
(2013) 10 BOM CK 0046

In the Bombay High Court

Case No : Testamentary Suit No. 29 of 2001 in Petition No. 3 of 2001

Domnic D'Souza and Nelson D'Souza APPELLANT

Vs

Mrs. Julie D'Mello RESPONDENT

Date of Decision : 29-10-2013

Acts Referred:

Citation : (2013) 6 ABR 1073 : (2014) 1 ALLMR 624 : (2014) 2 BomCR 137 :
(2013) 6 MhLj 732

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : H.K. Vazirani and Ms. Pushpa Goswami, for the Appellant; Lucas D'Mello, Constituted Attorney, for the Respondent

Judgement

R.D. Dhanuka, J.—Plaintiff/Petitioner has filed this petition inter-alia praying for probate of the last Will and Testament No. (1 of 2001) of Mr. Domnic D'Souza (hereinafter referred to as the said deceased). It is the case of the plaintiff that the said deceased had executed a Will dated 6th March, 1996 and had appointed the plaintiff as his sole executor of the said deceased. The said deceased died leaving behind him the plaintiff who was his son, widow Mrs. Agnes D'Souza, Mr. Walter D'Souza, son, Mr. Melvyn D'Souza, son of the pre-deceased son of the said deceased and Mrs. Julie D'Mello, married daughter. It is the case of the plaintiff that the said Will was attested by Mr. James M. D'Mello and Mr. Satish Ramdas Patil. Dr. Suresh W. Nagdev had examined the said deceased on 6th March, 1996 and found him to be of a sound and disposing mind. On the said Will, the said doctor had made such endorsement and certified that the said doctor had examined the said deceased and found him to be in a sound disposing mind and had fully understood the contents of the said Will. Citation was served upon the legal heirs and next of kin according to the provisions of Indian Succession Act, 1925 by which parties were governed. Mrs. Julie D'Mello, married daughter of the said deceased filed a caveat on 25th June, 2001 and affidavit in support of the caveat on 25th June, 2001. In view of the caveat and affidavit in support filed by the caveator, the said probate petition was converted

into a suit.

2. In the said affidavit in support of the caveat, caveator disputed the Will executed by the said deceased and alleged that the same was forged and fabricated. According to the caveator, the said deceased had revealed to the caveator in presence of the other party that he had kept behind the sufficient amount and property for caveator in his Will and that the Will was the last Will and testament. It is alleged that the petitioner however did not disclose any such Will and shall be directed to produce last Will of the said deceased before this court. It is also alleged that in the month of April, 1996, the caveator had visited the deceased and found that his physical and mental condition was very weak. It is alleged that Will of the deceased propounded by the plaintiff did not appear to be a genuine Will of the deceased because during the time of execution of the Will, the deceased was suffering from ill health and he was frequently hospitalized. It is alleged that during the month of March, 1996, the said deceased was unable to walk and was not mentally fit. The said deceased was also admitted in RCF hospital for some days. On these grounds, the caveator sought dismissal of the petition.

3. On 9th August, 2002, the caveator filed additional affidavit disputing the signature of the deceased on the alleged Will. It is also alleged that the petitioner has shown less valuation of the property in the schedule and have not paid court fees properly and had played a fraud on this court.

4. On 8th June, 2011, this court framed three issues in the suit and directed the plaintiff to file his affidavit of examination in chief as also further witnesses and the affidavit of documents. Following issues were framed which are answered as under:-

1. Whether the last Will and Testament of the deceased Domnic Joseph D'Souza dated 6th March, 1996 was validly executed?

Yes

2. Whether the deceased was in sound state of mind at the time of execution of the Will?

Yes

3. What relief, if any, is the plaintiff entitled to?

As per order

5. The defendant had engaged an advocate who was asked to return the papers by the defendant. Defendant thereafter started appearing in the matter through her Constituted Attorney who is her husband. On 8th September, 2011, this court took the affidavit dated 16th July, 2011 of the plaintiff in lieu of examination in chief and affidavit dated 16th July, 2011 of the attesting witness Mr. Satish Patil in lieu of examination in chief on record and also list of documents on record tendered by the plaintiff. Since defendant and her advocate

were absent, in order to give an opportunity, the matter was adjourned for a week for cross examination of the plaintiff and his witness.

6. On 18th November, 2011, this court recorded the statement of the defendant who was present in the court that she had discharged her advocate and did not want to cross examine the plaintiff. He had already filed an affidavit in lieu of examination in chief. This court, therefore, closed evidence of the plaintiff (PW1). Since attesting witness was not present, this court adjourned the proceedings for recording evidence of the attesting witnesses for two weeks.

7. On 2nd December, 2011, Mr. Lucas D'Mello, husband and Constituted Attorney of the defendant informed this court that Mr. D.C. Pathak, advocate who was appearing for the defendant in the past had been discharged and he would be conducting the case in person as the constituted attorney of the defendant and tendered attested copy of the power of attorney. This court accordingly directed the plaintiff to serve copy of the affidavits of the two attesting witnesses on the defendant through her constituted attorney within two weeks and adjourned the matter for four weeks.

8. The first attesting witness Mr. Satish Ramdas Patil (PW2) was examined before this court on 22nd March, 2012. Examination in chief and cross examination of the said witness was conducted in court. The said witness was cross examined by the Constituted Attorney of the defendant.

9. The plaintiff examined Mr. James Marshal D'Mello, second attesting witness (PW3) who filed his affidavit in lieu of examination in chief dated 16th July, 2011. The said witness was cross examined by the Constituted Attorney of the defendant on 22nd March, 2012. The plaintiff thereafter proposed to examine Dr. Suresh Nagdev who had made an endorsement on the said Will about the sound health and disposing mind of the said deceased and that the said deceased had understood the contents of the Will.

10. On 16th July, 2011, the plaintiff filed an application in the suit proposing to examine Dr. Suresh W. Nagdev stating that the said doctor had been suffering from heart problem and would not be in a position to visit this court to give evidence. The said doctor however agreed to be examined at the clinic or at his residence by the court commissioner. The plaintiff prayed for appointment of the court commissioner for the purpose of examining the said doctor at his clinic and agreed to comply with the payment of commissioner's fees directly to the court commissioner as may be ordered by this court.

11. On 2nd March, 2012, this court recorded the statement of the learned counsel for the plaintiff that the next witness Dr. Suresh W. Nagdev was unable to come to the court on account of his advanced age and as also due to his pre-occupation as a doctor and requested that a commissioner be appointed for recording evidence of the doctor at his clinic. This court appointed an advocate as the Court Commissioner for recording evidence of Dr. Suresh W. Nagdev. Matter was adjourned to 15th March, 2012 for further evidence. On 22nd March,

2012, this court recorded the statement of the learned counsel appearing for the plaintiff that the evidence of the other witness of the plaintiff i.e. Dr. S.W. Nagdev would be taken by the Commissioner appointed for that purpose on 31st March, 2012. Matter was adjourned to 12th April, 2012.

12. By a letter dated 26th March, 2012, addressed by the plaintiff's advocate to the defendant, plaintiff informed the defendant that by an order passed by this court, Mr. S.B. Pande, retired Judge had been appointed as a court commissioner for recording evidence of Dr. Suresh W. Nagdev as well as cross examination at his clinic at Shop No. 8, Netaji Market, Opp. Jhama Sweets, Chembur Colony, Mumbai-400 074 on 31st March, 2012 at 12.00 noon and informed that the defendant was required to remain present at the said clinic. It is not in dispute that the said letter was received by the defendant.

13. Since there was no cross examination of Dr. Suresh W. Nagdev by the caveator or her constituted attorney, learned court commissioner submitted report alongwith oral evidence led by the said witness before the court commissioner. The court commissioner recorded in the said report that defendant as well as her constituted attorney had declined to attend the commission and cross examine the said witness. By an order dated 17th June, 2013 passed by this court, it is observed that the defendant did not appear before the court commissioner on 31st March, 2012 when examination in chief of the doctor was recorded by the commissioner. It is also observed that the plaintiff has recorded full evidence with regard to the execution of the Will. That evidence shall have to be considered unless defendant appears for cross examining the last witness Dr. Suresh Nagdev and for her own cross examination upon her affidavit of evidence. It was made clear that if the defendant did not appear herself to be cross examined, her affidavit of evidence shall not be considered. Suit was adjourned to 10th July, 2013 for ex-parte decree. On 16th September, 2013, the defendant appeared through her constituted attorney and submitted that the defendant or constituted attorney of the defendant were not bound to cross examine the witness Dr. Suresh W. Nagdev by the plaintiff at his consulting room. It is submitted that the matter be placed on board for argument. Defendant did not propose to lead any evidence. Considering the request made by both parties, this court placed the matter on board on 8th October, 2013 for final hearing. On 8th October, 2013, defendant through her constituted attorney submitted that defendant has already filed written argument in this proceedings and this court shall consider the same while disposing of this testamentary suit.

REASONS AND CONCLUSION

14. Plaintiff who was appointed as an executor of the Will dated 6th March, 1996 examined himself and three other witnesses. In affidavit in lieu of examination in chief of the plaintiff dated 16th July, 2011, it was deposed by him that the said deceased had visited Dr. Suresh W. Nagdev who had examined him on 6th March, 1996 and had certified that the said deceased was found in a sound disposing mind. The said deceased accompanied by the plaintiff and two

witnesses viz. Mr. James M. D'Mello and Mr. Satish Ramdas Patil went for registration of the said Will before the Sub Registrar of Assurances. The said Will was read over and explained to the deceased who also knew English and after understanding the contents thereof and approved by him, the said two witnesses signed the said Will at the direction and in presence of the said deceased and each other as attesting witnesses. The said deceased also signed the said Will whose signature was attested by two witnesses. Signature of the said deceased and the witnesses are identified by the plaintiff in his affidavit. The said deceased was able to walk and was mentally fit and was in a position to make a Will and bequeath his property.

15. Plaintiff also examined Mr. Satish Ramdas Patil, one of the attesting witness who filed his affidavit in lieu of examination in chief dated 16th July, 2011. The said witness deposed that he was present with Mr. Domnic D'Souza and the petitioner for the purpose of attesting as witness in execution of the Will of the said deceased. The said witness also went alongwith the deceased, Mr. James M. D'Mello before the Sub Registrar of Assurances, Bandra. It is deposed that the contents of the said Will was read out to the said deceased who answered that he was aware of the contents of the said Will. The said witness has also identified the signature of the said deceased as well as attesting witness on the Will. It is also deposed that at the time, the said deceased had subscribed signatures to the said deceased, he was of sound and disposing mind, memory and had understood and made the said Will of his free will and pleasure. The plaintiff also examined Mr. James M. D'Mello, second attesting witness to the said Will who filed his affidavit in lieu of examination in chief dated 16th July, 2011. The said witness also identified the signature of the deceased and other attesting witness of the Will and also deposed that he was present at the time of registration of the Will before Sub Registrar of Assurances, Bandra. The said witness also deposed that the said deceased had subscribed his signature to the said Will and at that time, he was of sound disposing mind, memory and understood and the same was with his free will and pleasure.

16. The plaintiff also examined Dr. Suresh W. Nagdev before the Court Commissioner on 31st March, 2012. Examination in chief was lead orally before the learned Court Commissioner. The said witness in his examination in chief has deposed that he was medical practitioner since last 28 years and knew the said deceased. The said deceased had visited his clinic with the petitioner about 16 years back. The witness identified his signature on the original Will by which he had made an endorsement about the sound state of mind of the said deceased. The witness has deposed only after examining the said deceased and after the said witness found, the said deceased to be of sound state of mind. The witness deposed that medical endorsement was made by him in the Will.

17. As far as cross examination of the plaintiff is concerned, defendant though was given an opportunity to cross examine the plaintiff, the defendant did not cross examine him. This court has by an order dated 18th November, 2011

recorded that the defendant who was present in person did not want to cross examine the plaintiff. Evidence of the plaintiff (PW1) was accordingly closed. The matter was adjourned for recording evidence of the attesting witness.

18. On 2nd December, 2011, this court recorded the statement of the Constituted Attorney of the defendant that the defendant had discharged her advocate Mr. D.C. Pathak and the said constituted attorney would be conducting the case in person on behalf of the defendant and tendered attested copy of the power of attorney. This court, accordingly, directed the plaintiff to serve copy of the affidavits of the two attesting witnesses on the defendant through her constituted attorney.

19. As far as Mr. Satish R. Patil (PW2) examined by the plaintiff is concerned, the constituted attorney of the defendant cross examined the said witness. In the cross examination, the said witness deposed that he was regular visitor to the said deceased and on his visit the said deceased requested him to remain present on 6th March, 1996 for the purpose of registration. On 6th March, 1996, the said witness went to the house of the deceased when the plaintiff, Mr. Domnic D'Souza and one Mr. James M. D'Mello were present. All of them had gone to the office of the Sub registrar of assurances. The said witness denied that the said deceased was not in a position to walk. The witness also denied the suggestion of the defendant that the said witness, the plaintiff or any other attesting witness had supported the said witness to take him to taxi. The witness has also deposed that the said deceased had properly signed the document and his hand was not shaking at that time. No other questions were put to the said attesting witness by the constituted attorney of the defendant.

20. As far as witness Mr. James M. D'Mello, another attesting witness (PW3) examined by the plaintiff is concerned, the said witness was cross examined by the constituted attorney of the defendant. The said witness deposed that there was no need for him to advise the plaintiff to take the said deceased to RCF Hospital. The said deceased was in a position to walk. It is also deposed that the deceased had gone to the doctor and then to the office of the Sub registrar of assurances. The witness had not accompanied him to the doctor. Witness denied the suggestion of the defendant that he had helped the plaintiff in taking deceased directly to the office of the Sub registrar for assurances for his signature. No other questions were asked to the said witness.

21. As far as evidence of Dr. Suresh Nagdev (PW4) is concerned, defendant and her constituted attorney refused to cross examine the said witness and were absent inspite of service of notice. On perusal of the report submitted by the learned court commissioner, it is clear that though the parties were instructed to remain present at 12.00 noon on 31st March, 2012 in the clinic of the said witness (PW4), since the defendant or her constituted attorney did not remain present till 12.20 pm., the learned advocate appearing for plaintiff contacted the constituted attorney on phone and inquired as to whether he would be coming to attend the commission work but he refused straight way by informing that he

would attend the court only on 12th April, 2012 and was not suppose to attend the commissioner inspite of the order of this court. The learned commissioner also recorded that the plaintiff through his advocate had addressed a letter on 26th March, 2012 to the defendant which was received by the defendant on 26th March, 2012 informing well in advance that the commission was fixed on 31st March, 2012 at 12.00 noon in the clinic of the doctor Mr. Suresh W. Nagdev (PW4).

22. On perusal of the affidavit in support of the caveat and also written arguments filed by the defendant, it emerges that the defendant had disputed the execution of the Will as well as about the sound and disposing mind of the testator. This court has to consider whether burden of proof cast on the party is discharged by him or not.

23. On perusal of the affidavit filed by PW1 and two attesting witnesses PW2 and PW3, it is clear that all the three witnesses have deposed in their examination in chief that they were present at the time of execution of the Will and were also present alongwith the said deceased in the office of the Sub registrar of assurances for registration of the Will. It is also deposed by each of these witnesses that the said deceased was of sound and disposing mind. As far as petitioner is concerned, defendant had admittedly refused to cross examine the petitioner though an opportunity was given by this court. This Court thus closed the evidence of the petitioner (PW1) on 18th November, 2011.

24. As far as evidence of PW2 and PW3 which was laid to prove that the said deceased had executed a Will duly witnessed by two attesting witnesses and he was of sound and disposing mind at the time of execution of the said Will and who had identified the signature of the deceased and the attesting witnesses and had deposed to that effect in the affidavit of examination in chief, there was no cross examination of these two witnesses by the defendant on the issue of execution of the Will or about sound and disposing mind of the deceased. The witness examined by the petitioner confirmed what was stated in the examination in chief. There was hardly any cross examination of these two witnesses on the relevant issue.

25. As far as evidence of Dr. Suresh Nagdev, (PW4) is concerned, the said witness had in his examination in chief identified his signature on the endorsement made on the Will. The said witness also deposed that his signature was affixed only after examining the said deceased and after finding him to be of sound state of mind. The witness deposed that the contents of the said endorsement was true and correct. On perusal of the Commissioner's report, it is clear that though the defendant was informed about the date of recording evidence of the said witness in the clinic of the said witness, defendant as well as her constituted attorney were absent. Though the petitioner's advocate contacted the defendant and her constituted attorney, the learned advocate was informed by the constituted attorney that he would not attend the clinic of the said witness for cross examination and would remain present in the court on the

adjourned date. When the matter was placed on board, this court enquired with the defendant as to why no cross examination was conducted of the doctor, the constituted attorney of the defendant replied that he was not bound to cross examine the doctor at his clinic. Defendant also did not wish to examine herself as a witness. On the joint request of parties, matter was placed on board for final arguments.

26. I have considered the written arguments submitted by the defendant. On perusal of the written arguments, it is clear that the various allegations which are made in the affidavit in support of caveat are reiterated in the written arguments. Various irrelevant allegations are also made against the petitioner's advocate. The fact remains that the none of these allegations made in the affidavit in support of the caveat are sought to be proved by the defendant by leading any evidence. Two of the witnesses examined by the plaintiff were not even cross examined by the defendant. In respect of other two witnesses, there was no cross examination on the relevant issues. No positive evidence is laid by the defendant. None of the allegations thus made in the affidavit in support of the caveat have been proved. Onus was on the defendant to prove that the deceased was not of sound and disposing mind at the time of execution of the Will. Though the plaintiff laid evidence of other witnesses to prove the aspect of valid execution of the Will and about the sound state of mind of the deceased at the time of execution of the Will in respect of which there was no cross examination of the defendant, defendant did not choose to lead any oral evidence to prove allegations made in the affidavit in support of the caveat. Such allegations which are not proved by the defendant but made in affidavit in support of caveat thus cannot be considered.

27. In my view, the defendant having not cross examined the two witnesses of the plaintiff on the issue of execution of the Will and in respect of sound state of mind of the deceased at the time of execution of the Will deposition of such witness as remained uncontroverted and are thus deemed to have been proved.

28. As far as evidence of the other two witnesses i.e. attesting witnesses PW2 and PW3 are concerned, on perusal of the cross examination, it is clear that there was no cross examination on both these issues. Cross examination was in respect of the irrelevant issues raised by the defendant. In my view, once respondent has not cross examined the witnesses on the issue framed by this court on which positive evidence was laid by the plaintiff, such part of evidence has to be considered as proved not having been controverted in the cross examination.

29. This court had considered the application of the plaintiff for cross examining doctor at his clinic in view of his old age and has passed an order that the doctor be examined on commission at his clinic. Defendant was given due notice of such examination by the learned advocate representing the plaintiff. Even on the date of recording the evidence of PW4, constituted attorney of the defendant was contacted by the plaintiff's advocate on phone but he refused to attend the

venue of recording the evidence. Even when the matter appeared before this court, defendant did not seek to cross examine the said witness on the ground that defendant was not bound to visit the consulting room of the said witness for the cross examination and did not seek to examine the defendant either and made a request to hear the matter finally by treating the evidence of the witness closed.

30. In my view, PW1 to PW3 examined by the plaintiff have proved that the said Will dated 6th March, 1996 was validly executed by the said deceased and duly attested by two of the attesting witnesses. The said Will has been registered. The plaintiff as well as two attesting witnesses had also attended the office of the Sub registrar of assurances alongwith the said deceased. The said three witnesses had also proved that at the time of execution of the Will, the witness was of sound and disposing mind and was able to walk and was able to understand the contents of the Will. Witness (PW4) has duly proved that after examining the said deceased had found that the said deceased was of sound and disposing mind, and after examining him, the endorsement was made by the doctor. The said witness has confirmed the said endorsement. The witness has also deposed that whatever was stated in the said endorsement was true and correct. There is no cross examination admittedly of this witness. In my view PW4 has also proved that the said deceased was of sound and disposing mind at the time of execution of the Will. The said Will is accordingly marked as exhibit. Both these issues are accordingly answered in affirmative.

31. None of the issues raised by the defendant in the written arguments are proved by the defendant by cross examining witness examined by the plaintiff or by leading any positive evidence. I, accordingly pass the following order:-

(a) Testamentary suit is decreed.

(b) Prothonotary and Senior Master is directed to issue probate of the Will and testament dated 6th March, 1996 of the deceased Mr. Domnic D'Souza to the plaintiff having effect throughout India. Drawn up decree is dispensed with.

(c) No order as to costs.