

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

% *Date of decision: 26th November, 2018*

+ **FAO(OS) 170/2018, CM Nos. 48425-48426/2018**

AMRIT SRINIVASAN

..... Appellant

Through: MJr. Siddharth Yadav, Adv. with
Mr. Washim & Mr. Mohit, Adv.

versus

SIMRIN SINGH & ORS

..... Respondent

Through:

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM No. 48426/2018 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

FAO(OS) 170/2018

1. The present appeal has been filed by the appellant challenging the order dated October 04, 2018 passed by the learned Single Judge in CS(OS) No. 2258/2010 whereby the learned Single Judge has allowed the PW 4 to withdraw his affidavit by way of evidence and listed the matter before the Joint Registrar for inspection of the relevant document i.e the original Will dated June

05, 1996 and permitted PW 4 to file a fresh affidavit by way of evidence.

2. It is the submission of Mr. Siddharth Yadav, learned counsel for the appellant that the procedure evolved by the learned Single Judge is not in conformity with the provisions of the CPC and the law laid down by the Bombay High Court in the case titled as ***Banganga Cooperative Housing Society Ltd. v. Mrs. Vasanti Gajanan Nerurkar 2015 SCC OnLine Bom 3411.***

3. According to him, the learned Single Judge could not have allowed withdrawal of the affidavit by way of evidence. At the most, he should have permitted the PW 4 to see the relevant document and file an additional affidavit, if any.

4. The aforesaid submission made by Mr. Yadav does not impress us for the reason that the said procedure was evolved by the learned Single Judge on a submission made by the learned Senior Counsel appearing for the appellant before the learned Single Judge, which is recorded in para 5, which we reproduce as under:-

“5. Learned senior counsel for defendants No.1 and 2 submits that the proper course in such cases is to first show the relevant document to the witness and thereafter, permit

him to file the affidavit by way of evidence and the statement of the witness with respect to the document has to be incorporated in the affidavit itself.”

5. In fact, the said order was passed by the learned Single Judge in the Court. If the counsel for the appellant had any objection with regard to the procedure evolved by the learned Single Judge, he should have objected to it. During the course of submission, Mr. Yadav has stated that it was never the case of the appellant during the hearing before the learned Single Judge that the PW 4 should be allowed to withdraw the affidavit by way of evidence and file a fresh one. This submission of Mr. Yadav is not borne out from the record. There is no averment made in the appeal in that regard. The apprehension expressed by Mr. Yadav that PW 4 may resile from the affidavit earlier filed by him in the proceeding is also misplaced, inasmuch as in para 10 of the order, the learned Single Judge has stated as under:-

“10. As recorded in the order dated 11th January, 2017, the filing of the fresh affidavit shall not be prejudicial to the rights of the defendants to be refer to the affidavits being permitted to be withdrawn for the purpose of cross-examination of the witness.

The aforesaid conclusion of the learned Single Judge protects the interest of the appellant.

6. Insofar as the plea of Mr. Yadav that the procedure evolved by the learned Single Judge is not in accordance with the provisions of CPC and the law laid down by the Bombay High Court in *Banganga Cooperative Housing Society Ltd. (supra)*, suffice it to state that the Bombay High Court in the said case has held that once an evidence affidavit is filed, the examination-in-chief of the deponent has, for all intents and purposes, begun. It may be permissible for the deponent to file a further affidavit, since Order XVIII Rule 4 does not limit itself to a single affidavit. In other words, there cannot be any withdrawal of evidence by way of affidavit, just as there can never be withdrawal of examination in chief recorded directly in Court.

7. Having noted the conclusion of the Bombay High Court, in the facts of this case and in view of our conclusion above, we are of the view, the reliance placed on the judgment is misplaced. The interest of the appellant has been protected.

8. We do not see any merit in the present appeal. The same is dismissed.

CM No. 48425/2018 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

NOVEMBER 26, 2018/ak

