

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

**NOTICE OF MOTION NO. 182 OF 2019
IN
TESTAMENTARY SUIT NO. 72 OF 2005**

Vijay Kumar Gupta

...Applicant / Plaintiff

Versus

Naresh Kumar Gupta & Anr.

...Respondents / Defendants

**WITH
NOTICE OF MOTION NO. 33 OF 2014
IN
TESTAMENTARY SUIT NO. 72 OF 2005
WITH
TESTAMENTARY SUIT NO. 72 OF 2005
IN
TESTAMENTARY PETITION NO. 528 OF 2005**

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- Mr. Simil Purohit a/w M.A. Menon and Mr. Jairam Chandani i/b Lexim Associates, for Plaintiff.
- Mr. Farhan Dubash, Mr. Mohit Arora, Mr. Akshay Doctor and Mr. Sahil Harjani i/b Desai & Diwanji and Co., for Defendant No.1.
- Ms. C.M. Vaidya, 2nd Assistant to Court Receiver.

* * *

CORAM : MANISH PITALE, J.

DATE : 26th APRIL, 2024

P. C. :

1. Heard learned counsel for the parties.
2. By this notice of motion, the plaintiff has applied to this Court seeking permission to lead evidence in rebuttal. In the affidavit in support of the notice of motion, the plaintiff has stated the reasons and the backdrop in which the aforesaid prayer for allowing rebuttal evidence has been made. The defendant has opposed the aforesaid prayer and in that context, the learned counsel for the parties are

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heard.

3. The learned counsel appearing for the plaintiff invited attention of this court to earlier orders passed in these proceedings, particularly orders dated 04th May, 2016, 28th November, 2017 and 27th September, 2018. It is brought to the notice of this Court that when the plaintiff sought to confront the defendant's witness with certain photocopies of documents, a specific objection was raised that such a procedure could not be permitted, particularly because it would amount to permitting the plaintiff to rely upon documents that were held back and, in a sense, it would amount to springing a surprise on the witness of the defendant. The aforesaid issue was considered in the order dated 04th May, 2016 and it was held that such procedure could not be permitted and that therefore, the plaintiff was not entitled to rely upon photocopies of such documents at the stage of cross-examination of the defendant's witness. It was observed that the plaintiff intended to interpose his witness at the stage of cross-examination of the defendant's witness, but such procedure was impermissible and hence, the plaintiff was not permitted to undertake such an exercise. In the said order, it was observed that if the plaintiff eventually makes out a case to lead rebuttal evidence, he may approach the Court for doing so.

4. The subsequent order dated 28th November, 2017 was

concerned with a situation where the plaintiff sought issuance of witness summons to the Secretary of a Cooperative society and Branch Manager of a Bank. At that stage, the defendant relied upon the earlier order dated 04th May, 2016. In the subsequent order dated 28th November, 2017, it was observed that if the evidence of documents was restricted to the signatures of the deceased and not on substantive evidence of the contents of the documents, there could be no objection as regards interposing of witnesses by the plaintiff to prove the signatures on the documents. It was observed that the earlier order dated 04th May, 2016 could not come in the way of considering the prayer made on behalf of the plaintiff. Here again, this Court observed that evidence pertaining to the documents, including substantive evidence of the truth of their contents, if required, could be led in rebuttal evidence, for which the plaintiff would have to make out a case by moving an appropriate application.

5. By a subsequent order dated 27th September, 2018, this Court marked the signatures on the two documents i.e. letters dated 31st March, 2004 and 29th December, 2004, addressed by the deceased to the Secretary of the society as Exhibits “P-27” and “P-28”. The originals were retained in Court.

6. The learned counsel for the plaintiff submits that in the backdrop of the aforesaid orders, the question as to whether the

plaintiff could lead rebuttal evidence in the context of the aforesaid documents was kept open for consideration. While asserting that the prayer made in the present motion deserves to be granted, the learned counsel for the plaintiff referred to the contents of the affidavit in support of the caveat. It was submitted that in the affidavit itself the caveator - defendant had referred to alleged confused state of mind in which the deceased could be found and in that regard, reference was made to contents of paragraph Nos.32 to 34 of the affidavit in support of caveat. It was submitted that despite the aforesaid statement made in the affidavit in support of the caveat, only two issues were framed in the present suit and that no issue was framed in respect of unsoundness of mind of the deceased. The first issue pertained to the validity of the alleged Will and the second issue pertained to the question as to whether the Will was a forged and fabricated document. The burden to prove the first issue was placed on the plaintiff, while the burden to prove the second issue was placed on the defendant.

7. It was submitted that during the course of evidence, the defendant produced DW-2 i.e. the Doctor, who was cross-examined on behalf of the plaintiff. DW-3 i.e. a handwriting expert was also cross-examined on behalf of the plaintiff. It is the case of the plaintiff in the affidavit in support of the present motion that it would be necessary to bring out the truth of the matter by proving the contents of the

documents i.e. letters dated 31st March, 2004 and 29th December, 2004, as well as certain other documents which form a chain of correspondence exchanged between the deceased and the society. It is the case of the plaintiff that if an opportunity is granted to lead rebuttal evidence, the contents of such documents could be proved, in order to address the question as to the state of mind of the deceased at the time of execution of the subject Will. It is submitted that the aforesaid earlier orders passed by this Court cannot come in the way of the plaintiff. If held otherwise, it is contended, that while the plaintiff was deprived of an opportunity to confront the witnesses of the defendant with the said documents at the time of cross-examination, the plaintiff would also stand deprived of proving the contents of the documents at the stage of rebuttal evidence. According to the learned counsel for the plaintiff, this would not be in the interest of justice. On this basis, it is submitted that the motion deserves to be granted.

8. On the other hand, the learned counsel appearing for the defendant submitted that in the present case, the earlier orders of this Court did not reserve any right in the plaintiff to lead rebuttal evidence. The observations in the earlier orders were clear that the plaintiff would have to make out a case for rebuttal evidence. It was submitted that if the present motion is allowed, it would amount to the trial continuing endlessly and the plaintiff unfairly getting an

opportunity to reopen the trial at this stage.

9. It was submitted that in the affidavit in support of the caveat, not only had the caveator – defendant made statements as regards the confused state of mind of the deceased at the relevant period of time, but reference was also made to a particular doctor, who was treating the deceased. It was the very same doctor, who was produced as DW-2 on behalf of the defendant.

10. It was further submitted that the first issue framed in the present suit subsumes within itself the burden on the plaintiff to prove that the deceased testator was of sound and disposing state of mind at the time when the Will was executed. Once the burden was on the plaintiff from the very beginning to prove the aforesaid aspect of the matter, there was no question of the plaintiff contending that in the absence of an issue framed as regards soundness of mind of the deceased, the plaintiff could not have led evidence on that aspect of the matter at the outset. It was further submitted that as per the settled law recognized by the Supreme Court in its judgment in the case of *Murthy and others Vs. C. Saradambal and others*¹, the burden is always on the plaintiff to prove validity of the Will and also to prove that the testator at the relevant time was in a sound and disposing state of mind. The plaintiff cannot claim that he was not aware about discharging such a burden and therefore, rebuttal evidence at this

¹ (2022) 3 SCC 209

stage cannot be permitted. It is the case of the caveator – defendant that the statement made in the affidavit in support of the caveat was absolutely clear with reference to the treating doctor and therefore, it was incumbent upon the plaintiff to have led cogent evidence at the outset and he could not be permitted to holdback material that was in his possession while leading his evidence and then seeking to produce after the stage of cross-examination of the witnesses of the defendant.

11. It is submitted that the order dated 04th May, 2016, in this context is crucial and in the light of the said order and even subsequent orders passed by this Court, it becomes clear that the plaintiff cannot be permitted to adopt a procedure unheard of as to the manner in which the evidence is to be led at various stages during the course of the trial.

12. It was further submitted that this Court in the case of *Usha D. Shah and Another Vs. Utility Premises Pvt. Ltd. & Others*², clearly held that where the onus to prove squarely lies on the plaintiff, there is no provision for reserving plaintiff's evidence in rebuttal. In support of the very same proposition, reliance was also placed on judgment of the Delhi High Court in the case of *Hemant Kumar Singhal Vs. Indian Overseas Bank and Another*³.

13. It was further submitted that apart from seeking to prove

2 2017 SCC OnLine Bom 6781

3 2019 SCC OnLine Del 11802

documents in which signatures have been marked as Exhibits “P-27” and “P-28”, the plaintiff is now seeking to rely upon a whole new set of documents, resulting in reopening of the trial, which cannot be permitted. On this basis, it was submitted that the motion deserves to be dismissed.

14. This Court has considered the rival submissions in the backdrop of the earlier orders passed by this Court. By order dated 04th May, 2016, this Court had refused permission to the plaintiff to confront the witnesses with documents at the stage of cross-examination on the basis of photocopies of the documents in which the signatures were eventually marked and Exhibits “P-27 and “P-28”. In the subsequent order dated 28th November, 2017, this Court did permit the plaintiff to issue witness summons to the secretary of the Society and the Branch Manager of the concerned Bank. It was specifically observed that the order order dated 04th May, 2016, would not come in the way issuing of witness summons, although observing that if the plaintiff desired to lead substantive evidence as regards the truth of the contents of the said documents, he may have to do so by leading rebuttal evidence upon obtaining permission of this Court by way of an appropriate application. The order dated 27th September, 2018, eventually marked only the signatures on the said two documents as Exhibits “P-27” and “P-28.”

15. It is evident that at the stage of cross-examination of the witnesses of the defendant, the plaintiff was not permitted to rely upon the said documents. In order to examine as to whether it can be said that the plaintiff held back the documents, which were in his possession and therefore, rebuttal evidence cannot be permitted, it would be necessary to refer to the issues framed in the present suit. A perusal of the order dated 24th June, 2013, would show that the following issues were framed :

ISSUES

- “1. *Whether the Plaintiff in Suit No. 72 of 2005 proves that the Will dated 21st October, 2004 is the Last Will and Testament of the deceased Testator as stated in para 2 - 3 of Probate Petition No. 528 of 2005, since converted in Suit No. 72 of 2005 ?*
2. *Whether the Defendant in Suit NO. 72 of 2005 / Plaintiff in Suit No. 63 of 2006 proves that the Will dated 21st October 2004 is forged and fabricated as asserted in para 43 page 20 - 21 of the affidavit in support of the Caveat filed in Probate Petition No. 528 of 2005 ?*
3. *What order and decree ?”*

16. A perusal of the above quoted issues clearly shows that there was no specific issue framed with regard to the question as to whether the testator at the relevant time was of sound and disposing state of mind. In this context, the contents of the affidavit in support of the caveat are relevant. A perusal of the same shows that the

caveator – defendant stated in paragraph Nos.32 to 34, as regards the acute confusional state of mind of the testator. In that context, it was stated that on 03rd April, 2003, the deceased was hospitalized and the name of the treating doctor was also stated in the affidavit in support of the caveat. In the affidavit, at no place did the caveator – defendant indicate or claim that the testator was of unsound mind.

17. It is a matter of record that no specific issue was framed with regard to the soundness of mind of the testator at the relevant point in time. In this context, it is necessary to examine the contention raised on behalf of the defendant that the aforesaid issue pertaining to the soundness of mind of the deceased – testator is necessarily subsumed in issue No.1 quoted hereinabove. The proof of validity of a Will would ordinarily require the plaintiff to prove that at the relevant time the deceased testator was of sound mind. This Court would not like to comment as to why this specific issue with regard to the soundness of mind was not framed in the aforesaid order framing issues in the present suit. But, it is evident that such a specific issue was not framed. In the judgment upon which the learned counsel for the defendant placed reliance i.e. judgment in the case of **Murthy and others Vs. C. Saradambal and others** (*supra*), the Supreme Court had relied upon an earlier judgment in the case of *Bharpur Singh Vs. Shamsher Singh*⁴, to hold that it is upon the

4 (2009) 3 SCC 687

plaintiff to prove that the testator at the relevant time had a sound and disposing state of mind. Proving the validity of a Will would require the plaintiff to demonstrate that the signature on the subject Will was that of the deceased – testator and for that purpose the plaintiff was required to examine attesting witness, which in this case has been done. In fact, the plaintiff has examined the attesting witness and himself, to prove his case about the Will having been validly executed. Even if the issue pertaining to soundness of mind of the deceased testator is a significant aspect in such cases, framing of issue in that regard would depend upon stand taken by the defendant in the affidavit in support of the caveat. In the present case, as noted hereinabove, apart from stating that the deceased testator suffered from acute confusional state of mind, a specific stand cannot be discerned, about unsoundness of mind of the deceased testator.

18. No specific issue having been framed in the present suit with regard to the soundness of mind of the deceased testator, and yet the defendant having examined DW-2 i.e. the doctor as a witness, indicates that the defendant would be taking stand about the state of mind of the deceased testator at the time when the Will was executed. The defendant has not made any statement that he will not rely upon the aspect of alleged unsoundness of mind of the testator. As to what can be called as a confused state of mind and whether the deceased testator can be said to be of unsound mind is a matter to be argued at

the stage of final hearing on the basis of the material placed on record. But, the question is, as to whether the contents of the documents now sought to be proved on behalf of the plaintiff, in that context would assist the Court to reach a finding about the truth of the matter.

19. The Testamentary Court is a Court of conscience and it is indeed concerned with only one issue, which is as to whether the subject Will in such cases can be said to be validly executed by the deceased testator. This Court as a Court of conscience cannot allow material that can assist this Court in reaching the truth of the matter, to be kept away on the basis of technical procedural arguments. In the present case, this Court finds that the plaintiff at the outset cannot be said to have been put to notice about the issue of soundness of mind as no specific issue in that regard was framed in the present suit. In the aforesaid documents only signatures have been marked as Exhibits “P-27” and “P-28”. On this basis, the plaintiff has already confronted DW-3 i.e. the handwriting expert.

20. But, it is crucial that if material is available to indicate the state of mind of the testator at the relevant point in time, it must be before the Court to satisfy its conscience with regard to the claims made by the rival parties. The Court cannot turn a blind eye to such material on the basis that allowing such material to come on record would turn the procedure of civil trial on its head or that it would

amount to reopening of the trial.

21. In the present case, considering the nature of issues framed in the aforesaid order passed by this Court, it cannot be said that the issue pertaining to soundness of mind was framed or that it had to be presumed that such an issue would be subsumed in issue No.1 framed by this Court. A perusal of issue No.1 shows that it pertains to validity of subject Will. In that context, the plaintiff was required to prove valid execution of the Will by examining the attesting witness and such other witnesses as was advisable. But, it cannot be said that in such circumstances, despite being aware of the fact that the plaintiff was required to prove the state of mind of the testator at the time of execution of the Will, he deliberately held back the relevant documents, thereby dis-entitling him to lead evidence in rebuttal.

22. The judgments of this Court in the case of **Usha D. Shah and Another Vs. Utility Premises Pvt. Ltd. & Others** (*supra*) and Delhi High Court in the case of **Hemant Kumar Singhal Vs. Indian Overseas Bank and Another** (*supra*), do recognize the settled position of law that when the onus squarely lies on the plaintiff to prove a particular issue, there can be no provision for reserving the plaintiff's right to lead evidence in rebuttal. In the present case, considering the only two issues framed, it cannot be said that the ratio of the aforesaid

judgments would apply.

23. This Court is of the opinion that in such circumstances, the plaintiff has indeed made out a case for allowing the prayer made in the notice of motion. This Court also considered the objection raised on behalf of the caveator – defendant as regards other documents sought to be relied upon by the plaintiff while claiming that he is entitled to prove the contents of the Exhibits “P-27” and “P-28” by way of rebuttal evidence.

24. This Court is convinced that the said documents can be said to be part of a chain of correspondence, which is relevant.

25. The Court while undertaking the exercise to get to the truth of the matter is entitled to look at all the relevant material. There is substance in the contention raised on behalf of the plaintiff that in the present case the defendant has not contended that the documents are irrelevant, while the emphasis is more on procedure rather than on a substantial objection.

26. In view of the above, the notice of motion is allowed in terms of prayer clause (a), which reads as follows :

“(a) That the Plaintiff be allowed to lead evidence in rebuttal;”

27. Accordingly, the plaintiff is granted time of six weeks to

file further affidavit-in-lieu of evidence along with compilation of documents.

28. List for further directions on **20th June, 2024.**

NOTICE OF MOTION NO. 33 OF 2014

1. The learned counsel for the defendant seeks time to file reply in this notice of motion.

2. Reply affidavit be filed within six weeks from today.

3. List for further directions on **20th June, 2024.**

(MANISH PITALE, J.)