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

+ **CS(OS) 1807/2003**

GEETA SANON

..... Plaintiff

Through: Mr. Puneet Agrawal, Advocate

versus

YOGESH KOHLI BC+

..... Defendant

Through: Mr. Siddharth Khattar, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

14.01.2016

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O.A. No.32/2015

This chamber appeal had been preferred to assail the order dated 26.11.2014 passed by the learned Joint Registrar (Judicial) in I.A. No.20517/2014 preferred by the defendant to seek the striking out of the partial testimony of PW-1 and PW-2 as contained in their affidavit by way of evidence towards examination in chief. The learned Joint Registrar has allowed the said application by which the appellant/plaintiff is aggrieved.

A little background of the necessary facts may be stated. The plaintiff has filed the present suit claiming partition of the property belonging to the father of the parties. The stand taken by the defendant in the written statement is that the late father of the parties has left his will in favour of the

defendant. The defendant also instituted a probate petition in the court of the District Judge. In the said probate proceedings, the plaintiff herein has raised all his objections to the said will propounded by the defendant.

When the defendant set up a will in his written statement, the plaintiff has, in his replication, stated that the same is forged and fabricated. Admittedly, the plaintiff has not made detailed averments with regard to the alleged fraud and fabrication of the will in his replication.

After the evidence had been practically concluded in the probate case, the same was transferred to this court and registered as probate case no.66/2013. On 09.07.2014, this court held that it would not be appropriate to club both the cases for purpose of trial. However, it was clarified that the suit and testamentary case will be disposed of together. It was directed that the evidence in the testamentary will be recorded separately.

The status as of today is that the recording of evidence in the testamentary case is also not complete as the evidence of the plaintiff in the suit, who is the objector in the said testamentary case is not yet concluded. It appears that while filing the affidavits by way of evidence towards examination in chief in the present suit, the plaintiffs witness – PW1 is the plaintiff and PW2 is the other non-party witness, have sought to incorporate evidence qua the defence taken in the probate case. It is that aspect which has been expunged by the learned Joint Registrar while passing the impugned order.

Since there are no specific pleadings contained in the suit, i.e. either in the plaint or in the replication of the plaintiff qua the grounds on which the will is claimed to be forged and fabricated, in my view, the learned Joint Registrar was justified in passing the impugned order, qua evidence sought

to be led by plaintiff as PW-1, as it is well settled that no evidence can be led by a party beyond the pleadings. However, the said principle would not apply qua PW-2, who is not the plaintiff and claims to be an independent witness.

At the same time, I may observe that the issue with regard to the validity and enforceability of a will is to be decided in the probate proceedings and the findings returned by the court in probate case would bind the parties in the suit on the said aspect. Thus, there was, in fact, no necessity in the first place on the part of the plaintiff to assail the will either in the plaint or in the replication by making detailed averments.

Accordingly, the present appeal is partially allowed inasmuch, as, the paragraphs expunged from the affidavit of PW-2 are restored, while the order is upheld qua the expungement made in the affidavit of PW-1 in paras 8 to 13 and 15.

The appeal stands disposed of with the aforesaid observations.

I.A. No.3122/2015

In view of the order passed in O.A. No. 32/2015, learned counsel for the plaintiff does not press this application. Accordingly, the same is dismissed as withdrawn.

CS(OS) 1807/2003

In view of the notification No.2718/DHC/Orgl. dated 25.11.2015, issued under Section 4 of the Delhi High Court (Amendment) Act, 2015 (Act 23 of 2015), at the request of the counsels for the parties, the present suit is transferred to the Court of the District Judge (South), Saket Courts for further proceedings before the competent court on 01.04.2016.

It is made clear that as both sides are duly represented today, no fresh

notice for appearance shall be issued and the parties shall ensure their presence before the concerned Court on the aforesaid date.

It is pointed out by learned counsel that Test Case No.66/2013, which was initially filed before the District Judge, had been transferred to this court and clubbed with the present suit on 09.07.2014. This court had ordered that the present suit and the testamentary case shall be disposed of together, while the evidence in the testamentary case was directed to be recorded separately.

Since the testamentary case was transferred to this court only on account of pendency of the present suit before this court, I direct that along with the present suit the said Test. Case no.66/2013 be also transferred to the court of the District Judge.

A copy of this order be placed in the file of Test. Case No.66/2013 by the registry, and the same shall also be transferred simultaneously.

VIPIN SANGHI, J

JANUARY 14, 2016

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