

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

**CHAMBER SUMMONS NO.145 OF 2015
IN
TESTAMENTARY SUIT NO.70 OF 2012
IN
TESTAMENTARY PETITION NO.737 OF 2012**

Olga Rodrigues & Others)....Applicants

IN THE MATTER BETWEEN :

Olga Rodrigues & Others)....Plaintiffs/Petitioners

V/s.

Christopher Pinto & Others)....Defendants/Respondents

Mr.Janak Dwarkadas, senior advocate a/w Mr.Zubin Behramkamdin and Ms.Vidhya Nair i/by Madhusudan G.Gawde for the applicants/plaintiffs.

Ms.Sonal a/w Mr.Shushrut Desai i/by M/s.Thakore Jariwala & Associates for defendant nos.1 to 12 & 14 to 16.

Ms.Anita Castellino a/w Ms.Alisha Lambay, Ms.Akshata naik and Ms.Sonali Sabane i/by Lambay and Co. for defendant no.13A.

CORAM : K.R.SHRIRAM,J

DATE : 3.4.2017

P.C.:-

1 This petition has been filed propounding a writing dated 29.6.2011 as the last will and testimony of one Sidney Albert Anthony Pinto who died on 25.10.2011. 16 out of the 27 legal heirs listed in the petition, have filed caveat. After the caveat was filed and registered, the petition was converted into a suit under Rule 403 of the Bombay High Court (O.S) Rules. Issues were framed on 2nd

March 2015. The plaintiffs filed affidavits in lieu of examination in chief of 8 persons.

2 The first witness who was cross-examined was the attesting witness Noshir Jehangir Sethna. Mr.Sethna is a partner of the law firm Wadia Ghandy & Co. During cross-examination, Mr.Sethna was confronted with the copy of the Will which was annexed to the petition and the original Will which was lodged with the Prothonotary & Senior Master. It would be useful to reproduce question nos.35 to 40, question nos.54 & 55 and the answers thereto of the evidence recorded on 2.7.2015.

"Q.35 : (Shown page 5 of Exh.P2 Green and also page 13 of Exh.B to the petition)

Would you agree that the form of the initials and their location on page 5 of Exh.P2 materially differ from those at page 13 of Exh.B to the petition (internal page 5) ?

Ans. : I do agree that they are different and that there is a discrepancy.

Q. 36 : Would you agree that the initials that appear on internal pages 1 to 16 materially differ from the corresponding pages of Exh.B to the petition ?

Ans. : I agree that they do differ. I am unable to explain the discrepancy.

Q.37 : Would you also agree that there is a discrepancy in the handwritten date "29th" and the word "June" between Exh.P2 and Exh.B to the petition ?

Ans. : Yes, I agree that there is discrepancy.

Witness volunteers : *It is my practice to execute Wills in duplicate. One of these is on ledger paper, which is termed as the 'original'. The other is on plain white paper. The idea is to have a stand-by document in the event that the 'original' is lost or misplaced. It appears that Exh.B to the petition is a copy of that white paper duplicate. This is why there are discrepancies.*

Q.38 : I put it to you that the three signatures on internal page 16 of Exh.P2 and the corresponding page of Exh.B to the petition are also different. Would you agree ?

Ans. : Yes, they do appear to be different.

P.C.:-

For clarity, I must note that Exh.P2 is an original will on ledger paper. Ex.B to the petition is a true copy of a will, and is said to be a true copy of Ex.P2. What has been put to the witness and accepted by him is that there are material differences in the signatures, initials and handwriting between the document annexed to the petition and the document marked in evidence. At this stage, I must note that I have given the petitioners the option of withdrawing the petition. I have made it clear that this option may not be available to them hereafter, in view of today's cross-examination, and particularly if the cross-examination of this particular witness is completed today, as I fully intend to have done. Mr.Behramkamdin, learned Counsel for the plaintiffs, says that he has no instructions that enable him to withdraw the petition. Given the answers elicited in cross-examination, especially the preceding few, I am not prepared to adjourn the cross-examination and intend to complete it today.

Q.39 : Would you also agree that there are discrepancies in the handwritten portion at page 16 of Exh.P2 and the corresponding page Exh.B to the petition, namely, your name, the word "Solicitor", the name "Sandeep Narayan Pavaskar", and the words "Accountant Wadia Ghandy & Co." ?

Ans. : Yes.

Q.40 : (Shown the docket of Exh.P2 as also the docket between pages 24 and 25 of the petition.)

Would you agree that these two dockets also differ from each other at the top i.e., the date as also the handwritten marking at the foot ?

Ans. : That is correct.

Witness volunteers : This is because they belong to two separate documents.

Q.54 : (Shown Evidence Affidavit.)

Mr.Sethna, where in this Affidavit do you refer to the existence of a will made on white paper ?

Ans. : I have not mentioned it anywhere.

Q.55 : Is it mentioned anywhere in the Affidavit filed along with the petition ?

Ans. : There is no mention in that Affidavit either."

3 After the evidence of Mr.Sethna was closed, the plaintiffs with the leave of the court filed the affidavit dated 18.8.2015 of plaintiff no.3 in lieu of examination-in-chief and Sandip Pavaskar the other attesting witness dated 31.8.2015. It is the case of the plaintiffs that the deceased had executed three wills, the first one dated 11th June 2009, the second dated 17th March, 2011 and the third which is the subject of this petition dated 29th June 2011. In his affidavit in lieu of examination in chief, the plaintiff no.3 has stated as under :-

In respect of the alleged Will dated 11th June 2009 that "the said Will was finalized and two prints of the same were taken (one on green paper and one on white paper). On 11th June 2009, the deceased executed the Will (by signing on both the green and white paper Will) in Mr.Noshir Sethna's chamber. I say that I had accompanied him to the office of M/s.Wadia Ghandy & Co."

..... In respect of the alleged Will dated 17th March 2011 "On 17th March 2011, Mr.Sethna and Mr.Pawaskar came to the deceased's flat for execution of the said Will. I was present with the deceased at this time. The deceased was handed over two copies of the Will i.e., one on ledger paper and the other on white paper. This Will (on ledger paper and white paper) was execute on 17th March 2011. Even for execution of Will dated 17th March 2011. Mr.Sethna along with Mr.Sandeep Pawaskar were the attesting witnesses."

.....In respect of the alleged Will dated 29th June 2011 :

.....Mr.Sethna and Mr.Pawaskar came to the deceased's flat. When they came to the flat, the deceased, Joanna and I were present. The deceased was handed over both the ledger paper and white copy of the final Will and the draft Will to read. After reading the draft Will he wrote on it that it was acceptable to him and signed the same. The deceased then read both, the Will on green paper and the Will on white paper and then appended his initials on both the copies of the Will around the same time. He then appended his signature on the last pages of both the copies of the Will around the same time. I say that the execution of the Will was done in presence of Mr.Sethna, Mr.Pawaskar, Joanna and myself."

4. Mr.Sandeep Narayan Pawaskar the other attesting witness of the alleged Will dated 29th June 2011 has stated in his affidavit in lieu of examination in chief dated 31st August 2015 that -

"On 29th June 2011, I went to Mr.Sethna's chamber soon after lunch. Mr.Sethna took two print outs of the will from his computer, one on ledger paper and the second one on white paper. Thereafter, Mr.Sethna and I went to Sidney Pinto's flat at Cuffe Parade with the two printouts and a draft Will. We were taken there in Mr.Pinto's car and Percy D'souza had come to our office to accompany us in the car."

"Thereafter, Mr.Sethna handed over both the copies of the Will i.e., the Will on ledger paper (hereinafter referred to as "the green paper Will" and the Will on white paper (hereinafter referred to as "the white paper Will") to Sidney Pinto. He also handed over the draft Will. Mr.Pinto then read the green paper Will and white paper Will and the draft which he had sent to Mr.Sethna."

".....I say that the green paper Will and the white paper Will were then executed by Sidney Pinto who signed on the last page of both Wills and put his initials on every page of the green paper Will and white paper Will around the same time in the presence of Mr.Sethna, Percy D'souza, Joanna D'souza and myself and all of us did see Mr.Sydney Pinto sign and place his initials as stated above. The date "29th June" was inserted by Sidney Pinto on the green paper Will and the white paper will in his own handwriting. I say that it is a practice followed by Wadia Ghandy & Co. that while executing a Will the testator puts his initials followed by Mr.Sethna and then the second attesting witness. Accordingly, Mr.Sethna and myself attested the green paper Will and the white paper Will by affixing our signatures on the last page of the green paper Will and the white paper Will. The attestation by Mr.Sethna and myself was done in the presence of Sidney Pinto who saw us signing immediately after he executed the green paper Will and the white paper Will."

5 The defendant no.13A took out a Notice of Motion (L) No.167 of 2015 to delete portion from the affidavit in lieu of examination-in-chief of plaintiff no.3 and Mr.Sandip Narayan Pavaskar relating to existence/execution of a so-called white paper Will as being inadmissible due to lack of pleadings in respect thereof.

It is at this stage, the plaintiffs have taken out this chamber summons for leave to amend the petition. The proposed amendment is as under :-

"3A The deceased on 29th June 2011 had executed his last will in duplicate i.e., one on green ledger paper as well as the duplicate on white paper on the same day and at the same time in presence of the same attesting witnesses. The duplicate Wills are however in law, one Will and are therefore, referred to hereinafter as "The Will". Both the print outs of the Will were taken from the same computer. Both the print outs of the Will were kept in the custody of Wadia Ghandy & Co. after the execution thereof at the request of the testator. Due to inadvertence, a copy of the duplicate of the will executed on white paper was annexed as Exhibit-B to the petition at the time when the petition was filed. In order to dispel any doubts that the will had not been revoked a copy of the Will executed on green ledger paper and deposited with the Prothonotary & Senior Master along with the Executors' Oath is hereto annexed as Exhibit B-1".

6 Ms.Sonal appearing for defendant nos.1 to 12 and 14 to 16 and Ms.Castellino appearing for defendant no.13A strongly opposed the chamber summons. Ms.Sonal submitted that

(a) under order 6 rule 17, once the trial has begun, unless the court comes to conclusion that in spite of due diligence before the commencement of trial, the party could not have raised the matter before the commencement of trial, the amendment should not be permitted and the applicant has shown no evidence which would help the court to come to such a conclusion ;

(b) Plaintiff no.3 who filed the petition as the executor was present according to his affidavit when the alleged Will was executed but still he chose not to mention about the so-called Will being

executed in duplicate or in counter parts ;

(c) Wadia Gandhi & Co. was the advocate through whom this petition was filed and hence, Mr.Sethna being a partner of the said firm ought to have known that the Will was executed in duplicate or in counter parts and drafted the petition accordingly;

(d) Now to say that they have received legal opinion that this has to be mentioned in the petition is no ground for allowing the amendment ;

(e) the proposed amendment changes the nature of the case even though the contents of the Will in the ledger paper and white paper are identical ;

(f) Amendment application is taken out with malafide intention to undo damage caused to the plaintiffs' case and the cross-examination of Mr.Sethna in response to question nos.35 to 40 ;

(g) It is an abuse of process of the court because the chamber summons has been taken out only after defendant 13A took out the Notice of Motion ;

(h) This chamber summons has been taken out only after the evidence of the plaintiffs' 3rd witness and the other attesting witness was filed and the plaintiffs could have taken out this chamber summons soon after the evidence of Mr.Sethna was recorded on 2.7.2015.

7 Ms.Castellino adopted the submissions made by Ms.Sonal. In addition Ms.Castellino also added that (a) there was gross delay in taking out this application which was done only after defendant no.13A filed the Notice of Motion and hence, it was malafide and abuse of process; (b) ignorance of law is not an excuse and the attesting witness was a Solicitor.

It is also submitted that Mr.Sethna was also an attesting witness and ought to have mentioned in his affidavit in lieu of examination-in-chief and being a Solicitor, should have ensured that petition should reflect correct facts. These are only after thoughts, only being introduced to undo the damage in Mr.Sethna's cross-examination.

8 Order 6 Rule 17 of the Code of Civil Procedure Code reads as under :-

“Amendment of pleadings - The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

9 Admittedly, the trial has commenced. The proviso is

couched in a mandatory form. The courts can allow an application for amendment after the trial has begun only if the conditions precedent therefor, are satisfied, i.e., must come to a conclusion that in spite of due diligence the party could not have raised the matter before the commencement of the trial.

10 The words “due diligence” have not been defined in the Code. As per Black's Law Dictionary a ‘diligence’ means a continual effort to accomplish something, care, caution the attention and care required from a person in a given situation. ‘Due diligence’ would also mean the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge a legal obligation. It also means reasonable diligence, such diligence as prudent man would exercise in the conduct of his own affairs.

11 Ms.Sonal relied upon the following judgments to buttress the case. Ms.Sonal submitted relying upon ¹***Chander Kanta Bansal Vs. Rajinder Singh Anand*** that delay and laches on the part of the parties would also be relevant factors for allowing or dis-allowing application for amendment of the plaintiffs. This judgment was relied upon even to explain the meaning of due diligence.

1 (2008) 5 Supreme Court Cases 117

²***Vidyabai and Ors. Vs. Padmalatha and Anr.*** was relied upon to submit that the court's jurisdiction to allow such an application was taken away unless condition precedent therefor was satisfied when the trial has commenced.

³***J.Samuel and ors. V/s. Gattu Mahesh & Ors.*** to submit that due diligence is an idea that reasonable investigation is necessary before certain kinds of relief are requested.

⁴***Mrs.Sunita Devendra Deshprabhu V/s. Sitadevi Deshprabhu*** to submit that legal opinion obtained later cannot be a ground for seeking an amendment after the trial has begun.

12 Mr.Dwarkadas relied upon the judgment in ⁵***Dinkar s/o Venka Munde & Ors. Vs. Uttam s/o Rajaram Munde & Ors.*** to submit that the court should allow all amendments that may be necessary to determine the real question and controversy between the parties provided it does not cause prejudice or injustice to the other party. Mr.Dwarkadas also relied upon ⁶***Rajesh Kumar Aggarwal & Ors. Vs. K.K.Modi & Ors*** where Paragraph nos.15, 16, 17, 18 & 19 read as under :-

"15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently allow all amendments that may be necessary for determining the real question in controversy between the

2 (2009) 2 Supreme Court Cases 409

3 (2012) 2 Supreme Court Cases 300

4 2016 SCC On Line Bom.9296

5 2013(9) LJSOFT 245

6 (2006) 4 Supreme Court Cases 385

parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.

17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.

18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is the amendment will be allowed ; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary have expressed certain opinions and entered into a discussion on merits of the amendment. In cases like this, the court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice. It is settled by a catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.

19. While considering whether an application for amendment should or should not be allowed, the court should not go into the correctness or falsity of the case in the amendment. Likewise it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case."

The object of Order 6 Rule 17 is that the courts should try the merits of the case that come before them and should,

consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. The rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court. The court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. The amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice. The court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the ends of justice.

13 Mr.Dwarkadas also submitted relying upon these judgments that if the relief sought by way of amendment could also be claimed by way of a separate suit, to avoid multiplicity of proceedings, the court should, in the interest of justice, permit amendment even if trial has begun. Mr.Dwarkadas submitted that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court. Mr.Dwarkadas also submitted that there was no malafide intention in applying for amendment.

14 The reason for which the amendment application became necessary is because according to the plaintiffs factually the will was prepared in 2 originals or two counter parts. The applicants have filed further affidavit dated 9.2.2017 of Mr. Noshir J.Sethna, the

attesting witness whose evidence is concluded, in support of this chamber summons. In the said affidavit Mr.Sethna has stated :-

"3. In or about 2008, I was approached by Sidney Pinto in my professional capacity to prepare his Will. From that time on he executed three Wills, the first one on 11th June 2009, the second one on 17th March 2011 and the last one was on 29th June 2011. All three Wills were executed by him in the presence of my firm's Accountant Mr.Sandeep Narayan Pawaskar and myself and the same were attested by us. I am not aware whether he had made any other Will or Wills prior to June 2009 ;

4. Prior to the preparation and execution of the Will of 11th June 2009, Sidney Pinto accompanied by Percy D'souza had come to my office to discuss his proposed Will. He had brought with him a typed draft which he discussed with me and requested me to furnish a revised draft in accordance with the discussion which he had with me. Accordingly, I prepared a draft which Sidney Pinto went through. He made some changes on the draft in his own hand and on the basis of the changes, a final draft was prepared. The said Will was finalised and printed on ledger paper on 11th June 2009 and the same was executed by Sidney Pinto and attested by my accountant Sandeep Narayan Pawaskar and myself at my office.

5. Thereafter, in or about February 2011, Sidney Pinto informed me over the telephone that he wished to make some changes in his Will of June 2009 and that he would be sending me a typed draft incorporating the changes which he wished to make. I accordingly prepared a fair copy and on 17th March 2011, Sidney Pinto executed the said Will in presence of my accountant the said Sandeep Narayan Pawaskar and myself at his residence.

6. In June 2011, Sidney Pinto sent Percy D'Souza to my office with a copy of his Will of 17th March 2011 containing some modifications therein indicated in red type with a request that I should prepare a fresh Will on those lines. Thereupon, a fresh Will was prepared as per the instructions given by Sidney Pinto (hereinafter referred to as "the Will") and on 29th June 2011 I attended Sidney Pinto's flat at Cuffe Parade together with our Accountant Mr.Sandeep Narayan Pawaskar, where Sidney Pinto executed the Will in our presence and we attested his signature thereto in the manner specified hereinbelow."

15 Mr.Sethna has also stated that after his cross-examination, he consulted a senior counsel and sought his opinion

who advised that if a Will is executed in duplicate, both wills have to be lodged in the court to rebut the presumption which would otherwise be drawn that the testator may have destroyed one of the counter parts with the intention of revoking the wills and it was for that reason it was necessary to produce the original white paper will before this court. Mr.Dwarkadas relied upon part B, 'Duplicate wills' on page-127 of Williams and Mortimer on Executors Administrators and Probate 128 (1970 edition) and Paruck- The Indian Succession Act 1925 (11th edition) page-38, to submit that when the will is executed in duplicate, both the parts must be lodged with the petition for probate and if one is lost or not lodged, there could be a presumption that the testator has revoked the other part which means the entire petition will fall flat. Mr.Dwarkadas submitted that in the interest of justice the amendment application should be granted because no prejudice would be caused to the defendants. Mr.Dwarkadas submitted that there are no 2 separate wills but only one will which is prepared in duplicate or in counter parts and either they go together or fall together. It was also submitted that the objections raised in the affidavit in support of the caveat are that the Will has not been validly executed as required under Section 63 of the Indian Succession Act, the testator did not possess sound disposing mind while executing the will and the document is vitiated by fraud and therefore, even if petition is allowed to be amended, the

objections raised in the caveat cannot change or vary.

16 It is settled law that while considering the application under order 6 rule 17 of the Code of Civil Procedure, the courts do not go into the correctness or falsity of the case in the amendment. What the court only looks at is whether the amendment is necessary for determining the real question in controversy between the parties provided it does not prejudice or cause injustice to the other side. Rule of amendment is essentially a rule of justice, equity and good conscience and power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the court.

17 The witness Noshir J.Sethna during his cross-examination, in response to question nos.35, 36 & 37, did agree that there were some discrepancies between the signature in the photo copy of the will annexed to the petition and the original Will. At the same time after giving the answer to question no.37 the witness has volunteered *"It is my practice to execute Wills in duplicate. One of these is on ledger paper, which is termed as the `original'. The other is on plain white paper. The idea is to have a stand-by document in the event that the `original' is lost or misplaced. It appears that Exh.B to the petition is a copy of that white paper duplicate. This is why*

there are discrepancies.”

18 In the further affidavit filed in support of the chamber summons the witness has explained that he was under a genuine and bonafide belief and his understanding was the law required only one part of the duplicate will to be filed and proved for grant of probate. It was for this reason namely on account of this understanding of the law, under which he was mistakenly labouring under, he directed his firm to file this probate petition along with the green paper will as being the last will and testament of the deceased. He has also stated that he was also not aware that it would have been prudent and proper to produce both the counter parts of the will and if not done a rebuttable presumption may arise that the testator may have destroyed one of the counter parts with the intention of revoking the will. The subsequent witnesses, i.e., the other attesting witness and the plaintiff no.3 have both mentioned about the will being executed in duplicate in their respective affidavits in lieu of examination in chief. The petition does not say so because it has been explained by Mr.Sethna that he was under a mistaken belief that only one part of the duplicate will was required to be filed and proved for grant of probate. Mr.Sethna has also stated that the will was prepared in duplicate, i.e., one part on ledger paper and other part on white paper and both the counter parts were kept in the

custody of Wadia Ghandy & Co. and that entry was made in two separate registers maintained by Wadia Ghandy & Co. The Registers have also been produced through the other witnesses. It is also not disputed that both the documents are identical though the defendants dispute that they were validly executed. If the amendment is not permitted, there is a likelihood, as the plaintiffs apprehend, that the court may strike off the evidence of the other attesting witness and plaintiff no.3, being beyond the pleadings. At the same time, if the fact that alleged will was executed in duplicate is not brought on record a rebuttable presumption may arise or at least it will be argued, even though the white paper will and ledger-green paper will, both, are in the custody of the court, that the testator may have destroyed one of the counter parts with the intention of revoking the will. Therefore, if the amendment is not allowed, in my view, a greater prejudice would be caused to the plaintiffs than to the defendants.

19 By allowing the amendment, no prejudice would be caused to the defendants because if the court considers it necessary, on an application or on its own, may recall Mr.Noshir Sethna to give further evidence and he could be cross-examined. In any event, the defendants also will get their turn to prove that the testator was not of sound disposing mind while executing the Will and that the Will was

prepared by fraud or is fraudulent. If defendants succeed, grant of probate will be refused. We must keep in mind that the Will is one, they are not two separate wills. Of course, a situation may arise as to which Will was executed last, but in my view, that also is purely academic because contents of both the green paper will and white paper will are identical and both were executed on the same day.

20 The explanation given in the further affidavit dated 9.2.2017, in my view, satisfies the prerequisite 'due diligence'.

One of the main reason I am persuaded to come to this conclusion is because during the cross-examination, Mr.Sethna, after answering Q.37 in cross-examination, on his own volunteered and mentioned that Will was executed in duplicate. It was not that he was tutored to say that. He had, after agreeing that there was some discrepancy, clarified the position. Yes, one may ask should Mr.Sethna not have exercised more diligence or sought legal opinion before he filed the petition. He would have, if he had a doubt in his mind. But he thought one original was enough. If he could be under that belief, plaintiff no.3 cannot be faulted to have accepted what Mr.Sethna advised. My conscience does not permit me to penalize a party for the fault of his lawyer. Further, the proposed amendment does not change the nature of the case. I do not have anything to label the proposed amendment as malafide or an abuse of process.

Chamber summons was not taken immediately but still no prejudice is caused to the defendants. It is all well to say that it is the same Solicitor whose firm filed the petition etc. but I would only look at it more as a genuine mistake that the petition or Mr.Sethna's affidavit of evidence did not disclose that the alleged will was executed in duplicate.

21 While considering precedents, it must be kept in mind that every judgment must be read as applicable to the particular facts proved, or assumed to be proved. A case is only an authority for what it actually decides. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. The ratio of any decision must be understood on the background of the facts of that case. With this being the law on precedents, the judgments cited by Ms.Sonal, in my view, do not aid the defendants.

 In *Chander Kanta Bansal* (supra) relied upon by defendants, the court was considering an application for amending the written statement which was made more than 18 years after the suit was filed by the plaintiffs to frustrate the claim of the plaintiffs. In that case the trial had been completed and after the final arguments, when the defendant came to know that she was going to lose her case, the defendant was trying to change her stance by filing the

application to amend the written statement.

In *Vidyabai and Ors.* (supra) relied upon by the defendants, it was a suit for specific performance and an application for amendment of the written statement was filed and the trial court dismissed the application holding that an entirely new case was sought to be made out and that the applicants had no knowledge of the facts stated therein was rejected. The trial court had made it evident that the applicant had not been able to fulfill the precondition of 'due diligence'. The apex court thereafter settled the principle that after the trial has begun, the court if it has to grant the amendment has to come to a conclusion that in spite of due diligence, parties could not have raised the matter before the commencement of the trial.

In the case of *J.Samuel* (supra) relied upon by defendants, the application for amendment was filed after the arguments were concluded and the matter was posted for judgment. In that case specific averments as contemplated under section 16-(C) of the Specific Relief Act were missing and the suit filed was for specific performance. After the matter was reserved for judgment, an application was filed to amend the plaint and the proposed amendment was that the plaintiff was ready and willing to perform. It

was for that reason the court did not grant the amendment application.

So far as *Sunita Deshprabhu* (supra) the facts are also not similar to the facts in the present case.

22 As regards the delay, if the plaintiffs had taken out the application soon after cross-examination of Mr.Sethna, the order of this court passed on 11.8.2015, where the court in para-6 stated *“Things might have been very different had the plaintiffs, following the cross-examination of Mr.Sethna, sought an amendment to the petition to undo the effect of the cross-examination of Mr.Sethna. That might conceivably be held to be an abuse of the process of the court”* would have come in the way. This application was taken out in view of the application taken out by defendant no.13A. I find nothing wrong with that and in any event no prejudice is caused to the defendants. At the most it could be termed inconvenience.

23 If the amendment is not permitted, that would also result in multiplicity of proceedings. It is not impossible for the plaintiffs to withdraw the petition and file a fresh petition mentioning therein the will was executed in duplicate one in white paper and other on green paper. If that can be done why should the plaintiffs not be allowed to amend this petition, to avoid multiplicity of proceedings to bring the

same facts on record.

24 Moreover, the amendment sought does not constitutionally or fundamentally change the nature of the proceedings and is essential/imperative for proper and effective adjudication of the case. Rule of amendment, as stated earlier, is essentially a rule of justice, equity and good conscience and power of amendment should be exercised with the larger interest of doing full and complete justice to the parties before the court.

25 In the circumstances, Chamber summons is allowed in terms of prayer clause-(a) with costs.

 The applicants to pay a sum of Rs.25,000/- as costs to the advocate on records for defendant nos.1 to 12 and 14 to 16 and Rs.25,000/- to the advocate on record for defendant no.13A. These amounts to be paid in four weeks.

 Amendment to be carried out and amended petition to be served within 4 weeks.

(K.R.SHRIRAM,J)