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

+ CM(M) 1158/2017

LT. GEN . SATWANT SINGH DAHIYA & ANR Petitioners

Through: Mr. Shankar Vaidialingam & Mr.
Shivain Vaidialingam, Advs.

Versus

SHAKUNTALA DAHIYA J& ORS Respondents

Through: Mr. L.K. Singh, Adv. for R-1.
Mr. S.K. Singh, Mr. Ashish Kumar &
Mr. Rameezuddin Raja, Advs. for R-
2&3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **27.10.2017**

CM No.37621/2017 (for exemption)

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

CM(M) No.1158/2017 & CM No.37620/2017 (for stay)

3. This petition under Article 227 of the Constitution of India impugns the order [dated 27th September, 2017 in CS No.57610/2016 of the Court of Additional District Judge-03, New Delhi District, Patiala House Courts, New Delhi] dismissing the application of the petitioners / defendants no.1 and 4 in the suit to the effect that the respondents / defendants no.2&3 in the suit having examined three witnesses before appearing themselves as witnesses and / or before tendering their affidavits by way of examination-in-chief, are now not entitled to examine themselves as witnesses in the suit.
4. On enquiry, it is informed that the suit, from which this petition arises, has been filed by the respondent no.1, being the second wife of the

deceased, for partition of the estate of the deceased; the petitioner / defendant no.1 is the son of the deceased from the first wife of the deceased and the petitioner / defendant no.4 is a company under the control and management of the petitioner / defendant no.1 and in which the deceased owned shares; the respondents no.2&3 are son and daughter respectively of the deceased from the second marriage of the deceased with the respondent no.1.

5. The counsel for the petitioners / defendants no.1 and 4 has argued i) that the respondents / defendants no.2&3, after 11 years of the institution of the suit, produced a Will of the deceased; ii) that the respondents / defendants no.2&3 were ordered to lead evidence first; iii) in the order appointing Court Commissioner for recording evidence, it was specified that the parties will appear first if intending to examine themselves, before examining any witnesses; iv) that the respondents / defendants no.2&3 however, before filing their affidavits by way of examination-in-chief, examined one witness from the office of the Sub-Registrar where the document claimed by them to be the Will is registered and another witness from another Sub-Registrar where the document claimed by the respondents no.2 & 3 to be a Trust Deed was registered and one attesting witness to the document claimed to be the Will; v) that the respondents / defendants no.2 & 3 have not given any sufficient reason for examining the aforesaid witnesses before themselves; vi) that the respondents / defendants no.2&3 are thus now not entitled to examine themselves as witness.

6. I have enquired from the counsel for the petitioners / plaintiffs, whether not the main issue in the suit is with respect to the document claimed

by the respondents / defendants no.2&3 to be the Will of the deceased.

7. The counsel for the petitioners / defendants no.1 and 4 admits, though states that there are some ancillary issues also with respect to the extent of the estate and the petitioners / defendants no.1 and 4 has also propounded a Will.

8. Once the main issue in the suit is with respect to a document claimed to be the Will and which can be proved only by the attesting witness and not ordinarily by the propounder, no error is found in the respondents / defendants no.2&3 having examined the attesting witness to the Will before examining themselves.

9. As far as the official witnesses from the office of the Sub-Registrars of documents are concerned, they are merely for production of the record and their examination is immaterial.

10. The counsel for the petitioners / defendants no.1 and 4 of course states that the said witnesses from the Sub-Registrars office made statements beyond production of documents and on which statements, respondent / defendant no.3 in her affidavit by way of examination-in-chief is relying.

11. The said aspect is not to be considered at this stage. It will be open to the counsel for the petitioners / defendants no.1 and 4 to urge so at the time of final arguments.

12. Rule 3A of Order XVIII is not an absolute rule. Though the counsel for the petitioners / defendants no.1 and 4 upon asking has drawn attention to the order sheets when the witnesses aforesaid were examined but the same is not found to contain any objection of the petitioners / defendants to their examination before the respondents / defendants no.2&3; though

subsequently an application is stated to have been filed.

13. The stand of the petitioners / defendants no.1 and 4 and which has been pursued till this Court is found to be dilatory.

14. I have enquired from the counsel for the petitioners / defendants no.1 and 4, whether the petitioners / defendants no.1 and 4 are in possession of the estate of the deceased.

15. The counsel for the petitioners / defendants no.1 and 4 states that the petitioners / defendants no.1 and 4 are in possession of all three properties of the deceased.

16. That explains the aforesaid dilatory conduct to delay the disposal of the suit, to continue in possession of the property.

17. The counsel for the petitioners / defendants no.1 and 4 states that in fact it is the respondent no.1, plaintiff and the respondents / defendants no.2 and 3 who have been delaying the disposal of the suit.

18. On request of the counsel for the petitioners / defendants, it has been enquired from the counsel for the respondents / defendants no.2 and 3 appearing on advance notice, whether the respondent / defendant no.2 also wants to examine himself.

19. The counsel for the respondents / defendants no.2 and 3 states that the respondent / defendant no.2 is not to be examined.

20. There is no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

OCTOBER 27, 2017

‘gsr’ ..

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