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

Date of decision: 09.10.2023

+ CM(M) 1256/2023 & CM APPL. 40099/2023

INDU BHUTANI

..... Petitioner

Through: Mr. Sanjeev Kumar Dubey, Sr.
Advocate (Through VC) alongwith
Mr. A.K. Sen and Ms. Shazia and Mr.
Asif Inam, Advocates

versus

RAKESH KAPOOR & ORS.

..... Respondents

Through: Ms. Zeba Khair and Ms. Ananya
Garg, Advocates

%

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. This petition filed under Article 227 of the Constitution of India impugns the order dated 11.07.2023 passed by the ADJ, South District, Saket Court, New Delhi ('Trial Court') in CS DJ No. 7440/2016 titled as "**Rakesh Kapoor & Ors. v. Indu Bhutani**" whereby the Trial Court has dismissed the application filed by the Petitioner herein under Order 18 Rule 5 read with Section 151 of the Code of Civil Procedure, 1908 ('CPC') for leading additional evidence.

1.1. The Petitioner herein is the defendant and the Respondents herein are the plaintiffs in the suit filed under section 34 of Special Relief Act, 1963 seeking a declaration that the Will dated 25.11.1997 alleged to have been



signed by Smt. Shanti Devi Kapoor ('said Will') is null and void.

2. The learned senior counsel for the Petitioner states that the Petitioner herein by her application dated 10.02.2023 is not seeking recall of any of the plaintiff witnesses or the defendant witnesses; instead, she is seeking direction for producing additional witness. He states that the Petitioner proposes to summon Mr. Madan Khanna as an additional witness.

2.1. He states that the Petitioner herein is relying upon the registered Will dated 25.11.1997 executed by late Smt. Shanti Devi and it is the case of the Petitioner herein that she realised on 07.01.2023 that Shri. Madan Khanna had accompanied late Smt. Shanti Devi Kapoor to the office of the Sub-registrar, Mumbai on 25.11.1997 for registration of the said Will.

3. In reply, the learned counsel for the Respondents states that the application filed by the Petitioner is neither maintainable in law nor *bona fide* in nature.

3.1. She states that in the facts of this case, the Trial Court permitted Petitioner i.e., the defendant to lead evidence in the first instance; and she, in fact, lead evidence from July, 2016 till January, 2018 and produced as many as three (3) witnesses i.e., DW-1, DW-2 and DW-3.

3.2. She states, thereafter, the Respondents herein i.e., the plaintiffs lead their evidence from February, 2018 and concluded the same in October, 2018; thereafter, the matter was set down for final arguments.

3.3. She states that at this belated stage on 12.11.2018, the Petitioner herein i.e., the defendant filed an application for leading additional evidence of two (2) witnesses who were examined as DW-4 and DW-5. The Petitioner sought liberty to lead evidence of DW-4 on account of the fact that the attesting witnesses to the said Will had expired in May, 2017 and,



DW-4 was the son of one of the attesting witnesses.

3.4. She states that in 2018 as well, the Trial Court permitted the Petitioner to lead additional evidence, even though it was belated and thereafter, the evidence was closed; and the matter was once again set down for final arguments.

3.5. She states that the Respondents herein duly addressed the final arguments on 14.10.2022 and 01.12.2022 and concluded the same.

3.6. She states that thereafter, the matter was set down for the final arguments of the Petitioner herein. At that stage, the Petitioner sought an adjournment on 03.01.2023, 13.02.2023; and after seeking an adjournment on third date of hearing, this application (under consideration) was filed under Order 18 CPC for leading of evidence of the proposed witness Shri. Madan Khanna.

3.7. She states that highly belated stage in the proceedings, at which the said witness is sought to be produced, is not maintainable. She states that in the facts of this case there is no presumption of the genuineness of the evidence of the witness proposed to be lead.

3.8. She states that there would be no sanctity to trial proceedings, if a party is permitted to continue to file applications for leading additional evidence; which if genuine was always available to the party herein at the beginning of the trial.

4. This Court has considered the submissions of the parties and perused the paper book.

5. In the application filed under Order 18 CPC, the Petitioner has stated that she proposes to lead evidence of Sh. Madan Khanna as she has learnt recently on 07.01.2023 that he accompanied late Smt. Shanti Devi Kapoor to



the office of the Sub-registrar, Mumbai on the date of the registration of the said Will.

5.1. The Petitioner has stated that the finding of the Trial Court that the name of Shri Madan Khanna does not find mention in the evidence is incorrect as DW-1 in her cross-examination dated 13.07.2016 has duly mentioned Shri Madan Khanna. The relevant portion of the testimony reads as under: -

“My mother used to go out of her house with the assistance of her neighbour Mr. Madan Khanna and others in the building. It is wrong to suggest that my mother never used to go out with any of her neighbours but me. It is wrong to suggest that I never allowed my mother to be friendly with any other person or meet with any other person including Ravi Mehra or any of her maternal relatives.”

(Emphasis supplied)

5.2. This Court is of the opinion that the contention of the Petitioner is incorrect. In this testimony dated 13.07.2016, there is no mention that Shri Madan Khanna had accompanied late Smt. Shanti Devi to the Registrar's office for registration of the said Will. The context in which Mr. Madan Khanna finds a mention in her cross-examination dated 13.07.2016 does not support, the testimony, which is now proposed to be given by the proposed witness.

5.3. In fact, it is the stated case of the Petitioner that she learnt about this fact only on 07.01.2023 and therefore, this fact could obviously not find any mention in her testimony recorded in 2016. This version of the presence of Mr. Madan Khanna at the office of the Sub-registrar, Mumbai is a material fact which does not find any mention in the pleading or the evidence of DW-1. It is in this context that the Trial Court has rightly returned a finding that name of Mr. Madan Khanna does not form part of the record.



6. The contention of the Petitioner that Mr. Madan Khanna is a vital witness to prove the execution of the said Will, in view of the fact that the attesting witnesses of the said Will have expired, would also not justify permitting evidence at this stage.

6.1. The Respondent has rightly pointed out that in 2018, when leave was granted to the Petitioner to lead evidence in the second innings; she examined DW-4 and DW-5. The said witnesses were specifically sought to be examined by in order to overcome the hurdle created by the death of the attesting witnesses. DW-4 Mr. Manish Nanda is the son of the deceased attesting witness Mr. Vijay Nanda. Similarly, the official witness (DW-5) was summoned from the Sub-registrar's office at Mumbai to prove the registration of the said Will.

6.2. The Petitioner was thus aware that she has the onus of proving execution of the said Will and she was granted two innings by the Trial Court to lead evidence.

7. There is another aspect of veracity of the testimony offered. The said Will is dated 25.11.1997. Mr. Madan Khanna proposes to lead oral evidence in 2023 to the effect that he accompanied her to the Sub-registrar's office. This fact, if true, finds no mention in the pleadings or testimony of the fact witness who have already deposed and therefore raises a question on the truth of this assertion being made for the first time in 2023. Mr. Madan Khanna's oral testimony is admittedly incapable of being verified without independent documentary evidence.

7.1. There is no doubt that procedure is handmaiden of justice. However, following procedure ensures integrity in the conduct of a trial. Each party has notice of the claim and defence of the opposite party. The procedure is



followed so that the trial is concluded in an orderly and time bound manner. Infact, if the rules of procedure are not followed it would lead to a mis-trial. For instance, the Respondent herein had no notice of this witness of his deposition; and at this belated stage in trial, how are they to verify or rebut this witness. The Petitioner herein was granted sufficient opportunity by the Trial Court to lead evidence to prove due execution of the said Will and if she did not produce or enlist Mr. Madan Khanna at an earlier stage, the presumption that arises is that he did not infact accompany the deceased. In the opinion of this Court permitting this testimony at this belated stage is against the principles of natural justice.

7.2. The suit was instituted in 2011. The rules of procedure required the Petitioner to enlist all material witnesses to prove her defence at the earlier. The Petitioner first led evidence in 2016 and then again in 2018. The Trial Court therefore granted sufficient opportunities to the Petitioner. However, this application filed in 2023 after the Respondents have concluded their final arguments cannot be allowed.

8. The operative part of the order of the Trial Court reads as under:-

“ Arguments heard. Record perused. Considered.

Perusal of the record reflects that the Plaintiffs have filed the present suit in the year 2011 under Section 34 of the Specific Relief Act seeking declaration of Will of Late Smt. Shanti Devi dated 25.11.1997 as null and void and the consequential relief of the cancellation of said Will and permanent injunction. It is pertinent to mention that in the WS filed on behalf of the Defendant there is no mention of the aforesaid person.

On completion of Plaintiff Evidence, the matter was fixed for Defendant Evidence in 2016, wherein the Defendant was cross-examined extensively. Apart from herself, the Defendant also examined other witnesses, i.e. DW-2 Shailender Sharma, DW-3 Roma A. Sarabhai, DW-4 Manish V Nanda, DW-5 Sh. Sai Nath Keshav Chaubal, Joint District Registrar, Class-II (Record Section), Mumbai City, Maharashtra. It is further pertinent to mention that in 2017, the Defendant had moved an



application seeking to examine Mr. Manish who have been examined as Defendant no. 4, there was no mention of the witness sought to be examined at this stage, i.e Mr. Madan Khanna by the Defendant at any time. It is significant to mention that it is the case of the Defendant himself that they have come to know about whereabouts of this witness in January 2023 and however, the Plaintiffs counsel had concluded her part of final arguments, at this stage, the matter is at the stage of addressing of final arguments on behalf of Ld. Counsel for Defendant.

Careful and meaningful reading of the entire record reflects that the name of this witness was neither the part of the pleadings nor the part of the evidence, and the present application in the considered opinion of this court appears to be an afterthought to fill up the lacuna of the present case. In fact, it will not be out of context to mention that never did the Defendant move any application or take any steps or even mentioned before this Court prior to this application that Mr. Madan Khanna was also a necessary witness, when it was in the knowledge of the Defendant even in the year 2017 that the attesting witnesses to the impugned Will had expired. It cannot be the case that the Defendant were aware of the facts or the developments in the present case during trial. It is also pertinent to mention that the application itself provides that the witness may be crucial which shows that the Defendants are only trying to fill up the lacuna as they are aware of the arguments that has been advanced by counsel for the Plaintiff in this Court. Reliance is placed on the judgment of *Sunita Vs. Sanjay Kumar in CM Appeal No . 63762-63/2017*, in this regard.

In the considered opinion of this Court, on the basis of the facts and law discussed above, there appears to be no merits in the present application on the part of the Defendant. The present application is accordingly dismissed.”

(Emphasis Supplied)

9. This Court is in agreement with the findings of the Trial Court and does not find any infirmity in the said order.
10. Accordingly, the present petition is dismissed along with pending applications, if any.

MANMEET PRITAM SINGH ARORA, J

OCTOBER 09, 2023/rhc/asb

Signature Not Verified

Digitally Signed
By: MAHIMA SHARMA
Signing Date: 15.10.2023
15:17:24



Click here to check corrigendum, if any