



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

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Judgment reserved on: 03.01.2024
Judgment pronounced on: 18.01.2024

+ CM(M) 2123/2023

ARVINDER SINGH SANDHU

..... Petitioner

Through: Mr. Harpreet Singh, Ms. Suhani
Mathur, Mr. Jatin Kumar Gaur and
Mr. Gurpreet Singh, Advs.

versus

KAWALJEET SINGH SANDHU & ORS.

..... Respondents

Through: Mr. Sudhir Nagar, Adv. for R-1.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The present petition filed under Article 227 of the Constitution of India, 1950 is directed against the impugned orders dated 07.10.2022 and 10.01.2023 passed by the learned Additional District & Sessions Judge-2, Karkardooma Court, Delhi (hereinafter referred to as "ADJ") in CS No. 1883/2016 titled "Kawaljeet Singh & Ors. Vs. Arvinder Singh Sandhu & Ors." whereby the learned ADJ has dismissed the application filed by the petitioner under Order XVIII Rule 17 of the Civil Procedure Code (hereinafter referred to as "CPC") and the review application of the order dated 07.10.2022 filed by the petitioner respectively.
2. The brief facts necessary for disposal of the petition are that in the year 2013, the respondents herein had filed a suit for declaration, partition



and permanent injunction in respect of the property bearing no. B-51, Jhilmil Colony, Shahdara, New Delhi. The petitioner herein filed the written statement whereby the petitioner relied upon Will dated 25.09.1995 executed by the mother of the petitioner in presence of respondent no. 4 herein (defendant no. 4 in the Suit).

3. It is the case of the petitioner that the mother of the parties namely Smt. Harbans Kaur had executed a will in July, 1992 in favour of the father of the parties and the said Will was cancelled by her in March, 1993 vide registered cancellation of Will deed. Thereafter, the mother of the parties had further executed a Will dated 25.09.1995 in favour of the petitioner in presence of Defendant no. 4 and hence the petitioner became the sole and absolute owner of the suit property by virtue of Will dated 25.09.1995. Conversely, the respondent has claimed the said Will to be a manufactured document by the petitioner.

4. The record reveals that respondent no. 1 led the plaintiff evidence and same was concluded. Thereafter, the petitioner led his evidence in defence and five witnesses were examined and discharged. The defence evidence was closed vide order dated 30.05.2022 and the case was fixed for final arguments.

5. The petitioner being aggrieved by the decision of learned ADJ to close the evidence on behalf of the respondent moved an application under Order XVIII Rule 17 CPC wherein, he sought permission to examine respondent no. 1 as a witness as he is a key witness in proving the Will dated 25.09.1995. The said application was dismissed by learned ADJ vide impugned order dated 07.10.2022. The petitioner preferred a review application, however, the same was dismissed vide impugned order dated



10.01.2023. Aggrieved by both the orders, the petitioner preferred the present petition.

Submissions by the petitioner

6. Mr. Harpreet Singh, learned counsel for the petitioner submitted that the learned Trial Court failed to appreciate that in order to prove Will dated 25.09.1995, respondent no. 4 is a vital witness as the said Will was executed in his presence. Therefore, the learned Trial Court failed to exercise its inherent powers to permit fresh evidence by examining respondent no. 4 as a defence witness. The learned Trial Court failed to appreciate the import of Section 68 of the Indian Evidence Act, 1872 and Section 63 of the Indian Succession Act, 1925 as respondent no. 4 is a crucial witness to prove the Will.

7. It was further submitted that the learned ADJ failed to appreciate that the Court has powers under Order 16 Rule 1(3) CPC to call any witness even if the name of said witness is not included in the list of witnesses. Moreso, respondent no. 4, being one of the defendants his name is not required to be included as a witness in the list of witnesses. Reliance was placed by the learned counsel on the following judgments in support of the above contentions:-

- a. **K.K. Velusamy vs. N. Palanisamy** [(2011) 11 SCC 275]
- b. **Meena Pradhan & Ors. vs. Kamla Pradhan & Anr.** in Civil Appeal No.3351 of 2014 decided on 21.09.2023.
- c. **Dinesh Singh Bhim Singh v/s Vinod Shobhraj Gajaria & Anr.** in Writ Petition No. 11185/2022 decided on 25.01.2023.



8. Conversely, Mr. Sudhir Nagar, learned counsel for the respondent submitted that the learned ADJ has rightly dismissed the application moved by the petitioner under Order XVIII Rule 17 CPC and also the review application filed thereafter as the application to examine DW-4 as a fresh witness was filed after a lapse of more than 5 years, without giving any justified reason for doing so. The suit filed by the respondent is pending trial since 2013 and the petitioner was granted opportunity to examine defence witnesses on 23.08.2017. Subsequently thereto, numerous adjournments were requested but the petitioner failed to summon their witnesses thereby delaying the trial of the suit. So much so, the petitioner did not take steps to summon all the witnesses and finally on 30.05.2022, the petitioner closed his evidence. Therefore, there is no substance in the argument raised on behalf of the petitioner that due to certain circumstances, he failed to produce his vital evidence, which he should be permitted at this stage.

9. It is further submitted that the review petition filed under Section 114 read with Order 47 Rule 1 CPC is also not maintainable as he failed to show that the order dated 07.10.2022 was passed on account of some mistake or error apparent on the face of the record. Final arguments have already been addressed by the parties and the case is listed at the stage of pronouncement of judgment / clarification before the learned ADJ, therefore, there is no merit in the present petition.

10. Following judgments were relied upon in support of the contentions raised herein above:

a. **Harpreet Singh Batra V. Karmawali & Ors.**
MANU/DE/2511/2022.



- b. **Vandana Kapuria v. D.D. Pradhan & Company Pvt. Ltd.**
MANU/DE/6348/2023.
- c. **Deepak Kumar &Ors. V. Jitender Jain** MANU/DE/3505/2021.
- d. **Ram Rati v. Mange Ram &Ors.** MANU/SC/0260/2016.
- e. **Bagai Construction Thr. Its Proprietor Mr. Lalit Bagai v. Gupta Building Material Store** MANU/SC/0195/2013.

11. The power to recall a witness is referable under Order XVIII Rule 17 of the CPC. The position of law is well settled that the power to recall a witness under Order XVIII Rule 17 of the Code can be exercised by a Court either on its own motion or on an application filed by any of the parties to the suit, however, such power is to be invoked not to fill up the lacunae in the evidence of the witness, which has already been recorded but to clear any ambiguity that may have arisen during the course of the examination of the witnesses. The learned ADJ had declined to grant the prayer of the petitioner herein to summon respondent no. 4 as a defence witness to prove the Will dated 25.09.1995 as the application under Order XVIII Rule 17 CPC was moved at a belated stage of the trial when the matter was listed for passing judgment in the case. Moreover, the petitioner could not well explain the delay for moving the application after a period of more than 5 years specifically when the petitioner himself had requested the learned Trial Court to close his evidence in defence. The learned Trial Court had observed that the petitioner herein had adopted a casual approach by filing the application at a highly belated stage.

12. Petitioner got the opportunity to examine his witness on 23.08.2017 and he closed his right of leading evidence in defence on 30.05.2022 after



satisfactorily examining his witness. During this period, he took recourse to sufficient opportunities to produce his witnesses but failed to summon all his witnesses. Respondent no. 4 is not a stranger to the proceeding but is one of the contesting parties. The evidence to be produced was in the knowledge of petitioner as issue no. 4 is framed in suit, the onus of which is on the petitioner to prove the same, issue no. 4 is reproduced herein below:-

“4. Whether Late Smt. Harbans Kaur has left behind a validly executed Will dated 25th September, 1995? If so, its effect? OPD 1 and 4”

13. It is an admitted position that despite repeated requests of the petitioner, the respondent no. 4 did not appear before the learned Trial Court on the ground that he is aged about 82 years and is residing at Mohali, Punjab. Needless to say that the petitioner did not adopt any alternative recourse of recording the evidence of the respondent no. 4 through a Commissioner or through video conferencing.

14. It is obvious that the prayer was a mere afterthought and the grounds assigned are abstruse.

15. It was submitted on behalf of the respondent that Section 68 of the Indian Evidence Act stringently provides that the execution of a Will can be proved according to the statutory conditions imposed by Section 63(c) of the Indian Succession Act.

16. There is merit in the submission of the learned counsel for the respondents that petitioner has not stated that respondent no. 4 is one of the attesting witnesses of the Will dated 25.09.1995. It is to be noted that the Will dated 25.09.1995 is not part of the record, therefore, it cannot be ascertained if respondent no. 4 attested to it in compliance of Section 63 of



the Indian Succession Act, therefore, no fruitful purpose will be served by examining respondent no. 4 as a witness. One of the cardinal principles of law of evidence is that best evidence must be given in all cases, which encompasses procedural regulations concerning the proof and presentation of facts. All that petitioner has said that respondent no. 4 is a vital witness, which is bald averment.

17. In such circumstances, as rightly observed by learned ADJ at the belated stage and that too after reserving the matter for pronouncement of judgment and further submission on behalf of defendant lacks bonafides.

18. In the opinion of this Court, the learned Trial Court has unerringly exercised the discretion in not permitting to take further evidence by recalling respondent no. 4 to stand in the witness box when the matter is fixed for final pronouncement and this Court does not find any error in the impugned orders warranting supervisory correction in exercise of power under Article 227 of the Constitution of India.

19. Consequently, the petition is dismissed.

SHALINDER KAUR, J.

JANUARY 18, 2024

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