



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

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Judgment reserved on: January 10, 2024
Judgment pronounced on: February 21, 2024

+ CM(M) 46/2024, CM APPL. 1490/2024 (stay)

BABU KHAN

..... Petitioner

Through: Ms. Manjula Gandhi and Mr. Umesh
Gupta, Advs.

versus

ZABUDDIN & ORS.

..... Respondents

Through: Mr. Arjun Mitra and Mr. Sarfaraz
Ahmad, Advs.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The present petition has been filed under Article 227 of the Constitution of India, 1950 by the petitioner assailing the order dated 09.10.2023 passed by the court of Learned Additional District Judge-09, Central Tis Hazari Courts, New Delhi in Civil Suit No. 13571/2016, titled as "*Zabuddin vs. Babu Khan & Ors.*" whereby the Learned Additional District Judge (hereinafter referred as "Trial Court"), dismissed the application under Order VIII Rule 1-A(3) read with Section 151 of Code of Civil Procedure, 1908 (hereinafter referred as "CPC").



The facts briefly narrated are hereinunder:-

2. Petitioner herein is the defendant and respondent no. 1 herein is the plaintiff in Civil Suit No. 13571/2016 which is pending adjudication before the Learned Trial Court.

3. The relevant facts for the purpose of adjudication of the present case are, that, the respondent no. 1 herein filed CS DJ No. 13571/2016 seeking reliefs of partition, permanent injunction and mandatory injunction for property bearing no. WZ-495, Wazirpur Village, Delhi-110052 (hereinafter referred as “suit property”) for his 7/120th share against the petitioner. Late Abdul Hamid, father of the petitioner died intestate leaving behind his widow namely Roshni (erstwhile defendant no. 2 in the Suit), two sons namely Sukke and Babu Khan (petitioner herein) besides four daughters. Petitioner is the only surviving son at present. Respondent no. 1 herein is the son of the deceased brother of the petitioner.

4. It is the case of the petitioner that, after the death of the parents of respondent no. 1, in 1997, the erstwhile defendant no. 2 vide oral gift, gifted half portion of the suit property to the petitioner and the other half portion was sold to one Hasina Begum and Mohd. Yamin (i.e., wife of petitioner and brother-in-law of the petitioner respectively) in 2006. In order to illegally grab the suit property, respondent no. 1 herein filed the present suit no. 89/2006 for partition / permanent injunction and mandatory injunction. As respondents to the said suit, the petitioner herein alongwith his mother (erstwhile defendant no. 2) filed a joint written statement along with counter claims.

5. Issues were framed on 05.02.2008, after the pleadings were completed. The evidence of respondent no. 1 herein was concluded on



10.09.2012 followed by evidence of two more witnesses of respondent no. 1 which were concluded, and evidence of respondents herein was closed on 21.05.2013. The evidence of petitioner herein was concluded on 11.04.2017. Thereafter, one more witness of petitioner herein was cross-examined and since then, the matter has been pending for the cross-examination of other witnesses of petitioner herein.

6. It is further the case of the petitioner that, on 01.04.2023 he opened up one old box/container which was in the possession of his deceased mother (erstwhile defendant no. 2 in the suit) kept in her room situated in suit property. The petitioner found one old original document alongwith some clothes in that box. Through his counsel, the petitioner got to know that it was actually registered Will dated 16.08.1995 executed by defendant no. 2 in favour of petitioner herein concerning the suit property.

7. Subsequently, the petitioner herein filed an application under Order VIII Rule 1-A (3) seeking the leave of the learned Trial Court to bring on record two additional documents i.e. registered Will dated 16.08.1995 and death certificate dated 03.02.2016, which he found in a box after the death of his mother (erstwhile defendant no. 2 in the Suit), Late Roshani. Vide impugned order dated 09.10.2023, the learned Trial Court took on record the death certificate dated 03.02.2016 of the mother of the petitioner (erstwhile defendant no. 2 in the Suit) but, denied to take on record her registered Will dated 16.08.1995.

8. The impugned order dated 09.10.2023 passed by learned Trial Court in Civil Suit No. 13571/2016, titled as "*Zabuddin Vs. Babu Khan & Ors.*" observes the following:



“20. ...As already noted above, the applicant has failed to show due diligence in producing the said document i.e., alleged registered Will dated 16.08.1995 at the appropriate stage in the present matter. Hence, court is of the view that no discretion can be exercised in his favour so as to follow him to file said document at this stage under the garb of the present application. However, the copy of death certificate of defendant no. 2 is taken on record, she being herself party to the present proceedings and factum of her death, as also the date of her death, are not in dispute. Application stands disposed of in these terms.”

9. Aggrieved by the impugned order, petitioner approached this Court by way of the present petition.

Submissions by the Petitioner

10. Ms. Manjula Gandhi, learned counsel for the petitioner submitted that the learned Trial Court has erroneously decided the genuineness and authenticity of the registered document/Will, which is not the touchstone for deciding an application under Order VIII Rule (1A)(3) CPC at the stage of the production of documents. She further states that, the document sought to be brought on record is a registered Will, existence of which cannot be doubted at the prima facie stage of production of documents since as per the settled law it is presumed to be genuine.

11. It is further submitted by the counsel for petitioner that the impugned order failed to observe that the said registered Will was undoubtedly in the knowledge of the petitioner but was never in his power and possession. The existence of Will was never in question and even respondent no. 1 herein was well aware of it and had in fact put questions in the cross-examination of the petitioner regarding the said Will.



12. It is further submitted that there was no delay in producing the said registered Will as the petitioner had given sufficient reasons for the same. The petitioner immediately on the discovery of the said registered Will, filed the said application without any delay. The registered Will of the petitioner's mother was dated 16.08.1995 and she expired on 03.02.2016. thus, there was no occasion to mention or file the said registered Will before her death i.e., either at the time of written statement or evidence affidavit.

13. Learned counsel for the petitioner relied upon the following judgments:

- a. *Rasmos Impex Pvt. Ltd. Vs. Rajan & Co. & Ors.* (2004 SCC OnLine Del 130).
- b. *Sugandhi (dead) by LR & ANR. V. P. Rajkumar* (MANU/SC/0792/2020).
- c. *Levaku Pedda Reddamma & Ors V. Gottumukkala Venkata Subbamma & Anr.* (2022 SCC OnLine AP 19)

Submissions by the Respondent:

14. Conversely, Mr. Arjun Mitra, learned counsel for respondents negates the submission of the petitioner and contested that the application filed by the petitioner to bring on record the alleged registered Will is nothing but an abuse of the process of law and is another tactic to delay the matter.

15. Learned counsel for the respondent points out that, as per the case of the petitioner, the alleged Will came to his notice only after the death of his mother (erstwhile defendant no. 2 in the Suit), but during the cross-



examination dated 02.12.2016 as DW-1, the petitioner categorically deposed that Will of his mother was lying with his sister namely Sukko and he came to know about it subsequently.

16. He further submitted that Order VIII Rule 1-A (3) CPC refers to those documents which were not in the knowledge and power or possession of the defendant, can be filed with the leave of the court at later stage. In the present case, the petitioner had full knowledge and was in possession of the alleged documents since its execution as he has already stated in his cross examination dated 02.12.2016, that the defendant no. 2 had executed a Will, accordingly the petitioner had knowledge prior to the death of his mother (erstwhile defendant no. 2). It is also submitted that it does not depend on the wish of the petitioner that he can file documents whenever he wants or when it suits him.

17. Learned counsel for the respondents out rightly requested for dismissing the petition as, the petitioner filed the application before the learned Trial Court at a highly belated stage. At best, the same could have been filed immediately after the death of the mother of the petitioner (erstwhile defendant no. 2).

18. Learned counsel for respondents further submitted that the erstwhile defendant no. 2 and petitioner herein, filed joint written statement on 27.07.2006 and also filed her evidence by way of affidavit, in which the alleged Will has not been mentioned anywhere. He further submitted that the present document is a forged and fabricated document, which appears to be executed without the consent and knowledge of the erstwhile defendant no. 2.



19. It is further submitted by the learned counsel for respondent that, as per Muslim Personal Law/Shariyat, a Muslim either male or female can execute a Will only for 1/3rd of his/her estate. Bequest made beyond 1/3rd is not a valid bequest. If he/she wants to execute a Will in excess to 1/3rd of his/her estate it is mandatory to get NOC from all the legal heirs. Without NOC, the executed Will has no legal value and it's void.

20. It is further submitted on behalf of the respondents that the petitioner along with his mother (erstwhile defendant no. 2 in the Suit), in their joint written statement have taken the stand that the defendant no. 2 (erstwhile defendant no. 2 in the Suit) had gifted half portion of the suit property to petitioner herein, vide oral gift and she has already agreed to sell other half of the property to Hasina Begum and Mohd. Yamin, vide agreement to sell dated 15.02.2006 for valuable consideration of Rs. 3,00,000/-. On the contrary, it is now being claimed by the petitioner that his mother (erstwhile defendant no. 2 in the Suit), had already executed registered Will dated 16.08.1995 concerning the entire suit property in his favour. In case, any such registered Will dated 16.08.1995 in respect of suit property, had already been executed by erstwhile defendant no. 2 in the suit in favour of petitioner herein, then, there was no occasion for erstwhile defendant no. 2 in the suit, to give half of the suit property by way of oral gift to petitioner herein in the year 1997 or to sell the remaining portion to the wife and brother in law of the petitioner.

21. Learned counsel for the respondents relied upon the following judgments:

- a. ***Ramesh Kumar & Anr. Vs. Sangeeta Khanna*** [ILR (2014) II Delhi 1106.



b. *Mohd. Farooq Khan vs. Zubeda Khatoon & Ors.* in FAO (OS) No. 293/2012, decided on 22.03.2013 by this Court.

Reasons and conclusions

22. Before analyzing the arguments put forth by both the parties, it is vital to reproduce the provision in question i.e. Order VIII Rule 1A CPC, which is as under:

1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.—(1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

[(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.]

(4) Nothing in this rule shall apply to documents—

- (a) produced for the cross-examination of the plaintiff's witnesses, or
- (b) handed over to a witness merely to refresh his memory.

23. As would be manifest from the reading of the above provision, by virtue of Rule 1A to order VIII CPC, along with the written statement, the defendant must provide all supporting documents for any relief he may be seeking or contentions relying upon. The defendant is directed by subrule (3) of rule 1A of Order VIII to file all documents that he intends to rely upon or that are indicated in the lists of documents. Any document not presented at the time of filing of the written statement will not be admitted into evidence without the leave of the Court. Before the said amendment



in the Code was carried out, the filing of the documents on which the defendant wish to rely upon was contingent upon the framing of issues. This has been eliminated by the current amendment, which saves time for the litigants as well as the courts. Additionally, it requires leave of the Court before a document that is not part of the written statement already be taken on record. Order VIII Rule 1A does not specify when the defendant must utilize its right to submit further documents, in contrast to Order XIII Rule 1.

24. Order VIII Rule 1A of the CPC came up for consideration before the Hon'ble Supreme Court in the judgment titled Sugandhi (Dead) by LRs and Ors. Vs. P. Rajkumar (Supra), wherein it was held as under:

“9. It is often said that procedure is the handmaid of justice. Procedural and technical hurdles shall not be allowed to come in the way of the court while doing substantial justice. If the procedural violation does not seriously cause prejudice to the adversary party, courts must lean towards doing substantial justice rather than relying upon procedural and technical violation. We should not forget the fact that litigation is nothing but a journey towards truth which is the foundation of justice and the court is required to take appropriate steps to thrash out the underlying truth in every dispute.

Therefore, the court should take a lenient view when an application is made for production of the documents under Sub-rule (3).

10. Coming to the present case, the Defendants have filed an application assigning cogent reasons for not producing the documents along with the written statement. They have stated that these documents were missing and were only traced at a later stage. It cannot be disputed that these documents are necessary for arriving at a just decision in the suit. We are of the view the courts below ought to have granted leave to produce these documents.”

11. Therefore, for the foregoing reasons, the appeal succeeds and it is accordingly allowed. The orders impugned herein are set aside. The application (IA No. 551 of 2018 in OS No. 257 of 2014) filed by the appellant-defendants before the Principal Sub-Judge, Pudukottai, is accordingly allowed. Parties to bear their own costs.”



25. It is important to highlight the observations of the learned Division Bench of this Court in the case of **Mohd. Farooq Khan vs. Zubeda Khatoon & Ors.** (Supra), decided on 22.03.2013, which reads as under:-

“11. Admittedly the suit property was originally owned by late Abdul Waheed Khan. The whole defence of the defendants/respondents is founded upon the Will purported to have been executed by the deceased in favour of defendant No.1. The Muslim law of inheritance does not permit a deceased Mohammedan to bequeath more than 1/3rd of his share in his property and a bequest made beyond 1/3rd is not a valid bequest. There is no quarrel to this proposition.”

26. The findings in the case of “**Rasmos Impex Pvt. Ltd. Vs. Rajan & Co. & Ors.**” (Supra) are as under:

“There is a clear distinction between the filing of a document and the Trial Court taking the said document into consideration. It cannot be gainsaid that a document may be filed and subsequently not proved in accordance with law. Such a document may even be proved and therefore exhibited, but found by the Court to be of suspicious nature and therefore not be given credence to”

27. Yet, another important aspect is underscored in case of **IVY Muriel Fonseca v. MR Porus Adi Doctor** [2005 Vol 107(3) 458 (460) (Bom)] holding that it is premature for the court to determine whether a document might be admitted into evidence when a party requests permission to file it after the issues have been framed. Just a prima facie opinion must be established at the document production stage; the admissibility of the documents will be determined during the trial.

28. In the case of **Levaku Pedda Reddamma & Ors V. Gottumukkala Venkata Subbamma&Anr.** (supra) it was held:

“We find that the trial Court as well as the High Court have gravely erred in law in not permitting the defendants to produce documents, the relevance of which can be examined by the trial Court on the basis of the evidence to be led, but to deprive a party to the suit not to file documents even if there is some delay will lead to denial of justice. It



is well settled that rules of procedure are hand-maid of justice and, therefore, even if there is some delay, the trial Court should have imposed some costs rather than to decline the production of the documents itself.”

29. In context of the above, it is essential to look into the pleas raised on behalf of the parties. Insofar as the arguments of the petitioner are concerned regarding production of the Will dated 16.08.1995 at the belated stage, it is the explanation of the petitioner that he had found the said Will in a box which was in the possession of his deceased mother (erstwhile defendant no. 2 in the suit). He had an opportunity to open the said box after the death of his mother who expired on 03.02.2016. Therefore, he was unable to produce the said Will at the relevant time and also could not mention about it in his written statement or at a subsequent stage as he was having no knowledge about the said Will. According to the respondents the alleged Will is a forged document, if any such Will had existed, the petitioner would have produced it after the death of his mother and not at this belated stage.

30. It is also the stand of the respondent that the aforesaid Will has no legal value in accordance to Muslim Personal Law as a muslim can execute a Will only up to 1/3rd of his/her estate.

31. Learned counsel for the respondents with vehemence stressed on the submission that the said Will cannot be allowed to be made part of the record as it will contradict the claim already raised by the petitioner herein in his written statement before the learned Trial Court had germinate a separate cause of action altogether.

32. A well founded argument has been raised on behalf of the respondents which require consideration. It is the case of the petitioner that



erstwhile defendant no. 2 in the suit, in the year 1997 gifted half of the suit property vide oral gift to the petitioner and the other half portion was sold to wife of the petitioner and brother in law of the petitioner in the year 2006. However, the Will to be relied upon by the petitioner was executed on 16.08.1995 giving over the entire property in favour of the petitioner. Needless to say, a Will comes into effect only after the death of the testator.

33. Interestingly, the proposition of petitioner is that the erstwhile defendant no. 2, the testator of the Will had already disposed of the subject property of the Will during her life time by virtue of gift and sale, thus the property to be bequeathed by virtue of the Will no longer exists. Therefore, even if the Will is allowed to be taken on record no fruitful purpose will be served.

34. In the peculiar facts and circumstances of the case, the submissions of the petitioner are not sustainable; consequently, the petition along with pending application is dismissed.

SHALINDER KAUR, J.

FEBRUARY 21, 2024

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