have failed to prove that such documents could not be produced earlier inspite of due diligence.

18. It is submitted that under Order 18 Rule 17 of the Code of Civil Procedure, if any, lacuna remains in evidence or pleadings, the same cannot be cured by filing additional evidence / pleadings. He invited my attention to the affidavits in support of the caveats filed by the defendants and submits that since it was the case of the defendants that the deceased was coerced by the original petitioner to execute the Will, that itself presupposes that the defendants have admitted the existence of the Will. He submits that since the execution of the Will is admitted in the affidavits in support of the caveat, the defendants cannot be allowed to produce any new documents at this stage to indirectly dispute the signature of the deceased on the Will.

19. Learned counsel for the plaintiff also invited my attention to the issues framed by this Court and more particularly issue nos.2 and 3 in support of the submission that those issues clearly indicate that the execution of the Will by the deceased was admitted.

20. Learned counsel also invited my attention to some portions of the cross-examination of DW-1 and would submit that the said witness when was put a suggestion that the signature on the Will was that of the deceased, she answered that she did not know. He submits that since DW-1 is not familiar with the signature of the deceased as deposed by her in reply to question no.168, she will not

be able to identify the signature of the deceased on any other document. He submits that the defendants have sought to create a new case after evidence of the plaintiffs is already closed which is not permissible.

21. Learned counsel for the plaintiffs invited my attention to paragraph 4.3 of the affidavit in support of the caveat filed by Mrs.Phyllis Miranda on 19th April, 2000 making a reference to the application forms alleged to have been signed by the deceased. He submits that though the said documents were already alleged to be in possession of the said Mrs.Phyllis Miranda, the original defendant no.1, those documents were never sought to be produced by the defendants by filing compilation of documents, affidavit of documents or even in the affidavit in lieu of examination in chief filed by DW-1. He submits that this Court shall thus not accept the story of the defendants that those three forms are now discovered from the suitcase of the mother of DW-1.

22. Learned counsel for the plaintiffs also invited my attention to the affidavit of evidence dated 9th October, 2015 filed by DW-1 and more particularly paragraph 8 and submits that the said witness did not rely upon any documents, including those copies of the applications alleged to have been signed by the deceased though such documents were already referred to and relied upon in the affidavit of evidence filed by her mother Mrs.Phyllis Miranda.

23. It is submitted by the learned counsel that even according to DW-1, she had already spoken to Ms.Nisha Menon, handwriting expert on 20th April, 2016 about the documents which itself would

indicate that at least on 20th April, 2016, the defendants were already in possession of such documents, which are annexed to the affidavit in lieu of examination in chief of the said Ms.Nisha Menon.

24. Learned counsel for the plaintiffs invited my attention to the cross-examination of DW-1 and more particularly to the answers to question nos.115 to 120. He submits that even in the cross-examination DW-1 admitted that there were no documents annexed by the defendants in the affidavits in support of the caveats filed by them nor the same were in the custody of the defendants. He also invited my attention to the answers given by DW-1 to question nos.162 to 166 and 168 and would submit that DW-1 has already admitted that for what purpose the said witness had approached the handwriting expert.

25. Learned counsel for the plaintiffs invited my attention to paragraphs 3 and 5 of the affidavit in support of the chamber summons admitting that DW-1 was not in possession of any documents when the affidavit in lieu of examination in chief dated 9th October, 2015 was filed by the said witness. It is submitted that the person who was addressed those letters allegedly by the deceased has not handed over those letters to Mrs.Phyllis Miranda. The defendants have no explanation as to how those letters came into existence of other party, who was not the addressee of those letters. He submits that the defendants have not explained and proved the alleged leakage in the loft in the area in "Roma" where the mother of DW-1 was staying.

26. Learned counsel for the plaintiffs submits that even in the

affidavit of evidence of DW-2 i.e. Ms.Nisha Menon, or in the two reports filed by her, she has not mentioned as to when those documents were shown to her or the copies thereof were furnished to her. He submits that the said handwriting expert could not have prepared the report merely within seven days of the defendants allegedly handing over the documents to the said witness. It is thus clear that the defendants have not exercised any due diligence for producing these documents at the earliest opportunity available to them. He submits that the aunt of DW-1 was not the recipient of those documents. Out of five documents, three documents were already in alleged possession of the mother of DW-1, the original defendant no.1. He submits that in these circumstances, this Court shall not exercise any discretion in favour of the defendants by permitting the defendants to recall DW-1 and to lead additional evidence. He submits that the matter is already delayed on one or other ground and thus if any further opportunity is granted to the defendants to lead evidence at this stage by recalling DW-1, prejudice would be caused to the plaintiffs.

27. Mr.Bapat, learned counsel for the applicants (original defendants) in rejoinder invited my attention to the averments made in the affidavits in support of the caveats, including the affidavit in support filed by DW-1 herself. He submits that each of the defendants have disputed the existence of the Will, including the alleged signatures thereon. He submits that the allegations of coercion made by the defendants in those affidavits are in the alternate. In support of this submission, my attention is invited to paragraphs 5, 6, 8 and 9 of the affidavit in support of the caveat filed by DW-1 and also the original defendant no.1. He submits that this Court has already

framed the issue about the valid execution of the alleged Will which includes the dispute about the signature on the alleged Will.

28. Insofar as the submission of the learned counsel for the plaintiffs that those alleged application forms were already relied upon by the original defendant no.1 in her affidavit in support of the caveat and more particularly in paragraph 4.3 and thus the said documents not having been produced though was in the custody of the original defendant no.1, it cannot be allowed to be produced now is concerned, it is submitted by the learned counsel that the said documents were referred to and relied upon by the original defendant no.1. The plaintiffs never applied for inspection of those documents. The original defendant no.1 – Mrs.Phyllis Miranda has already expired. Those documents could be discovered by DW-1 only recently. He invited my attention to paragraph 7 of the affidavit in support of the chamber summons and would submit that DW-1 came in possession of those three applications referred to and relied upon by the said Mrs.Phyllis Miranda from a cupboard when DW-1 had visited the said house for the purpose of ascertaining the extent of leakage and for taking further steps to stop such leakage. He invited my attention to the objections raised by the plaintiffs and the deposition of DW-1 in reply to question nos.165 and 166. He submits that in any event the letters proposed to be produced by the defendants are 34 years old letters and thus can be allowed to be produced.

29. Insofar as the deposition of the witness to question no.168 that she did not know whether the deceased had signed the Will is concerned, it is submitted that the said DW-1 may not have

recognized the signature of the deceased on the Will but can recognize the signature on other documents sought to be produced. He also invited my attention to the reply given by DW-1 in response to the question nos.115 to 119. He submits that the defendants have acted with due diligence and have made an application for recall of DW-1 immediately after the affidavit of DW-2 was filed. He also invited my attention to the order dated 23rd November, 2016 passed by this Court in this regard.

30. It is submitted that insofar as the deposition of DW-1 that she did not have the documents is concerned, the said deposition in respect of the relevant documents enquired by the learned counsel for the plaintiffs during the course of cross-examination had nothing to do with the documents now sought to be produced by the defendants. He submits that in reply to question no.166, DW-1 has already answered that the said documents were handed over to her by her aunt - Mrs.Loretta Fonseca couple of months back. He submits that there was no further cross-examination of the said witness by the plaintiffs. It is thus proved that the said documents came in the custody of DW-1 before couple of months of closure of the evidence of DW-1. He submits that balance of convenience is in favour of the applicants and no prejudice would be caused to the plaintiffs if DW-1 is permitted to be recalled.

REASONS AND CONCLUSIONS :

31. A perusal of the affidavits in support of the caveats filed by all the defendants clearly indicates that the defendants have disputed the execution of the alleged Will dated 10th January, 1980 and more

particularly in paragraphs 3, 5, 6, 8, 9, 10, 17 and 24. Based on the pleadings filed by the parties, on 5th July, 2011 this court framed three issues which are as under :-

- 1). Whether the last Will and Testament of the deceased Robert Miranda dated 10th January, 1980 was validly executed ?
- 2). Whether the said Will was executed upon the domination of the plaintiff / petitioner and his brother ?
- 3). Whether the deceased was in a sound state of mind at the time of the execution of the Will ?

32. A perusal of the issue no.1 clearly indicates that the dispute about the existence and execution of the alleged Will and Testament dated 10th January, 1980 is an issue which will have to be adjudicated upon by this court in this testamentary suit.

33. Insofar as issue nos. 2 and 3 are concerned, if this court comes to the conclusion that the Will was executed by the deceased on 10th January, 1980, the issue nos. 2 and 3 will have to be decided by this court independently. If the answer to issue no.1 is in negative, the question of any adjudication of issue nos. 2 and 3 would not arise. A perusal of the averments in the affidavit in support of the caveat clearly indicates that even in paragraph (5) of the affidavit in support of the caveat, it was alleged by the defendants that the original

petitioner and his brother had misused their position of trust to coerce the deceased into signing the purported Will at a time when the deceased was not capable to make any testamentary disposition. It is averred that the said plea raised by the defendants is on the face of it is without admitting the execution of the said alleged Will dated 10th January, 1980. I am thus not inclined to accept the submission of the learned counsel for the plaintiffs that since the applicants (original defendants) have alleged that there was coercion on the deceased by the original petitioner and his brother into signing the purported Will, that would indicate that the execution of the Will is admitted by the defendants.

34. Insofar as production of the additional documents by recalling of the DW-1 by the applicants in this chamber summons is concerned, it is the case of the applicants in the chamber summons that when the DW-1 had filed affidavit in lieu of examination in chief dated 9th December, 2015 on behalf of the applicants, she had not filed any documents along with her affidavit in lieu of examination in chief since at the time of filing of the same, she was not in possession of any documents. It is the case of the applicants that during the cross examination of DW-1, Mrs. Loretta Peter Fonseca, the daughter of Mr. Robert Miranda handed over two letters i.e. the original letter dated 28th July, 1980 and photocopy of the letter dated 3rd July, 1980 to the DW-1 bearing the signatures of late Mr. Robert Miranda who had alleged to have executed the Will dated 10th January, 1980.

35. Insofar as the remaining three documents i.e. the application forms alleged to have been signed by the deceased Mr. Robert Miranda are concerned, it is the case of the applicants that

DW-1 discovered certain documents from the suit-case which was lying on the loft which belonging to her late mother – Mrs.Phyllis Miranda during the process of clearing the loft. Those three documents are alleged to have been signed by the deceased Mr.Robert Miranda for seeking various permissions from the Municipal Corporation of Greater Mumbai.

36. A perusal of the affidavit in support of the caveat filed by the mother of DW-1 i.e. Mrs.Phyllis Miranda, the original defendant no.1 and more particularly paragraph 4.3 thereof clearly indicates that it was her case in the said affidavit in support of caveat that the husband of the original defendant no.1 was to construct the additional floor in 'Roma' for her husband, the original defendant no.1 and their children. To that end, the deceased Mr.Robert Miranda had even signed certain application forms for the construction of the additional floors which she had sought leave to refer to and rely upon. It is the case of the applicants that the defendant no.1 could discover those three application forms signed by the deceased which were made to the Municipal Corporation only recently after evidence of DW-1 was concluded.

37. A perusal of the cross-examination of the DW-1 indicates that the witness was asked by the plaintiffs' counsel in the cross-examination whether she was going to examine any other witness. The DW-1 answered the said question in affirmative. The witness also denied the suggestion that her mother had copy of the Will dated 10th January, 1980 of the deceased prior to 1985 and her mother had seen copy of the said Will prior to addressing her letter dated 18th January, 1985. In reply to question no.164 when the witness was

asked whether she had provided any documents to Ms.Nisha Menon, the handwriting expert for verifying the signature of the deceased and decipher the writing of the second witness, the witness answered that she had provided a copy of Will and some other letters signed by her grand-father to Ms.Nisha Menon. She admitted that as of now, those documents did not form part of the present proceedings because they were of personal nature. In reply to question no.166, when she was asked whether she could tell how and when she came in possession of those alleged letters of her grand-father Mr.Robert Miranda, the witness answered that they were given to her by her aunt Mrs. Loretta Peter Fonseca, a couple of months ago.

38. It is thus clear that in cross-examination, the witness has *prima-facie* proved that those two documents were given to her by her aunt Mrs. Loretta Peter Fonseca, a couple of months before the date of the said deposition i.e. 21st July, 2016.

39. Insofar as the remaining three documents are concerned, it is not disputed by the plaintiffs that the said application forms were referred by the original defendant no.1 Mrs.Phyllis Miranda in her affidavit in support of the caveat as far back as on 19th April, 2000. She had sought leave of this court to refer to and rely upon those documents. It is not the case of the plaintiffs that they had applied for any inspection of those documents from the said Mrs.Phyllis Miranda, the original defendant no.1. The said Mrs.Phyllis Miranda expired on 13th April, 2015. In these circumstances, I am inclined to accept the explanation of the applicants that those documents were discovered by the applicants only when she visited the residence of her late mother for solving the problem of leakage.

40. A perusal of the further cross-examination of the DW-1 indicates that after the said witness deposed that those two documents were given to her by her aunt Mrs. Loretta Peter Fonseca, a couple of months ago in response to specific question as to how and when she came into possession of those alleged letters of her grand-father, the plaintiffs did not pursue the further cross-examination of the witness on that issue. It is thus clear that those documents were discovered recently by the applicants.

41. In my view since the applicants (original defendants) have disputed the execution of the alleged Will dated 10th January, 1980 and have proposed to examine the handwriting expert to prove their case, these five documents if proved would be relevant for the purpose of determining issue no.1 as framed by this court.

42. Insofar as the submission of the learned counsel for the plaintiffs that since the DW-1 had specifically answered in reply to question no.168 that she did not know when she was put a suggestion that the signature on the Will was that of the deceased and thus she would not be able to identify the signature of the deceased on the other documents also and thus no opportunity to lead any additional evidence by recalling the DW-1 shall be given is concerned, I am inclined to accept the submission of the learned counsel for the applicants that even if the DW-1 did not identify the alleged signature of the deceased on the alleged Will on the ground that she did not know the signature of the deceased on the alleged Will, it cannot be said that she would not be able to identify the signature of the deceased on the other documents. The Court can

also compare the signatures on the documents.

43. The court has to read the entire evidence in proper prospective and not any particular answer in isolation. I am not inclined to accept the submission of the learned counsel for the plaintiffs that the defendants have sought to create a new case after the evidence of the plaintiffs is already closed. The alleged signature of the deceased on the alleged Will have been all throughout disputed by the defendants and thus no new case is sought to be made out by the applicants as canvassed by the original plaintiffs.

44. Insofar as submission of the learned counsel for the plaintiffs that in paragraph 4.3 of the affidavit in support of the caveat filed by Mrs. Phyllis Miranda on 19th April, 2000, she herself had made a reference to the application forms alleged to have been signed by the deceased and thus the said Mrs. Phyllis Miranda did not produce those documents by filing compilation of documents, affidavit of documents or even in the affidavit in lieu of examination in chief filed by DW-1 and thus cannot be allowed to produce the documents at this stage is concerned, it is clear that the said Mrs. Phyllis Miranda herself had referred to those documents in her affidavit in support of the caveat dated 19th April, 2000 itself. It is also not in dispute that the plaintiffs did not make any request for inspection of those documents. It is not in dispute that the said Mrs. Phyllis Miranda expired on 13th April, 2015. The DW-1 filed her affidavit in lieu of examination in chief on 9th October, 2015. The DW-1 therefore could not produce those documents earlier. The fact remains that the original petitioner had filed a testamentary petition after more than 14 years of the demise of Mr. Robert Miranda.

45. A perusal of the record clearly indicates that when those five documents were sought to be produced by the applicants after closure of the evidence of the DW-1 through the second witness i.e. Ms.Nisha Menon, the handwriting expert appointed by the applicants, the applicants strongly raised objection in respect of the production of those documents on the ground that those documents were neither produced by the applicants nor referred at any point of time earlier and thus could not have been produced through the second witness. This court accepted the objections raised by the plaintiffs. The applicants accordingly indicated that the applicants would apply for recall of the DW-1.

46. This court by an order dated 29th November,2016 recorded those submissions, however made it clear that the applicants may file and move such application if permissible in law. The applicants immediately thereafter filed this chamber summons *inter-alia* praying for recall of the DW-1 and to prove those documents. In my view the applicants have thus justified the delay if any, in filing these chamber summons after closure of the evidence of the DW-1 for seeking recall of the DW-1 and for production of the additional documents.

47. Insofar as submission of the learned counsel for the plaintiffs that even according to the applicants, the documents were already in possession of the applicants atleast on 20th April, 2016 when the same were shown to Ms.Nisha Menon, handwriting expert is concerned, it is not the case of the applicants, that those documents were there in their possession of the applicants since

long. The application forms alleged to have been signed by the deceased were lying with the original defendant no.1 but could not be handed over to the other applicants during her lifetime.

48. Insofar as submission of the learned counsel for the plaintiffs that in reply to question nos. 115 to 120, DW-1 herself had admitted that there were no documents annexed to the affidavit in support of the caveat filed by the applicants, the same were not in custody of the applicants is concerned, a perusal of the answer to those questions clearly indicates that those questions were relating to specific averments made in the affidavits in support of the caveat. DW-1 had answered in cross-examination in response to the question no.165 that those two documents were given to her by her aunt Mrs.Loretta Fonseca a couple of months ago.

49. Insofar as the submission of the learned counsel for the plaintiffs that even in the affidavit of evidence of DW-2 or in her two reports filed by her along with affidavit in lieu of examination in chief, she has not mentioned as to when those alleged documents were shown to her or copies thereof were furnished to her is concerned, DW-1 in her cross-examination has already deposed that those documents were shown to DW-2 before her affidavit in lieu of examination in chief was prepared by the said witness. Be that as it may, DW-2 can be cross-examined on this deposition by the plaintiffs. I am thus not inclined to accept the suggestion of the plaintiffs that the defendants have not exercised any due diligence for producing these documents at the earliest opportunity available to them.

50. Insofar as the submission of the learned counsel for the plaintiffs that the aunt of DW-1 was not recipient of those two documents out of five documents and that the aunt of DW-1 has not been examined by the defendants is concerned, as and when those documents are produced in evidence by DW-1, she can be subjected to cross-examine on this issue.

51. The Supreme Court in case of **Salem Advocate Bar Association, T.N.** (supra) has held that even before insertion of Order 18 Rule 17-A in the Code of Civil Procedure, 1908, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced inspite of due diligence. Order 18 Rule 17-A did not create any new right but only clarified the position. It is held that deletion of Order 18 Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just.

52. The Supreme Court in case of **K.K. Velusamy** (supra) has dealt with the scope of section 151 of the Code of Civil Procedure, 1908 at great length. The principle of law that can be culled out from the judgment of the Supreme Court in case of **K.K. Velusamy** (supra) are :-

(i). Section 151 is not substantive provision which creates or confers any power or jurisdiction on Courts. Section 151 recognizes and confirms that if CPC does not expressly or impliedly cover any

particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it.

(ii). The inherent powers of the Court being complementary to the powers specifically conferred, a Court is free to exercise them for the purposes mentioned in section 151 when the matter is not covered by any specific provision in CPC and the exercise of those powers would not in any way be in conflict with what has been expressly provided in CPC against the intention of the legislature.

(iii). Powers under section 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in CPC governing the matter, when the *bonafides* of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of Court.

(iv). There is no specific provision in the Code of Civil Procedure enabling the parties to reopen the evidence for the purposes of further examination in chief or cross-examination. In the absence of any provision providing for reopening of evidence or recall of any witness for further examination in chief or cross-examination, for the purpose other than securing the clarification required by the Court, inherent powers under section 151 of the Code of Civil Procedure, subject to its limitations, can be invoked in appropriate cases to reopen the evidence and / or recall witnesses for further examination.

(v). Such inherent powers are not affected by the express power conferred upon the Court under Order 18 Rule 17 of the Code

to recall any witness to enable the Court to put such question to elicit any clarifications.

(vi). Order 18 Rule 17-A of CPC was deleted with effect from 1st July, 2002. The deletion of the said provision however, does not mean that no evidence can be received at all, after a party closes his evidence.

(vii). If there is time gap between completion of evidence and hearing of arguments, for whatsoever reason and if in that interregnum, a party comes across some evidence which he could not lay his hands on earlier, or some evidence in regard to the conduct or action of the other party comes into existence, the Court may in exercise of its inherent power under section 151 of the Code, permit the production of such evidence if it is relevant and necessary in the interest of justice, subject to such terms as the Court may deem fit to impose.

(viii). The need for the Court to act in a manner to achieve the ends of justice subject to the need to comply with the law does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the Court, or if interests of justice require the Court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly.

(ix). The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula.

(x). There can always be exceptions in exceptional or extraordinary circumstances, to meet the ends of justice and to prevent abuse of process of Court, subject to the limitation recognised with reference to exercise of power under section 151 of the Code.

(xi). The power under section 151 or Order 18 Rule 17-A of the Code of Civil Procedure is not intended to be used routinely, merely for asking and if so used, it will defeat the very purpose of various amendments to the Code to expedite trials.

(xii). Where the application is found to be *bonafide* and where additional evidence oral or documentary, will assist the Court to clarify the evidence on the issues and will assist in rendering justice and Court is satisfied that non-production earlier was for valid and sufficient reasons, the Court may exercise its discretion to recall the witnesses or permit fresh evidence. The Court however, shall ensure that the process does not become protracting tactic. The Court should firstly award appropriate costs on other side to compensate for delay. The Court then shall take up and complete the case within the fixed time schedule so that the delay is avoided. If the application is found to be mischievous or frivolous or to cover up negligence or lacunae, it should be rejected with heavy costs.

(xiii). If the application is allowed and the evidence is permitted and ultimately the Court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs

apart from ordering prosecution if it involves fabrication of evidence.

(xiv). If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the Court should reject the application.

53. In this case the evidence of DW-1 has been closed. The applicants had already filed affidavit of DW-2. During the course of cross-examination of DW-1, she had already indicated that certain papers were shown to the handwriting expert for her opinion. Two out of five documents were given to DW-1 by her aunt Mrs. Loretta Peter Fonseca a couple of months ago as deposed by the said witness in her cross-examination in reply to question no.166. The cross-examination was concluded on 21st July, 2016. I am inclined to accept the submission of the learned counsel for the applicants that all the said five documents could not be produced by the applicants inspite of due diligence. In my view, those documents would be required for the purpose of proving issue no.1 as to whether the deceased had executed the last Will and Testament dated 10th January, 1980 validly or not.

54. Ultimately the Court has to find out the truth in the matter and for that purpose if any additional opportunity by way of recall has to be furnished, in the interest of justice and with a view to find out the truth, the Court can exercise discretionary power under section 151 of the Code of Civil Procedure. The Court can in such an event can expedite the hearing of the suit and hear the arguments of the parties

day to day. The other party can be also compensated in terms of payment of exemplary costs.

55. It is not in dispute that the entire evidence of the applicants is not concluded. DW-2 has yet to be cross-examined by the original plaintiffs. The existence and the contents of the documents sought to be relied upon by the applicants by recalling DW-1 can be considered by this Court when such documents are tendered by DW-1. In my view, thus no prejudice would be caused to the original plaintiffs if DW-1 is recalled as a witness for the purpose of proving and exhibiting the documents in evidence which are annexed as Exhibits-1 to 5 to the affidavit in lieu of examination in chief of Ms.Nisha Menon – DW-2.

56. I, therefore, pass the following order :-

a). The chamber summons is made absolute in terms of prayer clause (a).

b). It is made clear that the original plaintiffs are permitted to cross-examine the DW-1 after her additional evidence is concluded. The admissibility of the documents proposed to be tendered by DW-1 to be considered by this Court before the cross-examination of DW-1 is recommenced.

c). The original plaintiffs are permitted to cross-examine DW-1.

d). The applicants are directed to pay the costs of Rs.25,000/-

to the original plaintiffs within two weeks from today, without fail.

e). The chamber summons is disposed of in aforesaid terms.

(R.D. DHANUKA, J.)