

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

% **Date of decision: 25th August, 2017**

+ **CM(M) No.915/2017 & CM No.30638/2017 (for stay)**

NEELAM VERMA

..... Petitioner

Through: Ms. Geeta Luthra, Sr. Adv. with Mr.
Rajiv Kumar and Mr. Prateek Yadav,
Advs.

Versus

CHAKRESH KUMAR

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

CM No.30639/2017 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

CM(M) No.915/2017 & CM No.30638/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order [dated 24th July, 2017 in PC No.01/12 (New No.16018/16) of the Court of Additional District Judge (West)-02, Tis Hazari Courts, Delhi] of dismissal of the application of the petitioner for recall and re-examination of the witness P.K. Joshi examined by the petitioner.
4. The petitioner has filed the Probate Case, from which this petition arises, seeking probate of the document dated 15th February, 2011 as the validly executed last Will of Shri Virender Kumar Verma who died on the same day i.e. 15th February, 2011.

5. The petitioner, in proof of the document claimed to be the Will, examined one P.K. Joshi as PW-2 and who was cross-examined by the counsel for the respondent.

6. The petitioner, thereafter filed an application under Order XVIII Rule 17 of the Code of Civil Procedure, 1908 (CPC) pleading, (i) that the petitioner, after PW-2 P.K. Joshi had been examined cross-examined and discharged, visited the house of PW-2 P.K. Joshi on the occasion of the birthday celebrations of the granddaughter of PW-2 P.K. Joshi; (ii) that the petitioner, on the said occasion enquired from PW-2 P.K. Joshi the circumstances of execution of the document of which probate is sought; (iii) PW-2 P.K. Joshi then revealed that he was handed over a copy of the typed Will, newspaper dated 5th January, 2008 through which the deceased Virender Kumar Verma had debarred his son and one handwritten document in which details of other properties were mentioned, by the deceased Virender Kumar Verma in the morning of 15th February, 2011; (iv) that the petitioner also came to know that the deceased Virender Kumar Verma, after handing over the aforesaid documents to PW-2 P.K. Joshi had requested PW-2 P.K. Joshi to get typed a Will after changes and PW-2 P.K. Joshi had acted upon the instructions of the deceased Virender Kumar Verma; (v) that the petitioner asked PW-2 P.K. Joshi as to why PW-2 P.K. Joshi did not depose the said facts and did not bring the documents(claimed to be possessed by him) to the Court at the time of his deposition; (vi) PW-2 P.K. Joshi replied, that he had brought the documents with him to the Court but since the counsel for the respondent did not ask the PW-2 P.K. Joshi about the same, he did not depose about the same; (vii) the petitioner got frustrated

and asked PW-2 P.K. Joshi to depose the true facts before the Court; (viii) PW-2 P.K. Joshi however is not ready, stating that he will not get into any kind of harassment or disturbance by coming again and again to the Court; (ix) that the PW-2 P.K. Joshi has however handed over the original paper in which details of the properties are mentioned and the copy and typed Will on the basis of which he got typed the Will dated 15th February, 2011, to the petitioner; (x) that the petitioner did not have the knowledge of the aforesaid facts and the documents through which the deceased had debarred his son; (xi) that examination of PW-2 P.K. Joshi is essential for proper adjudication of the matter; and, (xii) recalling of PW-2 P.K. Joshi is necessary and if he is not re-examined, the petitioner will suffer irreparable injury.

7. The counsel for the respondent opposed such re-examination of PW-2 P.K. Joshi stating that the deceased Virender Kumar Verma was not in a position to move and talk due to his precarious physical condition and had been put on inotropic medicines i.e. life support medicines; according to the testimony of PW-2 P.K. Joshi also, the deceased was being provided oxygen to breathe properly; it was further contended that the petitioner was attempting to fill up the lacunae in his case and which was not permissible.

8. The learned Additional District Judge / Probate Court has dismissed the application reasoning (i) that the document where the details of movable properties such as fixed deposits and other income schemes and life insurance are mentioned, does not bear any date and signatures; (ii) similarly, the typed copy also is neither signed nor bears any signatures; (iii) the newspaper cutting dated 5th January, 2008 is contrary to the record; the petitioner herself when appeared in the witness box proved the original copy

of newspaper Ex.PW1/1 whereby respondent was debarred; (iv) now a new story was being developed; (v) in the pleadings, there is no plea of preparation of Will of deceased Virender Kumar Verma, details of FDRs, LIC policies and other saving schemes and typing of the draft Will; (vi) PW-2 P.K. Joshi, while appearing as a witness had all opportunity to depose about these facts in the Court; (vii) now attempt was being made to fill up lacunae and gaps which appeared after detailed cross-examination of PW-2 P.K. Joshi; (viii) there is no provision of law which permits a party to re-examine the witness to fill up the lacunae and to produce documents; (ix) it is for this reason only that the legislature in its wisdom has repealed Order XVIII Rule 17A of the CPC; and, (x) that reliance placed by the senior counsel for the petitioner on *K.K. Velusamy Vs. N. Palanisamy* (2011) 11 SCC 275 was not apposite.

9. The senior counsel for the petitioner has argued, that the petitioner by re-examining the witness is not seeking to fill up the lacunae but is only wanting the witness to depose true facts which the witness had not told to the petitioner and which were earlier not known to the petitioner. It is further contended that there is nothing in law which bars further examination of a witness in such circumstances. Reliance is placed on:-

- (a) *K.K. Velusamy* supra holding that in the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for the purposes other than securing clarification required by the Court, the inherent power under Section 151, subject to its limitations, can be invoked in appropriate cases to re-open the evidence

and/or recall witnesses for further examination; that inherent power of the Court is not affected by the express power conferred upon the Court under Order XVIII Rule 17 of the CPC; that the deletion of Order XVIII Rule 17A of the CPC does not mean that no evidence can be received at all, after a party closes its evidence and it only means that the amended structure of the CPC found no need for such a provision;

- (b) ***Lata Sharma Vs. K.R. Saini*** (2015) 224 DLT 469, where the plaintiff, after closure of her evidence and closure of the defence evidence, was in a suit for recovery of possession of immovable property and *mesne* profits, was permitted to summon a witness to prove the documents of title in favour of the plaintiff;
- (c) ***Indian Heritage Research Foundation Vs. State*** MANU/DE/2590/2016, where, in a Probate Case, the petitioner was permitted, after closure of its evidence, to summon the record of the Sub Registrar to prove the factum of registration of a Will; and,
- (d) ***Amrish Agarwal Trading as Mahalaxmi Product Vs. Venus Hom Appliances Pvt. Ltd.*** 2017 SCC OnLine Del 8184 where the defendant was permitted to recall one of its witnesses to produce original documents.

10. The question, in my view is not whether the Court is empowered to recall a witness or not. I also have in ***Himalayan Heli Services Pvt. Ltd. Vs.***

Himachal Helicopter Skiing Pvt. Ltd. 2017 SCC OnLine Del 9749, relying besides on *K.K. Velusamy* supra also on *Paramount Enterprises Limited Vs. S.D. Surie* (2014) 14 SCC 542 and *Ram Rati Vs. Mange Ram* (2016) 11 SCC 296, refused to interfere with the order of the Additional District Judge allowing the application of the plaintiff for recalling of the order closing the evidence of the plaintiff.

11. The question is, whether in the facts and circumstances of the present case, the petitioner is entitled to recall a witness to the Will who has earlier been examined, cross-examined and discharged.

12. A document as a Will, vide Section 68 of the Indian Evidence Act, 1872, can be proved only by a witness thereto, if alive and not by the propounder thereof. Execution of a Will, vide Section 63 of the Indian Succession Act, 1925, requires the person making the Will to sign the document intended to be the Will at such a place as to show that it is intended to give effect to the writing contained therein and further requires the Will to be attested by two or more witnesses, each of whom has seen the testator sign the Will and further requires each of the witnesses to sign the Will in the presence of the testator. Needless to state that proof of Will requires all the said requirements/ingredients to be proved.

13. PW-2 P.K. Joshi, in his examination-in-chief recorded in the Court (as distinct from by way of affidavit of examination-in-chief) deposed that the document was executed in his presence and in the presence of witnesses Shri Praveen Kumar Saini and Shiv Shakti Pandey. In his cross-examination, he deposed (i) that the petitioner, on 14th February, 2011 called him at his home from her home; (ii) that he first went to the house of the petitioner and

therefrom he, the petitioner and Mr. Ramesh went to the hospital in the Emergency Section; (iii) that only three of them were present in the Emergency Section of the hospital; (iv) that the deceased Virender Kumar Verma was admitted in hospital by him on 14th February, 2011; (v) on 14th February, 2011, while the deceased Virender Kumar Verma was being examined by the doctors in the Emergency Section, he, the petitioner and Mr. Ramesh were standing outside; (vi) that he himself did nothing and no writing or signing work was done by him on 14th February, 2011; (vii) that from 14th February, 2011 till the dead body of the deceased was brought home, he remained in the hospital; the petitioner also remained there with him throughout; the petitioner however went out from the hospital on 15th February, 2011 for a while for withdrawing money; from 14th February, 2011 to 15th February, 2011 he might have visited the Intensive Care Unit (ICU) seven-eight times and every time stood there for one or two minutes; (viii) that in the ICU, an attendant can go at a time fixed by the hospital and frequent visits are not possible; (ix) that he signed the Will in the ICU; (x) that the Will was got typed in Rohini Court on 15th February, 2011 at about 11 or 11.30 am; (xi) he himself got the Will typed from Rohini Court but could not tell the name of the typist; (xii) the petitioner was not with him when the Will was being typed; (xiii) when the Will was being typed, the deceased Virender Kumar Verma was also not with him; (xiv) that he gave the typed Will to the deceased at about 12.30 or 1 pm and at that time, he and the deceased Virender Kumar Verma were present in the ICU; no doctor, nurse or any employee of the hospital was present around the bed of the deceased Virender Kumar Verma; and, (xv) that he did not take the paper on which the Will was typed.

14. A perusal of the testimony already recorded of PW-2 P.K. Joshi clearly shows that it is not as if the PW-2 P.K. Joshi did not have opportunity to depose what he is now seeking to be recalled for to depose.

15. Rather, it is quite evident that the petitioner wants to recall PW-2 P.K. Joshi, being under apprehension that the testimony of PW-2 P.K. Joshi may not prove the Will. The question thus is whether the petitioner can be said to be so entitled to.

16. None of the judgments cited by the senior counsel for the petitioner are on such facts. In fact **K.K. Velusamy** itself holds that such exercise should only be permitted to do what is 'right' and to undo what is 'wrong' and if the ends of justice warrant it and only where the application is found to be *bona fide*.

17. I have in **Jatinder Singh Bhatia Vs. State** AIR 2009 Del 54 held (i) that the principle of finality attaches not only to final disposal of a *lis* but also to each segment of the proceedings; (ii) there is no reason not to apply the said principles for examination of witnesses also; (iii) once a witness has been examined and discharged, he cannot be permitted to be recalled on the ground that the witness has changed his statement or has changed his mind or that he earlier did not tell the truth; (iv) trial often spans over months/years and if such a practice is to be allowed / encouraged, it will lead the parties to pursue the witness to depose in their favour, not only before their appearance in the court but even after they have appeared and deposed; (v) the Division Bench of this court in Jessica Lal murder case 135 (2006) DLT 505 has noticed the trend of the witnesses turning hostile and held that Courts must put an end to this kind of attitude, of witnesses turning hostile in

order to thwart the course of justice; and, (vi) that we will be encouraging the trend of witnesses turning hostile if applications such as the one in that case and the application as has been filed by the petitioner in the present case are to be allowed; and, (vii) rather such conduct shows that the witness is in truck with the party seeking to examine him and recall of the witness is an artifice.

18. The main edifice for recalling PW-2 P.K. Joshi is of PW-2 P.K. Joshi having not had an opportunity to depose about the same earlier. However, as found by me hereinabove, the PW-2 P.K. Joshi, in his examination-in-chief and his cross-examination, had full opportunity to depose what is now being pleaded but did not so depose and the only inference is that the attempt to recall the witness is to improve the case and which cannot be permitted.

19. There is no merit in the petition.

Dismissed.

No costs.

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RAJIV SAHAI ENDLAW, J.

AUGUST 25, 2017

‘pp’..

(Corrected & released on 27th January, 2018)