

(2013) 10 BOM CK 0094
In the Bombay High Court
Case No : Petition No. 832 of 2010

Late Shri. Rajendra Singh, Chhatrasal Singh Kushwaha, alias APPELLANT
Rajendra C. Kushwaha alias R.C. Kukshwaha of Mumbai

Vs

Mr. Jitendra Singh Rajendra Singh Kushwaha of Mumbai, Mrs. RESPONDENT
Suman Jitendra Singh Kushwaha of Mumbai, Miss Nisha
Jitendra Singh Kushwaha of Mumbai and Suresh Rajendra
Singh Kushwaha

Date of Decision : 29-10-2013

Acts Referred:

Citation : (2013) 6 ABR 812 : (2014) 2 ALLMR 132 : (2013) 6 MhLj 802

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

Bench : Single Bench

Advocate : Shailesh Shah and Ms. Mamta Sadh instructed by Zohair and Co, for the Appellant; Mayur Khandeparkar instructed by y Nitin Parkhe, for the Respondent

Final Decision : Disposed Off

Judgement

R.D. Dhanuka J.

1. Plaintiffs have filed an application for striking of the order deleting paragraph 3, 4, 13 to 17 from the affidavit dated 18th March, 2013 filed by the defendant/caveator filed in lieu of examination in chief. Defendant/caveator has filed affidavit in reply to this application.

Mr. Shah, learned senior counsel appearing for the plaintiff invited my attention to paragraphs 3, 4, 13 to 17 of the affidavit in lieu of examination in chief filed by defendant on 18th March, 2013. The learned senior counsel also invited my attention to the issues framed by this court on 23rd August, 2012. The Testamentary petition was filed by the executor in this court inter alia praying for probate in respect of the alleged will and testament dated 10th May, 2006. This court has framed the following issues:

1. Whether the last Will and testament of the deceased, Rajendra Singh Chhatrasal Singh dated 10th May, 2006 was validly executed.

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

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

2. Learned senior counsel submits that by an order dated 23rd August, 2012 read with order dated 23rd January, 2013, plaintiff has been permitted to lead evidence in rebuttal if required. Evidence of two additional witnesses is complete. Learned senior counsel submits that in paragraph 3 and 4 of the affidavit in lieu of examination in chief filed by the defendant, it is deposed by defendant that the deceased parents were also staying with the plaintiffs at Santacruz address since 1982 and not at the address mentioned by the plaintiff. Learned senior counsel submits that paragraph 3 and 4 of the said affidavit are not relevant or material in any manner for deciding the petition for probate. Whether the said deceased was staying at the address mentioned by the plaintiff or at the address mentioned by the defendant is irrelevant for the purpose of deciding whether the said deceased had validly executed the Will and testament dated 10th May, 2006 or whether he was in sound state of mind at the time of execution of the Will. Learned senior counsel submits that similarly in paragraphs 13 to 17 of the affidavit in lieu of examination in chief, defendant has raised dispute in respect of certain properties which according to defendant, the said deceased could not have bequeathed. He submits that the issue of title cannot be decided by this court in testamentary proceedings and thus evidence if any on the issue of title would not be relevant or material in any manner for deciding the probate petition/ testamentary suit. Mr. Shah submits that this legal position is not in dispute.

3. Mr. Shah learned senior counsel placed reliance on Order 18 Rule 2 of the Code of Civil Procedure, 1908 in support of his submission that evidence has to be led in support of the issues which the party is bound to prove and not on any other irrelevant issues. Learned senior counsel submits that the dispute about address of the said deceased or whether the said deceased could have bequeathed some of the properties as mentioned in the affidavit in lieu of examination in chief, are not the issues in respect of which evidence can be led by the defendant. It is submitted that since all these paragraphs referred to aforesaid are not relevant in support of the issues involved, these paragraphs are required to be struck off at this stage. It is submitted that if this part of evidence which is not relevant is not struck off, there will be unnecessary lengthy cross examination of the defendant which would not be in the interest of any party. Order 18 Rule 2 and 4 of the CPC read thus:

2. Statement and production of evidence.-

(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

(3A) Any party may address oral arguments in a case, and shall before he concludes the oral arguments, if any, submit if the Court so permit concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record.

(3B) A copy of such written arguments shall be simultaneously furnished to the opposite party.

(3C) No adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing considers it necessary to grant such adjournment.

(3D) The Court shall fix such time-limits for the oral arguments by either of the parties in a case, as it thinks fit.

4. Recording of evidence.-

(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court, shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:

(3) The Court or the Commissioner, as the case may be shall record evidence either in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty day from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provision of rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commissions under this rule.

4. Mr. Khandeparkar, learned counsel appearing on behalf of the defendant on the other hand submits that the application filed by the plaintiff for striking of the defence is not maintainable. Reliance is placed on Rule 121(5) and 125(38) of the Bombay High Court (Original Side) Rules, in support of his submission that the applicants ought to have filed chamber summons and not such application by way of affidavit. Learned counsel submits that there is no provision for striking of the evidence under Order 18 Rule 2 or Order 18 Rule 4. Learned counsel placed reliance on Order 19 Rule 3 and submits that the defendant has personal knowledge to prove what is deposed in the affidavit in lieu of examination in chief. It is submitted in the event of this court coming to the conclusion that any matter whether hearsay or argumentative matter is referred in the affidavit, this court can impose cost which can be considered only after entire evidence is completed and this court can not strike of any part of evidence at this stage. Learned counsel submits that this court has no power to strike of portion of the affidavit.

5. Mr. Khandeparkar placed reliance on Rule 206 of the High Court (Original Side) Rules and submits that the court or Judge in chambers may order to be struck out from any affidavit any matter which is scandalous and may order the cost of any application to strike out such mater to be paid as between Advocate and client. Mr. Khandeparkar, learned counsel submits that in so far as the deposition made in para 3 and 4 in affidavit in lieu of examination in chief is concerned, the deponent of the affidavit has placed substantial evidence on record about the correct residential address of the said deceased at the time of his death to demonstrate that the plaintiff prevailed upon the deceased testator to execute the Will in question by bequeathing the property in favour of the party executing the Will. It is submitted that paragraphs 3 and 4 would indicate the conduct of the said deceased and the plaintiff and are thus relevant for the purpose of deciding the issue.

6. As far as depositions made in paragraphs 12 to 17 of the affidavit in lieu of examination in chief is concerned, the learned counsel submits that even in paragraph 12 of the affidavit in lieu of examination in chief, the witness has deposed that the said deceased cannot be bequeathed the ancestral property by

Will. It is submitted that though in paragraphs 13 to 17 also the defendant has raised similar objection regarding the rights of the said deceased to bequeath by Will various other properties, Plaintiff seeks striking of the evidence laid in paragraph 13 to 17 of the said affidavit. Learned counsel submits that what is stated in paragraph 13 to 17 was out of depositions made in paragraph 12. Reliance is placed on Section 136 of the Indian Evidence Act, 1871 by the learned counsel and would submit that it is for the court to decide as to admissibility of evidence after entire evidence is over and not at this stage. If the court comes to the conclusion that certain part of the evidence is not relevant, the same can be ignored or struck off at that stage. It is submitted that any part of the said affidavit can not be considered as irrelevant at this stage and thus cannot be struck off in view of section 136 of the Indian Evidence Act. Section 136 of the Indian Evidence Act reads thus:

136. Judge to decide as to admissibility of evidence.- When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise. If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking. If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

7. Mr. Shah, learned senior counsel for the plaintiff in rejoinder submits that Rule 121(5) of the Bombay High Court (Original Side) Rules, would apply if an application is made to amend the plaint or subsequent proceeding or to strike out any matter therein, the same has to be disposed of by the Judge in chambers. Learned senior counsel submits that affidavit in lieu of examination in chief is not pleadings but is evidence. It is submitted that Rule 121(5) thus does not apply. As far as Rule 121(38) is concerned, learned senior counsel submits that the matters which are not expressly required to be disposed of in court and which Judge thinks fit to be heard in chambers, such applications can be directed to be heard in chambers by the learned Judge. He submits that the said rule also will not apply to the facts of this case. It is submitted that the plaintiff has already filed an application. It is submitted that the objections raised by the defendant is hyper-technical. It is submitted that Rule 121 does not apply to striking of the evidence. In any event, u/s 151 of Code of Civil procedure, 1908, this court has inherent power to consider such application. It is submitted that order 18 rule 2 of CPC does not curtail the powers of the court u/s 136 of the Indian Evidence Act. It is submitted that the plea raised about the address of the deceased in the affidavit in lieu of examination in chief is not raised in the affidavit in support of caveat and cannot be allowed to be raised for the first time

in affidavit of evidence. Learned senior counsel submits that as far as depositions made in paragraph 12 which is not objected by the plaintiff, as to whether bequest could be made as to whether bequest could be made by the said deceased in respect of the ancestral property is concerned, in paragraph 12 of the said affidavit, deponent has also alleged that the Will was executed under pressure and/or undue influence, exercised or practiced upon the deceased by Plaintiff no. 1. It is submitted that since part of the evidence deposed in paragraph 12 is relevant to the issue, plaintiff rightly did not raise any objection in respect of the entire paragraph.

8. On perusal of the issues framed by this court, it is clear that the issues which are required to be proved by the parties is limited to the execution of the Will and as to whether deceased was in sound state of mind at the time of execution of the Will. This court while exercising the testamentary jurisdiction cannot decide the title in respect of the properties of the deceased or any third party in this testamentary suit. On perusal of paragraphs 13 to 17 of the affidavit in lieu of examination, it is clear that defendant has alleged that various properties described therein were ancestral properties and such properties could not have been bequeathed by the deceased testator by Will. Defendant also has set up adverse title in the said properties. In my view since this court cannot decide the title in respect of the properties of the deceased or third party, while exercising testamentary jurisdiction deposition made in paragraphs 13 to 17 of the affidavit in lieu of examination in chief disputing the title to the properties of the deceased or his power to bequeath the property by Will, are not relevant to the issue framed in this suit and thus no evidence on such allegation made by the defendant can be laid.

9. As far as deposition made in paragraph 12 of the affidavit in lieu of examination in chief is concerned, on perusal of the said paragraph, it is clear that defendant has not only submitted that the deceased cannot bequeath the ancestral property as the same were not self acquired properties of the deceased, but has also alleged that the Will was not executed or the deceased was under pressure and/or undue influence which was alleged to have been exercised or practiced on the deceased by the plaintiff. In my view, Mr. Shah, learned senior counsel for the plaintiff is right that in view of the dispute about the validity of Will having been raised along with title issue, Plaintiff did not raise objection for striking part of paragraph no. 12. Even if plaintiff has not applied for striking of the portion of paragraph 12, it would not mean that what is deposed in paragraph Nos. 13 to 17 would be relevant to the issue in testamentary proceedings. In my view, there is no merit in this submission of Mr. Khandeparkar, learned counsel for the defendant.

10. As far as deposition made in paragraph 3 and 4 of the affidavit are concerned, on perusal of the said paragraphs, it is clear that the allegations of the defendant is that the deceased was staying with plaintiff at Santacruz address since 1982 and not at the address mentioned in the plaint. In my view

whether the said deceased was staying at Santacruz or at Kalbadevi is not relevant for the purpose of deciding whether the Will was validly executed or not or whether the deceased was in sound state of mind at the time of execution of the Will and thus both these paragraphs are not relevant to the issues involved.

11. On perusal of Order 18 Rule 2 of the Code of Civil Procedure, it is clear that the party is entitled to produce his evidence in support of all the issues which he is bound to prove. The court has to see whether evidence proposed to be led by the party is relevant in support of the issues involved. Only such evidence which is relevant in support of the issues, the party is bound to prove such issue. Any evidence which is not relevant to the issues involved, can be considered irrelevant. There was an amendment to Order 18 Rule 4 of the Code of Civil Procedure, 1908 by which examination in chief of the witness is allowed to be filed on affidavit. The legislative intent to permit examination in chief of the witness by filing affidavit was to expediate the trial. The question that arises for consideration of this court is if there was no such amendment permitting the party to file affidavit in lieu of examination in chief of the witnesses and if the oral examination of the party who seeks to lead oral evidence was required to be recorded in the court, whether court could have permitted the party in examination in chief to lead any evidence which was not relevant to the issue. In my view, the court could not have permitted or would have stopped the party from leading evidence in examination in chief to the issue which were not relevant for the purpose of deciding the suit. The court cannot permit the party to lead an irrelevant evidence or evidence not related to the issue even in affidavit filed by way of examination in chief in lieu of oral evidence. Order 18 rule 4 in my view has to be read with Order 18 rule 2 which clearly provides that evidence has to be in support of the issues which party is bound to prove. In my view, since the defendant is not bound to prove nor it is relevant in the testamentary proceedings that the deceased who was alleged to have bequeathed particular property was not owner of the said property such part of evidence is irrelevant and can not be permitted by Court. If the court could not have permitted the defendant to lead such evidence as not related to the issue involved under Order 18 rule 2, the court cannot permit the said party to lead evidence not related to the issue involved or the issue which the party is not bound to prove under Order 18, rule 4 by filing affidavit in lieu of examination in chief.

12. As far as maintainability of this Chamber summons is concerned, on perusal of Rule 121(5) and 121(38), in my view, since 121(5) applies to the pleadings and not to evidence, such rule will not apply to the application filed by the plaintiff for striking of the part of the evidence. As far as rule 121(38) is concerned, that gives discretionary power to the court to dispose of the matters which are not expressly required to be disposed of in the court by hearing the same in chambers. The said rule also does not apply to such application. In my view, section 151 of the Code of Civil Procedure, 1908, gives inherent powers to the court to strike of the irrelevant evidence at this stage with a view to avoid

any further delay in the matter and to avoid any cross examination on irrelevant issues. In my view, part of the evidence which is on the face of it irrelevant and not relevant to the issue involved or issue which the court ultimately cannot decide, can be struck off and/or can be ignored even before commencement of cross examination.

13. As far as submission of Mr. Khandeparkar that the court has to decide the admissibility of evidence at the stage of final arguments and not at this stage u/s 136 of the Indian Evidence Act is concerned, in my view on plain reading of section 136 of the Indian Evidence Act, it is clear that at the stage when the party proposes to give any evidence on any fact, the court is empowered to ask such party who is proposing to give evidence, in what manner the alleged fact if proved would be relevant and the court shall admit the evidence, if it deems that fact if proved would be relevant and not otherwise. The court is thus empowered to consider whether to admit the evidence which would be relevant and not otherwise. In my view, there is no substance in the submissions made by Mr. Khandeparkar learned counsel for the defendant.

14. I am of the view that paragraphs 3 and 4 of the affidavit in lieu of examination in chief which refers to the address alleged to be correct address according to the defendant of the deceased is not relevant to the issue. What is deposed in paragraph 13 to 17 which dealt with the power of the testator to bequeath the property alleged to be ancestral property in which defendant has claimed rights are irrelevant to the issue. Since this court cannot decide these issues in the testamentary proceedings, no purpose would be served by allowing the witnesses to depose on these allegations which are not relevant to the issues involved and which the court cannot decide. I, therefore, pass the following order:

(a) Deposition made in paragraphs 3, 4, 13 to 17 of the affidavit in lieu of examination in chief dated 18th March, 2013, being not relevant to the issue will not be read in evidence. Plaintiff is not required to cross examine the defendant in respect of such deposition made in paragraph 3, 4 and 13 to 17 of the affidavit dated 18th March, 2013. Defendant can adopt appropriate proceedings for adjudication of title before appropriate court.

(b) Both the parties are directed to proceed with evidence in respect of the remaining paragraphs of the said affidavit expeditiously.

(c) Application is disposed of in the aforesaid terms. There shall be no order as to costs.