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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 29.06.2015**

% **RSA 183/2015**

JAGMOHAN KHERA Appellant

Through: Mr. Pradeep Kumar Kaushik &
Dr.Sunil Kumar, Advocates.

versus

GOPAL KRISHAN KHERA Respondent

Through: Mr. Diwan Singh Chauhan, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

Caveat No.474/2015

1. Since the caveator has put in appearance, the caveat stands discharged.

C.M. No. 8633/2015

2. Exemption allowed, subject to all just exceptions.

3. The application stands disposed of.

C.M. No. 8634/2015

4. This application has been filed to seek condonation of five days delay in filing the present appeal.

5. Subject to all just exceptions, the application is allowed. The delay of five days in filing the present appeal stands condoned.

RSA 183/2015 and C.M. Nos.8631-32/2015

6. This is a regular second appeal under Section 100 CPC to assail the judgment and decree dated 15.12.2014 passed by Sh. Lalit Kumar, ADJ, Saket Courts, New Delhi in RCA No.30/2013.

7. The respondent plaintiff had preferred the suit for possession against the appellant defendant. The parties are siblings, and are both sons of late Sh.S.N. Khera. It is not in dispute that late Sh.S.N. Khera was the owner of the suit property being E-1/207-221, Lajpat Nagar-I, New Delhi – 110024, admeasuring 200 sq.yds.

8. Late Sh.S.N. Khera executed a registered Will dated 11.03.1999 qua the suit property in favour of the respondent/ plaintiff, and disowned the appellant/ defendant from his movable and immovable properties by virtue of a public notice dated 03.12.2000 published in the column of Daily “Pratap” in vernacular language. On the demise of late Sh.S.N. Khera on 09.01.2001, the respondent/ plaintiff claimed to have become absolute owner of the suit property. The respondent plaintiff preferred a probate proceeding in respect of the said registered Will, and Probate was granted on 21.08.2008 by Sh. Ravinder Dudeja, ADJ and the Letters of Administration

were granted by the then District Judge Sh.V.P. Vaish, in favour of the respondent plaintiff. On the strength of the said Probate and Letters of Administration, the respondent plaintiff preferred the suit for possession.

9. The issues were framed by Trial Court on 11.02.2004 and the matter was adjourned for plaintiff's evidence. The plaintiff's evidence was led and closed on 10.08.2004 and thereafter, the matter was adjourned for defendant's evidence. But the defendant failed to adduce any evidence. On 29.09.2004, the defendant's evidence was closed.

10. The defendant then moved an application under Order XVIII Rule 17 CPC, which was allowed by the Trial Court on 23.07.2009, and the defendant was granted one more opportunity to lead his evidence. Pertinently, in the meantime, the defendant/ appellant also moved an application under Order VI Rule 17 CPC for amendment of the written statement which was, however, dismissed on 13.07.2011. The defendant filed affidavits by way of evidence, but did not produce his witnesses for cross-examination before the Trial court despite opportunity being granted. Ultimately, the defendant's evidence was again closed by the Trial Court on 07.01.2012. No steps to assail the order dated 07.01.2012 were taken by the appellant defendant during the pendency of the suit. On the basis of the evidence led by the plaintiff, the suit was decreed by the Trial Court.

11. Before the First Appellate Court, in RCA No.30/2013, the appellant defendant moved an application under Order XLI Rule 27 CPC to lead additional evidence. According to the appellant, the suit property was an ancestral property and could not have been willed by the late father. It was

also argued that the suit property being a leased property from the L&DO, the same could not be willed without prior permission from the L&DO. According to the appellant, the respondent/ plaintiff had fabricated documents, including a General Power of Attorney, Will, and Agreement to Gift, and these documents were not produced before the Trial Court. The appellant claimed before the First Appellate Court that he had become aware of the fact that the said documents had been executed on the stamp paper not procured by late Sh.S.N. Khera or the plaintiff/ respondent on making an application under the Right to Information Act. The First Appellant Court by the impugned judgment dismissed the application under Order XLI Rule 27 CPC as well as the first appeal and re-affirmed the finding of fact with regard to the respondent's title to the suit property.

12. The discussion in the impugned judgment qua the application under Order XLI Rule 27 CPC reads as follows:

*“10. It is well settled law that the application under Order 41 Rule 27 CPC for production of additional documents should be considered at the time of final hearing of appeal on merits. Such application can be filed only on three situations firstly when learned trial court has illegally refused the evidence, although it ought to have been permitted; secondly the evidence sought to be adduced by the party was not available to it despite of the exercise of due diligence and thirdly the additional evidence was necessary in order to enable this court to pronounce the judgment or any other substantial cause or similar nature. However, in the present matter, none of above three situation has been arisen as **it is seen that appellant was already in power and possession of document but failed to prove the same as he did not lead his evidence.** Further it is seen that the suit before the learned trial court was for possession and plaintiff / respondent has proved on record that*

he became the owner of the suit property by virtue of registered Will dated 11.03.1999 executed by his father late Sh. S.N. Khera in his favour. It is further seen that the said Will was duly probated by the court of Sh. Ravinder Dudeja, the then learned Additional District Judge and the Letter of Administration was granted by Sh. V.P. Vaish, the then District Judge, Delhi.

11. Ld. Counsel for the appellant relied upon judgments Mehar Chand & Ors Vs. Lachhmi & Ors. AIR 1994 H.P. 172 wherein it was held that the documents of public nature can be permitted to take as additional evidence. Ld. Counsel for the appellant further relied upon judgment Mritunjaya Lenka & Ors. Vs. Gagan Kishore Swain AIR 1995 Orissa 71 wherein it was held that if the document are of important nature, they can be allowed to bring on the record. The prejudice cause to the respondent by prolonged litigation can be mitigated by directing to pay adequate cost.

12. Here in the present case defendant / appellant had been granted opportunity twice before the learned trial court to lead his evidence, however, he failed to do so. Moreover, the documents which he wants to prove on record was already in his knowledge and not a subsequent document. The facts of the present case are different from the facts of the referred judgement. Ld. Counsel for both the parties relied upon Union of India Vs. Ibrahimuddin & Anr. (2012) 8 SCC 148 of Hon'ble Apex Court wherein it is observed that additional evidence if found to have important bearing on the main issue or necessary to remove any lacuna in evidence and for clearing any doubt for pronouncing the judgment and required in the interest of justice can be taken on record. It is further observed that the appellant court should not ordinarily allowed new evidence to be adduced in order to enable a party to raise a new point in appeal. That inadvertence of the party or his inability to understand the legal issue involved or wrong advise of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a substantial cause within the meaning of the present rule. Mere

fact that the certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal. Considering the facts and circumstances of the case in hand, the above judgment is of no help to the defendant/appellant herein and rather it is supporting the contentions of the plaintiff/respondent herein.

*13. From above discussion it can be held that **defendant / appellant herein cannot be allowed to lead additional evidence when he had already been granted this opportunity twice by the learned trial court.** Hence, this application under Order XLI Rule 27 (aa) & 28 CPC is dismissed being devoid of merit.*

14. It is further seen that the issues were framed by learned trial court on 11.02.2004 and thereafter the matter was adjourned for plaintiff's evidence which was closed on 10.08.2004. Thereafter, matter was adjourned for defendant's evidence but defendant failed to adduce any evidence and on 29.09.2004, the defendant's evidence was closed. After that defendant moved an application under Order XVIII Rule 17 CPC which was allowed by learned Trial Court vide order dated 23.07.2009 and defendant was granted one more opportunity to lead his evidence. In the meantime, before proceeding for defendant's evidence, defendant/appellant moved an application under Order VI Rule 17 CPC for amendment of WS. However, the same was stands dismissed vide order dated 13.07.2011. It is seen that defendant has filed the affidavit of his witnesses, however, he could not bring his witnesses in the witness box despite opportunity granted to him by the learned trial court. Ultimately, the evidence of the defendant was closed on 07.01.2012. The appellant/defendant has not challenged the said order and it remained binding upon the appellant. It is further seen that the appellant again moved an application under Order VII Rule 11 CPC which was also dismissed by learned Trial Court and the appellant has not preferred any appeal or revision.”

(Emphasis supplied)

13. On merits, the First Appellate Court rejected the submission that the registered Will propounded by the respondent/ plaintiff was forged and fabricated, by observing that the appellant/ defendant had failed to explain the steps taken by him to prove that the said documents were forged and fabricated. It was observed that even the Trial Court had not accepted the contention of the appellant with regard to the alleged forgery and fabrication of the documents. Since the title of the respondent plaintiff had been duly established, the decree passed by the Trial Court was affirmed.

14. Learned counsel for the appellant submits that the appellant became aware of the alleged forgery and fabrication only at the appellate stage, and that the First Appellate Court erred in dismissing the appellant's application under Order XLI Rule 27 CPC. He submits that the appellant be granted one more opportunity to lead additional evidence by setting aside the impugned judgment and decree passed by the learned First Appellate Court and remanding the matter to the First Appellate Court.

15. I have heard learned counsel for the appellant, perused the impugned judgment of the First Appellate Court as well as that of the Trial Court and also considered the materials placed on record.

16. This being a regular second appeal, the same would be maintainable only upon this Court finding that a substantial question of law arises for consideration in the case. It is well-settled that in second appeal this Court would not interfere with the concurrent findings of fact. In the present case, the appellant has not been able to show that a substantial question of law has arisen for consideration of this Court. The findings of fact with regard to the

respondent's/ plaintiff's title to the suit property are concurrent inasmuch, as, the Trial Court and the First Appellate Court have both held that the title to the suit property vests with the respondent plaintiff on the basis of the registered Will, which stands duly probated.

17. The dismissal of the appellant's application under Order XLI Rule 27 CPC in the facts and circumstances narrated hereinabove is clearly justified. It is not the appellant's case that the documents that he sought to produce could not have been produced at the Trial Court stage. The trial got prolonged for over eight years on account of the delay in leading evidence on the part of the appellant/ defendant. In fact, his right to lead evidence was initially closed on 29.09.2004, and his application under Order XVIII Rule 17 remained pending for nearly five years and was allowed on 23.07.2009. The appellant defendant was given one more opportunity to lead evidence. Despite the opportunity, he again did not lead any evidence inasmuch, as, his witnesses were not produced for their cross-examination. It appears that he also moved an application in the meantime to amend the written statement – which appears to be a dilatory tactics on his part and the same was dismissed on 13.07.2011. His evidence was finally closed on 07.01.2012 and the appellant defendant accepted the said order during the pendency of the suit.

18. Learned counsel for the appellant submits that it was only when the appellant moved the application under the Right to Information Act that he learnt that the documents, which included the registered Will, had been executed on stamp paper not procured by late Sh.S.N. Khera, or the respondent. It is not explained as to why the application was not moved

during the pendency of the suit, and what prompted the respondent to move that application only at the First Appellate stage. In any event, merely because the stamp paper may not have been obtained by the party who has used the same, and may have been procured at his instance by someone else, would not be a ground to doubt the authenticity of the document itself, particularly when the Will is not even required to be executed on a stamp paper.

19. In these facts & circumstances, no substantial question of law arises for consideration of this Court. Accordingly, this appeal stands dismissed.

VIPIN SANGHI, J

JUNE 29, 2015

B.S. Rohella