

IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY AND INTESTATE JURISDICTION
ORIGINAL SIDE

Present :

THE HON'BLE JUSTICE I.P. MUKERJI

G.A. No. 3059 of 2014
T.S. No. 18 of 2012

In the goods of;
Sajani Devi Bhartia, deceased
Jagmohan Kejriwal & Ors.

Vs.
Ashrant Bhartia & Anr.

For the plaintiffs:- Mr. Dhruba Ghosh; Adv.
Mr. Anirban Roy; Adv.
Mr. C.M. Ghorawat; Adv.
Mr. Souvik Kanti Chakraborty; Adv.

For the defendants:- Mr. S,N, Mitra; senior Adv.
Mr. Sabyasachi Choudhuri; Adv.
Mr. Sarbapriya Mukherhee; Adv.
Mr. Sanjiv Trivedi; Adv.
Mr. Ravitej Chilumari; Adv.

Heard On:- 05.12.2014

Judgement On:- 16.12.2014

I.P. MUKERJI, J.

A short question arises for consideration in this application. The plaintiff, in a contested testamentary suit, to obtain probate of the alleged last Will and Testament of Sajani Devi Bhartia, wants an order from this court that the two attesting witnesses to the Will be examined on commission. These two attesting witnesses are: (a) Ajay Bhargava, Partner, Khaitan & Co., Advocates, 1105 Ashoka Estate, 24 Barakhamba Road, New Delhi- 110 001. (b) Sharad Vaid, Partner, Khaitan & Co., Advocates, 1105 Ashoka Estate, 24 Barakhamba Road, New Delhi- 110 001.

It is opposed by the caveators.

Some knowledge of the background is necessary.

Sajani Devi Bhartia, the testatrix was the wife of Mohan Lal Bhartia. In or about 2007 she was physically in a very poor condition. She could hardly move. Her husband was also ill with heart disease. On 2nd February, 2007 he was taken to Escorts Heart Institute and Research Centre in New Delhi for treatment. On 8th March, 2007, both husband and wife executed their respective last Will and Testament. Probate to the husband's Will was taken from this court on 10th September, 2009 in an uncontested cause. Initially a caveator had been filed a caveat objecting to the grant of probate to this Will. Subsequently it was withdrawn.

But the wife's Will executed the same day has been challenged in these proceedings. Mr. Choudhuri, the learned Advocate for the defendants/caveators laid great emphasis on the event of the husband being taken to USA, on 9th March 2007 for treatment, just one day after execution of the alleged Will.

On enquiry from the bar I found out that the wife did not accompany the husband. He lived for exactly one year thereafter, breathing on last 10th March, 2008. The wife lived for another year. She expired on 11th May, 2009.

The caveators have challenged the Will on many grounds. First of all, they have alleged that the Will was not executed by the testatrix at all. It is a forged document. Secondly, they have alleged that the Will is a product of fraud, coercion, undue influence etc. practised on the testatrix by the propounders of the Will.

According to learned counsel for the caveators these intricate questions have to be resolved in this suit. The evidence of the attesting witnesses is most important. To extract the truth the examiner has to be

face to face with the witness. The demeanor of the witness should be observed closely by the court and counsel. ***Panchkari Mitra Vs. Panchanan Saha & Ors. reported in AIR 1924 Calcutta 971*** was cited by Mr. Choudhury. Mr. S. N. Mitra, learned Senior Advocate leading Mr. Choudhury supplemented that if this probate proceeding could be filed in Kolkata, there was no reason why all the witnesses should not be examined in this court.

It is argued on behalf of the propounders that the attesting witnesses are lawyers practising in New Delhi. They are very hard pressed for time. Their time is valuable. A lot of their time would be utilized by their visiting Kolkata, this High Court and waiting for their turn to come to depose in this Court.

Mr. Ghosh, learned Advocate for the petitioner replied that the main property of the testatrix was situated in Kolkata and that is why the probate proceeding was instituted here.

Now, the law on the subject has to be examined.

What is examination of a witness in a court of law? It is part of our system of trial. It is a procedure by which the truth is sought to be elucidated. Examination of a witness in a Court involves his oral examination by the party producing him followed by his cross-examination by the other party and re-examination, if necessary, by the party producing him. **(see Chapter X of the Indian Evidence Act, 1872).**

A witness is asked oral questions. He is shown documents, he is shown objects, accounts, drawings maps etc. to prove their authenticity. He is asked a host of questions, by learned counsel for the party producing him to establish that party's case. When, that is over, he is cross-examined by learned Counsel for the other party. He is asked

questions, shown documents etc. to destroy the case that he has built in his examination-in-chief and to shake his credit.

During this exercise the reaction and demeanor of the witness, the time taken by him to answer, the way the answer is given, is closely observed by learned Counsel and the Judge or Jury to form an opinion whether the witness can be considered a truthful witness and whether the evidence that he adduces before the court is to be accepted or not.

Mr. Justice M. N. Mukerji, of our Court in *Panchkari Mitra vs. Panchanan Saha & Ors. reported in AIR 1924 Calcutta 971* opined that it was the right of a party to have the evidence taken in court. The court on the evidence before it has to arrive at the necessary conclusion whether that right should be taken away by ordering a witness to be examined on commission. Every factor should be considered by the court before coming to its decision.

Order XXVI of the Code of Civil Procedure is about commissions. Rules 1 and 4 thereof are set out below:

“R- 1. Cases in which Court may issue commission to examine witness.- Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the court or who is from sickness or infirmity unable to attend it:

(Provided that a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

Explanation.- The Court may, for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness.)”

“R- 4. Persons for whose examination commission may issue.- (1) Any Court may in any suit issue a commission (for the examination on interrogatories or otherwise of-

(a) any person resident beyond the local limits of its jurisdiction;

(b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(c) (any person in the service of the Government) who cannot, in the opinion of the Court, attend without detriment to the public service (MP)

(Provided that where, under Rule 19 of Order XVI, a person cannot be ordered to attend a Court in person, a commission shall be issued for his examination if his evidence is considered necessary in the interests of justice:

Provided further that a commission for examination of such person on interrogatories shall not be issued unless the Court, for reasons to be recorded thinks it necessary so to do.)

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

Rule 4A was added with effect from 1st July 2002. It is as follows:

“Commission for examination of any person resident within the local limits of the jurisdiction of the Court.- Notwithstanding anything contained in these rules, any Court may in the interest of justice or for the expeditious disposal of the case or for any other

reason, issue commission in any suit for the examination, on interrogatories or otherwise, of any person resident within the local limits of its jurisdiction, and the evidence so recorded shall be read in evidence”.

One does not miss the distinction that is made by the legislature between a witness who resides within the jurisdiction of this Court and the one who resides outside the jurisdiction of this Court. If the Court issues a commission for examination of a witness within its jurisdiction it has to be satisfied that he is sick or infirm or exempted. After the introduction of rule 4A even a witness within jurisdiction can be examined on Commission, for special reasons. When it comes to examination of a person living outside the jurisdiction of the Court, the rules are lenient. In fact, no condition has to be satisfied under Rule 4 before a commission can be issued. In fact, this provision for examination of a witness on commission under Rule 4 was amended by the Amendment of 1976.

The recording of evidence in Court under the Code of Civil Procedure, as amended in 2002 has become lenient. The evidence may not be recorded in Court at all. Order XVIII Rule 4(1) says that the examination in chief of a witness shall in all cases be on affidavit. Order XVIII rule 2 says that cross-examination and re-examination shall be done either before the Court or the Commissioner. The proviso to the sub-Section goes on to enact that the court while appointing a commission under the above sub-rule shall take into account all relevant factors. So much has the importance of live recording of evidence in the Courtroom been diluted that even cases where demeanor of the witness is crucial or relevant the examination can be made before the

Commissioner. The Commissioner has the duty to record the demeanor of the witness. **(see Order XVIII rule 4)**

It is the duty of the Commissioner to note down any objection taken during examination of the witness for subsequent decision by the Court. Order XVIII Rule 4 was amended with effect from 1st July, 2002. Order XVIII is not followed in our High Court because Chapter XIV of the Original Side Rules, having overriding effect (see Section 4 of the Code of Civil Procedure) says that ***“The evidence of each witness shall be taken down by or in the presence and under the superintendence of the Judge or one of the Judges.*”**

Such evidence shall be taken down ordinarily in a narrative form when in longhand, and in the form of question answer when in shorthand, by such officers of the Court as may be appointed for the purpose, and shall form part of the record”.

With the advance of technology, in the field of information broadcasting and communication recording of evidence, through video-conferencing was recognized. Such evidence was allowed in the case of ***State of Maharashtra Vs. Dr. Praful B. Desai with P.C. Singh Vs. Dr. Praful B. Desai & Anr. reported in AIR (2003) 4 SCC 601.*** In this case, in a criminal proceeding one Dr. Greenberg of New York USA was sought to be examined through video-conferencing. The complaint was against two Indian doctors of negligently causing the death of the complainant's wife in a Bombay hospital. Prior thereto opinion had been taken by the complainant and his wife from Dr. Greenberg of USA. Whilst lauding the technology of video-conferencing the Supreme Court observed and held the following in Paragraph 20 of the report:

***“Recording of evidence by video-conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the accused.*”**

The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact, the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded courtroom. They can observe his or her demeanour. In fact, the facility to playback would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter evidence by video-conferencing has to be on some conditions”

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Alternatively, Mr. Ghosh submits that the two witnesses should be allowed to adduce their evidence through video-conferencing.

It is true that Order XVIII of the Code of Civil Procedure has not been applied by the Original Side of our High Court. But nobody can say that Order XXVI relating to appointment of a commission is not applicable to the Original Side of our High Court.

When a witness is resident within the jurisdiction of this Court ordinarily he has to prove sickness or infirmity to avoid deposing in open court and to be allowed to be examined on Commission, unless he shows special circumstances as required in rule 4A. There is no such requirement if the witness resides outside the jurisdiction of this Court.

(Order XXVI rules 1 and 4)

It can only be said that by virtue of the amendments to Order XVIII of the Code of Civil Procedure, the right of a party to have a witness examined in Court has been severely curtailed. The effect of ***Panchkari Mitra Vs. Panchanan ;Saha & Ors. reported in AIR 1924 Calcutta 971*** has been diminished. Therefore, the dictum laid down in the said case of a valuable right being taken away, by an Order appointing a commission is no longer true.

Chapter XIV Rule 1 of the Original Side Rules remains a rule more as a result of its escaping the attention of rule makers for amendment, than for anything else. At any rate it remains as a Rule of procedure only, special to this High Court. But of course, subject to Order XXVI.

Therefore, in my opinion, on an application by a person resident outside the jurisdiction of this Court for being examined on commission, this Court has to examine the convenience of the parties. If on consideration of the balance of convenience, it appears, to the court that a witness so situated should be examined on commission it should pass such an Order. But that Order, in my opinion should fully protect the financial interest of the adversary, so that he does not become a loser in terms of money on the examination of a witness outside the jurisdiction of this court, on Commission. In extremely rare cases where the Court does not have confidence in the ability of the Commissioner to note or video record the demeanor of the witness or where even video-recording of the evidence cannot bring out the demeanor which the court would like to see during examination of a particular witness, the Court should refuse such an Order.

In this case, the two attesting witnesses are lawyers. They are partners in a reputed firm of solicitors in New Delhi. They are bound to be heavily pre-occupied in work everyday. In this Court, at this point of

time, it is not possible to allocate a fixed time period for examination of these two attesting witnesses because the Court simply does not have the time at its disposal. If it tries to take out that time it would be at the expense of other litigants.

Moreover, if these two attesting witnesses were examined in this court, they would have to travel frequently to Calcutta, waste a lot of time waiting in Court and sometimes go back doing nothing.

In such a situation, I think, that a commission should be ordered to examine the said two witnesses for the plaintiff. I pass the following order:-

- (a) A commission do issue to examine the two attesting witnesses of the alleged last Will and Testament of Sajani Devi Bhartia made on 8th March, 2007, namely,
 - (i) Ajay Bhargava, Partner, Khaitan & Co., Advocates, 1105 Ashoka Estate, 24 Barakhamba Road, New Delhi- 110 001.
 - (ii) Sharad Vaid, Partner, Khaitan & Co., Advocates, 1105 Ashoka Estate, 24 Barakhamba Road, New Delhi- 110 001.
- (b) The Commission will be held in New Delhi on court holidays common to the Supreme Court of India, Delhi High Court and Calcutta High Court at a venue to be fixed by the Commissioner, not being the working place of the attesting witnesses.
- (c) The entire proceedings are to be video recorded by a professional cameraman, so that the examiner putting the question, the witness giving the answer and the Commissioner are clearly seen. A transcript of the evidence is also to be taken.

- (d) Mr. Rudrajit Nath Ray, a Delhi based advocate is appointed as the Commissioner. He shall be paid remuneration at the rate of Rs.15,000 per sitting of not more than two hours' duration. If a sitting exceeds the said duration he shall be paid remuneration at the rate of Rs.15,000 for every additional two hours or part thereof. The Commissioner will be entitled to appoint and fix the remuneration of his staff.
- (e) The Commissioner shall not have the right to disallow any question or any document. If any objection is raised with regard to asking of a question, he shall record such objection but allow the answer to be given. Similarly, he shall allow documents objected to, to be shown to the witness and tendered, noting the objections. He will also record his observations, if any.
- (f) The Commissioner will file his report by 31st March, 2015 or such extended time, as this court may allow.
- (g) The Registrar of this Court will depute an official or officials to have custody all the records of this case and take them to the venue of the commission and bring them back to this court.
- (h) The report of the Commissioner may be filed with the said officer of this court immediately after the last sitting of the commission. The officer of this court will receive the report in a sealed cover and bring it back to this court along with the other records. The Commissioner will only notify the parties by letter that the report has been filed.

- (i) The fees of the Commissioner, his staff, the rental charges of the venue, the infrastructural costs for this exercise the travelling costs; expenses including hotel and travelling expenses and fees of this court's officers who will be the custodian of the records, as determined by the Registrar Original Side of this Court shall be borne by the plaintiffs.
- (j) The Plaintiffs shall also bear the following extra cost that may be incurred by the caveators to cross-examine the plaintiff's witnesses. The plaintiffs will have to pay for the air fare of two counsel, one senior and one junior and the Advocate-on-record for the caveators, from Kolkata to New Delhi and back, bear their hotel expenses in New Delhi traveling costs and so on, commensurate with their status.

For non-compliance of any of the conditions mentioned above the attesting witnesses would have to be examined in this court.

This application is accordingly disposed of.

Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I.P.Mukerji, J.)