

Dixit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

CHAMBER SUMMONS NO.122 OF 2018

IN

TESTAMENTARY SUIT NO.35 OF 2008

IN

TESTAMENTARY PETITION NO.100 OF 2008

Ashokan Balkrishnan Kundai Applicant

In the matter between

Ashokan Balkrishnan Kundai Plaintiff

V/s.

Suresh Prabhakar Karippara Defendant

Mr. Prakash Kadam, with Mr. B.G. Saraf, for the Applicant-Original Plaintiff.

Mr. Rajesh Shah, with Ms. Roshan D'Souza, I/by Ms. Purnima G. Bhatia, for the Defendant.

CORAM : A.K. MENON, J.

DATED : 27TH MARCH, 2019.

P.C. :

1. Heard learned Advocates for the parties.
2. By this Chamber Summons, the applicant-original plaintiff seeks permission to cross-examine his own witness No.2 – Mr. Vinesh K. Parmar, who is said to have attested the last Will and Testament of the deceased. The

said witness has affirmed an affidavit dated 18th April 2015 by way of examination-in-chief. In that affidavit, the witness has deposed that, he knew the deceased Karippara Prabhakar Govindan and that along with one Ambalal B. Patel (*since deceased*) and Advocate A.S. Korgaonkar, he was present at the time of execution of the Will by the deceased on 10th October 2002. He deposed that along with said Mr. Ambalal Patel, he saw the deceased executing the Will. He has also affixed his signature at the foot of the Will against his name. The affidavit also states that the witness believes that deceased Karippara Prabhakar Govindan executed the Will of his free will and pleasure.

3. Mr. Kadam, learned Advocate for the applicant, submitted that, during his cross-examination, his answers run contrary to his deposition by way of affidavit in lieu of examination-in-chief and that clearly the witness was turning hostile. It is contended that, even during further examination-in-chief, when the attention of this witness was drawn to the execution clause and he was asked to identify the signature against the execution clause, he deposed that he is not aware of the person who had signed. However, he admitted the signature of Mr. Ambalal B. Patel and his own signature. During cross-examination, he has contended that he did not know the deceased. He did not know who had drafted the affidavit and further that he had not given any instructions to anybody to prepare an affidavit-of-evidence. It is in this

background that Mr.Kadam submitted that, it is necessary to cross-examine the said witness.

4. Mr. Kadam has relied upon the decisions of the Supreme Court in the cases of *Rabindra Kumar Dey Vs. State of Orissa*¹ and *Maria Margarida Sequeria Fernandes and Ors. Vs. Erasmo Jack de Sequeria (Dead), through LRs*.² and also on the order dated 10th March 2016 passed by this Court, [Coram : G.S. Patel, J.], in *Testamentary Suit No.99 of 1999 in Testamentary Petition No.830 of 1999*, in support of his submission that the witness must be allowed to be cross-examined.

5. This application is opposed on behalf of the defendant-caveator by Mr.Shah, who submitted that the cross-examination has now been completed and the witness has clearly denied knowledge of the identity of the person, who has executed the Will. He, therefore, submitted that the application for cross-examination of the witness Vinesh Parmar need not be allowed.

6. I have heard the submissions of both the learned Advocates and I have considered the deposition of the witness. The record indicates that, the affidavit in lieu of examination-in-chief of the witness Vinesh K. Parmar was affirmed before the Assistant Chief Translator & Interpreter of this court. It is

¹ AIR 1977 SUPREME COURT 170

² AIR 2012 SC 1727

also seen to be duly interpreted to him in the Gujarati language by a Sworn Interpreter of this court on the date of affirmation. The affidavit was tendered and was taken on record of this proceedings by this court [*Coram : R.G. Ketkar, J.*] on 12th September 2017. More than two years had elapsed after the affidavit was sworn. On 12th September 2017, the witness was present in court. He was administered oath and upon been shown his affidavit dated 18th April 2015, the witness has identified his signature on it and has affirmed its contents. The court has also recorded that the witness confirmed that the contents of the affidavit were explained to him. It is on this basis that the affidavit was taken on record and the matter was relegated to the Commissioner for recording of evidence.

7. Although this is not a criminal trial, the principle, as contemplated under Section 154 of the Evidence Act, is applicable. The cross-examination of the witness called by the plaintiff would be at the discretion of the court. Although normally cross-examination of his own witness is not allowed, after declaring him hostile, the court is required to be satisfied, in the facts and circumstances of the given case, that the witness has behaved in a hostile manner. In the case of *Rabindra Kumar Dey (supra)*, the Hon'ble Supreme Court has, in paragraph No.10, observed thus :-

“10. Section 154 of the Evidence Act is the only provision under which a party calling its own witnesses may

claim permission of the Court to cross-examine them. The section runs thus :

“The Court may, in its discretion permit the person, who calls a witness to put any question to him, which might be put in cross-examination, by the adverse party.”

The section confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles, which may govern the exercise of such discretion. It is, however, well-settled that the discretion must be judiciously and properly exercised in the interest of justice. The law on the subject is well settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement, which he made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth.”

8. It may not be necessary that the witness is classified as a “hostile witness” at this stage. In its order dated 10th March 2016 passed in Testamentary Suit No.99 of 1999, this court has also considered the views of

other High Courts on the issue of the party having been permitted to cross-examine its own witnesses, without declaring them hostile. In this behalf, the extract reproduced from the decision of *Baikuntha Nath Chatteraj Vs. Prasanamoyi Debya*³, is material. The same is reproduced below for reference :-

“Whenever the court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as 'declared hostile', 'declared unfavourable', the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts.”

9. This observation was in the light of the discretion of the court under Section 154 of the Evidence Act. The extract in *Baikuntha Nath Chatteraj*

3 AIR 1922 PC 409

(*supra*) was also considered by the Supreme Court in the case of *Gura Singh V/s. State of Rajasthan*⁴. Thus, it is clear that the entire evidence of this witness need not be struck out in any event. Applying this principle to the present case, I am clearly of the view that the witness Vinesh K. Parmar has exhibited an element of hostility and that he seeks to resile from a material statement, which he has made before this court, particularly in view of the fact that the affidavit was interpreted and sworn before an officer of this court. After having administered oath, he has re-affirmed the contents thereof, after the affidavit was first sworn by him. Then he appeared on 12th September, 2017. This having been done, the answers given by the witness have clearly gone contrary to his own statements. In this background, I am inclined to hold that the plaintiff is entitled to cross-examine the attesting witness Mr. Vinesh K. Parmar.

10. For all the aforesaid reasons, I pass the following order :-

- (i) Chamber Summons is allowed in terms of prayer clause (a).
- (ii) No order as to costs.

(A.K. MENON, J.)

⁴ (2001) 2 SCC 205