

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

**TESTAMENTARY SUIT NO. 21 OF 2006
IN
TESTAMENTARY PETITION NO. 699 OF 2005**

Mohan Gurbaxani & Anr. .. Plaintiffs
Vs.
Jer Jawhar Thadani .. Defendant

**WITH
ORDINARY ORIGINAL CIVIL JURISDICTION**

SUIT NO. 1186 OF 2004

Jer Jawhar Thadani .. Plaintiff
Vs.
Mohan Gurbaxani & Anr. .. Defendants

Mr.Kirti Munshi i/b B.G. Saraf for plaintiffs in TS/21/2006 and for defendants in S/1186/2004.

Ms.Deepti Panda a/w. Mr.Mitesh Naik i/b M/s. Dhru and co. for defendant no.3.

**CORAM : K.R.SHRIRAM, J.
DATE : 5TH JANUARY, 2017**

P.C.

1 In Examination-in-Chief of PW-3 (Exh.P-3/1), in paragraph 13, the witness has stated as under :

“.....I am producing herewith as Annexure “2” (Colly.) in the compilation of original documents tendered with this affidavit, the letter dated 29.09.2002/30.09.2002 addressed by the deceased to me, the photocopy of the article “Your Questions” sent along with the letter, the draft Indenture of Gift enclosed with the letter as well as the handwritten note addressed by the deceased to Ms. Batul.....”

2 This draft Indenture of Gift addressed by the deceased Ms.Batul, the counsel for the plaintiff states, was not filed with the compilation of documents due to oversight. In the cross-examination by PW-3, Q-84 and Q-85 and the answers thereto read as under :

Attention of the witness is drawn to paragraph 13 of the Affidavit in Examination in Chief (Exhibit P-3/1) and more particularly “ I am producing herewith..... the deceased to Ms. Batul.”

Q.84 : I put it to you that you have not produced the draft Indenture of Gift referred to in the above paragraph?

Ans. : I agree. I have not produced it.

Attention of the witness is drawn to paragraph 13 of the Affidavit in Examination in Chief (Exhibit P-3/1) and in particular the first sentence, ending with “..... executing the Indenture of Gift.”

Q. 85 : I put it to you that the purported calculation of the stamp duty and other charges referred to by you in the above paragraph have also been not produced by you in the present proceedings?

Ans. : I agree. I have not produced it.

3 In re-examination, Q-1 and the answer thereto with the Commissioner's observations read as under :

Attention of the witness is invited to the portion of Paragraph No.13 of the Affidavit in Examination in Chief (Exhibit P-3/1) and more particularly “ I am producing herewith..... the deceased to Ms. Batul” and to the Q.No.84 and the answer thereto.

Q.1 : Can you explain the contradiction between your statement in paragraph No.13 of your evidence Affidavit to which your attention was invited and your answer to Q.84?

Advocate for defendant n.3 objects to the question on the ground that

there is no ambiguity or confusion in Q.Nos.84 and 85 and answers thereto, therefore, no re-examination or clarification of the said question ought to be allowed.

Subject to the objection, the witness is directed to answer the question.

Ans. : Yes. In fact, I had given the draft Indenture of Gift received with the letter dated 29th/30th September 2002 to my Advocates but inadvertently it was not part of the compilation of documents.

4 Shri Munshi for the plaintiff submits that this document, therefore, should be received in evidence subject to cross-examination by the defendants.

Ms.Panda appearing for defendant no.3 objects and states that only defendant no.3 has been appearing as main contesting witness. The counsel further states that this document is being produced only to cover-up the lacuna.

5 Even if I agree with Ms. Panda for a moment, I see no reason why this document should not be received in evidence. The purpose of re-examination is for the explanation of matters which have been brought down in cross-examination. Section 138 of the Evidence Act, 1872 reads as under:

138 Order of examinations.—*Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant*

facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. Direction of re-examination.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

6 An ambiguity can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination he has the liberty to put any question in re-examination to get the explanation. The explanation may be required either when ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If a party who has produced the witness feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course, to the other party cross-examining the witness on those question in re-examination. It would apply to a situation like in the present case. I find support from the judgment of the Apex Court in ***Rammi alias Rameshwar Vs. State of Madhya Pradesh***¹

7 To a specific question put by the Court, Ms.Panda also, in fairness, agrees that if this document has come through the witness at the stage of

1 AIR 999 SCC 3544

examination in chief, the document could have been received in evidence and marked as exhibit. Therefore, the said document is received in evidence and marked as **Exh.P-3/3A**. The defendants are at liberty to cross-examine PW-3 on this document and any other points raised in re-examination.

8 The Commissioner to complete recording of evidence of this witness by 31st January 2017.

The Commissioner to fix minimum two/three dates per session for cross-examining PW-3. If the Advocates do not respond to the Commissioner's communication within 48 hours of receiving the communication suggesting the dates, the Commissioner to go ahead and fix the dates and the Advocates and the witness shall make themselves available on those dates. If the witness or the advocates for the plaintiffs do not turn up, then the evidence of the witness should be closed and if the Advocates for the defendant do not turn up, then the cross-examination of PW-3 should be closed as 'no cross'. Once the dates are fixed, the Commissioner not to grant adjournment to any party on any ground whatsoever unless the situation is so grave that it warrants an adjournment and it should be for reasons recorded.

Shri Munshi states that this is the last witness of the plaintiff. Therefore, within two weeks of receiving of evidence of PW-3, the

Commissioner to file a report with copy to the plaintiff and defendant no.3.

Liberty to apply.

9 Within two weeks of the completion of recording of evidence of PW-3, the defendants to file their affidavit of documents and give inspection of the documents relied upon by them to the plaintiff. Within one week of taking inspection, the plaintiff to file the statement of admission and denial with reasons for denial.

10 Within one week of receiving the statement, the defendant no.3 to file his list of witnesses, affidavit in lieu of examination in chief and also compilation of documents and serve a copy thereof upon the plaintiff.

11 The suit be listed for receiving the documents and evidence of defendant no.3 and/or for marking of documents on 10th March 2017, on which date DW-3 to remain present in Court.

(K.R. SHRIRAM, J.)