

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 41 OF 2018
IN
TESTAMENTARY SUIT NO. 62 OF 2008
IN
TESTAMENTARY PETITION NO. 362 OF 2008

Mukesh Kantilal Zaveri

..... Applicant

IN THE MATTER BETWEEN

Mukesh Kantilal Zaveri

**..... Petitioner/
Plaintiff**

VERSUS

Maresh Kantilal Zaveri

..... Defendant

Ms. Shaista Pathan, i/b. Yusuf & Associates for the Plaintiff/Applicant.

Mr. Pankaj Kansara for the Defendant.

CORAM : R.D. DHANUKA, J.

DATE : 26th NOVEMBER, 2018

P.C.

By this notice of motion, the applicant (original plaintiff) seeks an order and direction to handover both the Wills dated 11th April, 1997 and 22nd March, 1999 which are in custody of this court for investigation to the Investigating Officer in Case No. 144/SW/2009 and in the alternate prays that this court shall allow the investigating officer and/or forensic expert to inspect the said Wills dated 11th April, 1997 and 22nd March, 1999.

2. Notice of motion is vehemently opposed by the learned counsel for the caveator on the ground that the evidence of the attesting witness

has already commenced and thus none of the prayers of the notice of motion shall be granted by this court.

3. It is not in dispute that the plaintiff had filed a complaint against the defendant (caveator) which is numbered as 144/SW/2009 and is pending. It is also not in dispute that both the parties are disputing the Will propounded by each other. The applicant is propounding Will dated 11th April,1997 whereas the defendant is propounding Will dated 22nd March,1999.

4. In my view no prejudice would be thus caused to the defendant if the investigating officer is allowed to inspect both these Wills propounded by both parties i.e. Will dated 11th April,1997 and 22nd March,1999 respectively.

5. My attention is invited to the order dated 14th December, 2017 passed by the learned Magistrate stating that the said matter be kept in abeyance till the decision of this court relating to the Will in question in testamentary petition or receipt of the documents to the investigating officer or further order by that court whichever is earlier.

6. Since both the parties are disputing the Will propounded by each other, I am inclined to grant prayer clause (b) of the notice of motion insofar as inspection of the documents of Wills dated 11th April,1997 and 22nd March,1999 by the investigating officer is concerned.

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

(a) The investigating officer is permitted to take inspection of the Will dated 11th April,1997 and Will dated 22nd March,1999 in question in presence of both the parties and their respective advocates in the Chamber of the Testamentary Registrar. The investigating officer shall be permitted to take photo of the said two Wills.

(b) The applicant is directed to bear the cost of any such photographs at the first instance.

(c) It is made clear that this court has not stayed the ongoing evidence.

(d) Mr.S.C.Dhawan, a counsel of this court having his address at C/o. Bombay Bar Association, High Court, Original Side, Room No.57, 3rd Floor, High Court Main Building, Mumbai 400 032 is appointed as a Court Commissioner for recording evidence of all the witnesses proposed to be examined by the parties.

(e) It is made clear that the fees and expenses of the learned Court Commissioner shall be borne by both the parties equally at the first instance.

(f) The learned Court Commissioner is requested to submit his report on or before 31st January,2019.

(g) The parties are directed to co-operate with each other and with the learned Court Commissioner in submitting the report expeditiously.

8. Notice of motion is disposed of in the aforesaid terms. No order as to costs.

9. Place the matter on board for marking of the documents on 5th **December,2018.**

[R.D. DHANUKA, J.]