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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 23/2024 and CM APPL. 9585/2024, CM APPL. 9586/2024, CM APPL. 9587/2024**

RAJ KUMAR MALHOTRA

..... Appellant

Through: Mr. Kuljeet Rawal and Mr. Aditya Joshi, Advocates.

versus

STATE AND ORS

..... Respondents

Through: Mr. Samar Kachwaha, Mr. Raghavendra M. Bajaj, Ms. Shivangi Nanda, Ms. Rini Mehra and Mr. Prayuj Sharma, Advocates for R-2 to 4.

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Date of Decision: 16th February, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

1. The present appeal has been filed under Section 10 of Delhi High Court Act, 1966 ('Act of 1966') impugning the order dated 5th January, 2024 passed in Test Cas No. 47/2000 ('Impugned Order') whereby the learned Single Judge directed the official witness i.e., PW-17 [officer of Union Bank of India] to trace the relevant record with regards to the two saving bank accounts of late Shri Kasturi Lal Malhotra for the years 1999-2004 as expeditiously as possible and latest within four weeks from the date of the said order, failing which the Local Commissioner has been directed to close



the evidence of PW -17.

2. Appellant is the son of late Shri Kasturi Lal Malhotra, who expired on 13th September 1999. The Appellant filed TEST CAS No. 47/2000 to prove the registered Will dated 18th January, 1999 said to be executed by his deceased father. The issues were framed on 03rd July, 2009 and the recording of evidence commenced before the Local Commissioner in August, 2009, but remains pending. The Appellant has completed recording the evidence of sixteen witnesses and the issue in the present appeal is with respect to time bound directions to the last witness PW-17.

3. Learned counsel for the Appellant states that PW-17 is the last official witness. He states that the said witness appeared for the first time on 10th November, 2023, 15th December, 2023 and thereafter on 05th January, 2024. He states therefore, there has been no delay in recording of the evidence of the said witness contrary to the findings of the impugned order. He states that the delay has occurred as the record which the witness is required to produce pertains to the year 1999-2004 and it is on account of Union Bank of India's own administrative protocol that the witness has sought adjournment to trace the old record. He states that PW-17 has made attempts on 15th December, 2023, 19th January, 2024 and 02nd February, 2024 to locate the old records. However, the same have been futile. He states that in these facts, the learned Single Judge ought not to have passed the pre-emptive directions in the impugned order. He states that the production of said documents is necessary to enable the Appellant to prove his allegation of use of funds by the Respondent Nos. 2 to 4.

4. The learned Single Judge by the impugned order has, after taking note



of the conduct of the proceedings passed a pre-emptive order that if PW-17 is unable to locate the bank statements for the period 1999-2004, in four weeks' time the Local Commissioner shall close the evidence of PW-17.

5. The impugned order is, admittedly, not appealable under Order XLIII Rule 1 CPC. We are of the considered opinion that the impugned order is not appealable under Section 10 of the Act of 1966 and is therefore not maintainable. The impugned interlocutory order does not satisfy the test of a 'judgment' within the meaning of Section 10 of the Act of 1966, as per the parameters laid down by Supreme Court in *Shah Babulal Khimji v. Jayaben D. Kania*¹, which is the test to be applied as held by the Full Bench of this Court in *Jaswinder Singh v. Mrigendra Pritam Vikramsingh Steiner*².

6. Even otherwise, this Court is of the opinion that the direction sought by the Appellant to Union Bank of India for the first time in the year 2023, to produce bank statements for the period 1999 till 2004 is, itself, not maintainable at the stage of recording of evidence. The Appellant has cleverly converted the stage of recording of evidence into the stage of discovery.

7. The present probate proceedings were instituted by the Appellant in the year 2000 and the document which is sought to be summoned from the Union Bank of India is for the subsequent period i.e., 1999 to 2004. The Appellant should have at the contemporaneous time i.e., 2004 obtained the certified copies of the said documents from Union Bank of India and placed

¹ (1981) 4 SCC 8

² 2013 (133) DRJ 1 (FB)



it on record in the trial as is permissible under the Bankers Book of Evidence Act, 1891. At the stage of recording of evidence, the official witness is to be summoned only for leading formal proof, if so, directed by the Court. However, in the facts of this case, no such steps were taken by the Appellant in the year 2004 to place copies/certified copies of the bank documents on the record of the probate proceedings.

8. We, in fact, find that Union Bank of India has been put to an onerous task of retrieving twenty-five years old records at the behest of the present Appellant who is clearly indulging in a fishing and roving enquiry to raise allegations of siphoning.

9. The learned Single Judge has therefore, granted sufficient opportunity to the Appellant to produce evidence which was otherwise inadmissible at this stage of the trial. As per the impugned order, the period of four weeks granted to the witness has already expired on 02nd February, 2024 and therefore, the impugned order has worked itself out.

10. We, therefore, find no infirmity in the impugned order and the present appeal is dismissed. Pending applications stand disposed of.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 16, 2024/msh/ms

Click here to check corrigendum, if any