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

+ CM(M) 1185/2017

PRIYAM BATRA (DECEASED) THROUGH LRS Petitioner
Through: Mr. Karan S. Thukral, Mr. Rohit
Yadav and Mr. Kapil Kumar, Advs.

Versus

NAVKETAN COOPERATIVE GROUP HOUSING
SOCIETY LTD & ANR Respondents
Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **27.10.2017**

CM No.38384/2017 (for exemption)

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

CM(M) 1185/2017 & CMs No.38382/2017 (for stay) & 38383/2017 (for condonation of 84 days delay in filing)

3. This petition under Article 227 of the Constitution of India impugns the order [dated 3rd May, 2017 in CS No.7703/2016 of the Court of Additional District Judge (ADJ)-03 (South), Saket Courts, New Delhi] to the extent the same allows the application of the respondent/defendant No.2 Ram Milan Dubey under Order XVIII Rule 16 of the Code of Civil Procedure, 1908 (CPC).

4. The petitioner/plaintiff has instituted the suit, from which this petition arises, *inter alia* for declaration that a document dated 30th December, 2008 claimed by the respondent/defendant No.2 to be the validly executed last Will of Smt. Mohinder Kumari Sood, stated to be the aunt of the father of the petitioner/plaintiff, is null and void. Though the petitioner/plaintiff along with this petition has not filed the copy of the order framing issues in the suit but has on asking, handed over a copy of the order dated 4th May, 2016 in the suit framing issues and which discloses the respondent/defendant No.2 to have also filed a Counter-Claim to the suit of the petitioner/plaintiff and an issue to have been framed qua the said document dated 30th December, 2008 and the onus of proof whereof is on the respondent/defendant No.2.

5. The respondent/defendant No.2 filed the application under Order XVIII Rule 16 of CPC, aggrieved from the order allowing which this petition has been preferred, stating (i) that one of the attesting witnesses to the document dated 30th December, 2008 namely S. Raman Sachdeva is suffering from kidney failure and is on dialysis since the year 2012 and is in such a condition that his life may come to an end at any moment of time; (ii) that the evidence of the said attesting witness is very necessary for the respondent/defendant No.2 to discharge the onus of the issue framed in the suit and the counter-claim; (iii) that the petitioner/plaintiff is not co-operating in progress of the suit and has not started leading her evidence and is trying to delay the suit at each and every stage. Pleading so, permission to immediately examine S. Raman Sachdeva was sought.

6. The counsel for the petitioner/plaintiff has argued that apprehension of death cannot be a cause within the meaning of Order XVIII Rule 16 of CPC.
7. The application aforesaid was supported with the affidavit of the respondent/defendant No.2 affirming the medical condition of the witness sought to be examined and was accompanied with certificates issued by hospitals about the medical condition of the witness sought to be examined.
8. The learned ADJ, in the impugned order, has allowed the application observing that the medical certificates placed on record by the respondent/defendant No.2 suggested that the witness sought to be examined immediately, was suffering from serious life-threatening diseases.
9. The counsel for the petitioner/plaintiff has argued that the petitioner/plaintiff, in the reply filed to the application had disputed the medical certificates filed by the respondent/defendant No.2. It is contended that when the said medical certificates were disputed by the petitioner/plaintiff, the learned ADJ could not have believed the same without proof thereof before the Court.
10. I am unable to agree.
11. Order XVIII Rule 16 of CPC is as under:

“16. Power to examine witness immediately—(1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.”

12. I have enquired from the counsel for the petitioner/plaintiff as to what is wrong with the order allowing the application aforesaid. In my opinion, there can be no better cause for immediate examination than the imminent death of an attesting witness to a document which is in issue in the suit.

13. An application under Order XVIII Rule 16 of CPC has a sense of urgency inherent in it. If it were to be held that the Court, to satisfy itself of existence of the cause for allowing immediate examination of witness, is first required to record evidence to prove existence of the cause, then even in the event of the Court ultimately finding the cause to exist, it may be too late for the evidence of the witness, who was sought to be immediately examined, being recorded. I am thus unable to agree with the contention of the counsel for the petitioner/plaintiff that the Court should first record evidence to determine existence of the cause cited.

14. The counsel for the petitioner/plaintiff has then referred to ***Laxmibai Vs. Bhagwantbuva*** (2013) 4 SCC 97, wherein it was held, in the context of the appellant who was 70 years of age and hale and hearty and not suffering from any serious ailment and was not on death bed, that there was no occasion for her to file an application under Order XVIII Rule 16 CPC as mere apprehension of death of a witness cannot be a sufficient cause for immediate examination of the witness. It was observed that apprehension of death applies to each and every witness, whether young or old, as nobody knows what will happen at the next moment.

15. The counsel for the petitioner/plaintiff has also relied on *Bishnupriya Devi Vs. Ashoka Crokeries Ltd.* 2013 SCC OnLine Ori 288, where a learned Single Judge of the High Court of Orissa, finding that there were discrepancies in various documents as to the age of the witness, held that the Suit Court wrongly exercised the jurisdiction under Order XVIII Rule 16 of CPC, thereby giving a go-by to the procedure under Order XVIII Rule 16 of CPC.

16. Neither the Supreme Court nor the High Court of Orissa in either of the aforesaid two judgments can be said to have unequivocally held that imminent death cannot be a ground for invoking the power under Order XVIII Rule 16 of CPC. I am constrained to observe that the counsel for the petitioner/plaintiff is reading the observations of the Supreme Court out of context. The observation that apprehension of death cannot be a sufficient cause for immediate examination of a witness was made in the context of a witness who, though 70 years of age, was hale and hearty and not suffering from any serious ailment and not on death bed. The position here is converse. The witness who has been permitted to be immediately examined was stated to be suffering from kidney failure and undergoing dialysis thrice a week for over one year prior to the filing of the application. The same would qualify as 'suffering from a serious ailment', and which the witness, subject matter of the case before the Supreme Court, was not found to be suffering from. The present was thus not a case of a mere apprehension of death which can strike anyone at any time, young or old and ailing or ailment-free.

17. Moreover, the Supreme Court as well as the High Court, both have reasoned that the power under Order XVIII Rule 16 of CPC is discretionary. Once it is found that the discretion exercised by the learned ADJ in allowing the application has not been perversely exercised and is based on reason, no case for interference therewith in exercise of powers under Article 227 of the Constitution of India is made out. Of course, the perception of different persons of the severity of the ailment may be different. However, merely because in the perception of the learned ADJ, the ailment of kidney failure resulting in dialysis thrice a week for over one year, was cause for immediate examination under Order XVIII Rule 16 of CPC, does not allow this Court, even if were to have a different perception, to interfere with the order.

18. The counsel for the petitioner/plaintiff has then contended that the impugned order, by allowing the application, upsets the course provided in law for recording of evidence. It is stated that the petitioner/plaintiff is to first lead her evidence; thereafter the respondent/defendant No.2 has to first appear as a witness, if desires to examine himself and only thereafter can examine other witness.

19. The whole purpose of Order XVIII Rule 16 of CPC is to allow examination of any witness in contravention of the provisions in the earlier Rules of Order XVIII of CPC of the chronology of recording evidence. Thus, the said argument is not available. Moreover, on a reading of the issues framed in the suit and the counter-claim, it appears that the outcome of the suit and the counter-claim mainly depends upon proof of the document dated 30th December, 2008 as the validly executed last Will of

Smt. Mohinder Kumari Sood. The said document has been propounded by the respondent/defendant No.2 and onus of proof thereof is on the respondent/defendant No.2. Even though the respondent/defendant No.2 may have propounded the said document, in accordance with law (Section 68 of Indian Evidence Act, 1872), the document claimed to be the Will is required to be proved by the attesting witnesses thereto and not by the propounder thereof. For this reason, in my opinion, whenever the main issue in a *lis* is the proof of a Will, generally, the attesting witnesses are entitled to be examined before the examination of the propounder thereof. Also, Rule 3A of Order XVIII of CPC, requiring a party who desires to appear as a witness to appear before other witnesses on his behalf are examined, is not mandatory and the Rule itself empowers the Court to, for reasons to be recorded, permit the party to appear as his own witness at a later stage; the rule is directory and not inviolable.

20. The last contention of the counsel for the petitioner/plaintiff is that the document dated 30th December, 2008 is purported to be attested by another witness also and can be proved by the other witness who is “alive and kicking”.

21. I am unable to agree. Merely because the law permits proof of a document claimed to be the Will by examining one of the attesting witnesses thereof, cannot come in the way of the propounder of the said document, if so desires, examining both witnesses or choosing the attesting witness he wants to examine. The said right of the propounder of the document cannot be taken away.

22. I have enquired from the counsel for the petitioner/plaintiff as to what is the prejudice which the petitioner/plaintiff is likely to suffer by examination first of the aforesaid witness and for which purpose the suit is informed to be listed today.

23. No reply has been forthcoming.

24. Rule 3A was incorporated vide the Amendment of the year 1976 of the CPC, on the recommendation of the Law Commission, to prevent the mischief of litigants examining other witnesses first and later covering up the gaps by examining themselves. Once it is found that no such mischief will occur, under Rule 3A, permission can be granted.

25. There is no merit in the petition.

26. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

OCTOBER 27, 2017

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(corrected & released on 8th December, 2017)