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IN THE HIGH COURT OF DELHI AT NEW DELHI

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TEST.CAS. 33/2017

SH. AMAN ICHHPUNIANI

..... Petitioner

Through: Mr. Bhuvan Gugnani, Mr. Rupender
Sharma, Advs.

versus

STATE & OTHERS

..... Respondent

Through: Ms. Hetu Arora Sethi, ASC with Ms.
Kavita Nailwal, Advs.

Ms. Vibha Mahajan Seth, Ms. Teena
Srivastava, Advs. for R2

Ms. Madhuri Sharma, Mr. Tushar Duneja, Advs.
for R3

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

01.02.2024

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I.A. 23085/2023

1. This is an application under Section 286 and 298 of the Indian Succession Act, 1925 on behalf of respondent no. 2 for dismissal of the present petition seeking grant of Letters Of Administration in respect of the estate of late Smt. Vinod S. Ichhpuniani in favour of the petitioner.
2. The petitioner and the respondent nos. 2 and 3 are the children and only surviving legal heirs of late Smt. Vinod S. Ichhpuniani. Respondent nos. 2 and 3, namely Mr. Mohit Sudershan Ichhpuniani and Ms. Radhika Sudershan Ichhpuniani, have filed a suit for partition, i.e CS(OS) 3442/2014, against the petitioner.
3. On 16.07.2019, this court passed the following order:-

“I.A. 2671/2019 in CS (OS) 3442/2014 (under Section 45 of



the Indian Evidence Act, 1872)

1. This is an application under Section 45 of the Indian Evidence Act for appointment of a handwriting expert to inspect the originals of the Bills dated 26th October, 2013 and 7th May, 2013.

2. At the stage of framing of issues, since the Plaintiff has raised a challenge to the above Wills, an issue in this respect would be framed, and the Plaintiff would be entitled to lead the evidence of a handwriting expert. In view, thereof, no order needs to be passed at this stage in the application and the same is disposed of.

I.A. 9006/2019 in CS(OS) 3442/2014 (for taking on record additional documents)

3. By this application under Order VII Rule 14, the counsel on behalf of the Plaintiffs seeks to place on record a report of M/s Truth Labs, which she wishes to rely upon in support of the Plaintiffs' case. Since issues are yet to be framed in the matter, the report is taken on record subject to any objections which may be raised by the Defendant, and subject to the said report being proved in accordance with law at the stage of trial.

4. I.A. is disposed of.

TEST.CAS. 33/2017 and CS(OS) 3442/2014

5. Vide order dated 28th September, 2018, the Defendant in CS(OS) 3442/2014 was directed as under:-

“Insofar as the other documents, discovery of which have been sought, all such documents which are in the power and possession of the Defendant including the original title deeds and the banks statements of the deceased parents shall be filed on record within a period of six weeks. The same shall be filed with an affidavit stating clearly that no other documents are available with the Defendant.”

6. Learned counsel for the Plaintiffs submits that this order



has been reiterated by the Joint Registrar on 18th January, 2019.

7. Since the Defendant has not filed on record all the documents and only copies have been filed, it is directed that he shall positively file the same in a sealed cover in this Court, within a period of ten days.

8. The above two cases are ripe for framing of issues.

9. Test Case No. 33/2017 seeks issuance of letter of administration in respect of Will of late Smt. Vinod S. Ichhpuniani dated 7th May, 2013. The deceased had two sons and a daughter, namely, Aman S. Ichhpuniani, Mohit S. Ichhpuniani and Ms. Radhika Sudershan Ichhpuniani.

10. CS(OS) 3442/2014 has been filed by Mr. Mohit S. Ichhpuniani and Ms. Radhika S. Ichhpuniani against Mr. Aman S. Ichhpuniani seeking partition of various properties owned by their parents. One of the submissions of the Plaintiff in this suit is that the Will dated 7th May, 2013, which was set up as a defence in this suit, is based on another Will i.e. that of the father dated 26th October, 2000. The first Will dated 26th October, 2000 has not been probated and hence the probate of the second Will is not maintainable.

11. Thus, both in the testamentary case and in the suit, the main issue would be as to whether the Will of the mother dated 7th May, 2013 is valid, legal and enforceable. Upon the said issue being decided, the issue in the suit for partition would only be as to whether the Plaintiffs are entitled to partition and if so, what would be the share of the parties and in what manner the partition is to be effected.

12. Since the parties are the same in both the matters, this court is of the opinion that a joint trial ought to be held.

13. After hearing parties, the following issues are framed:

Test Case No 33 of 2017

i) Whether the Will dated 7th May, 2013 is the



last, legal and valid testament of Smt. Vinod S. Ichhpuniani? OPP

ii) Whether the letters of administration in respect of Will dated 7th May, 2013 are not liable to be issued as the earlier Will of Mr. Sudershan Ichhpuniani dated 26th October, 2000, is not valid and legally enforceable? OPR2 and OPR3.

iii) Relief.

CS (OS) 3442/2014

i) Whether the Plaintiffs are entitled to a decree of partition and if so, what would be the shares of all the parties to the suit and in what manner is the partition to be effected? OPP.

ii) Relief.

14. The trial in both these proceedings shall be conducted jointly. The affidavits by way of evidence of the witnesses shall be first filed in the Test Case by the Petitioner therein. The affidavit would evidence in relation to the issue raised in the partition suit as well. Cross examination will take place together in both the proceedings.

15. Affidavits be filed by the Petitioner within six weeks. In view of the judgment cited in **Smt. Multivahuji w/o Goswami Goverdhaneshji Girdharlalji v. Smt. Kalindivahuji and others, AIR 1994 Guj. 42**, it is clarified that since the Test case is in relation to the parties' rights in rem and the suit would be personal to the parties, though the trial would be joint and conducted together, separate judgements would be rendered in both the matters.

16. List before the Joint Registrar on 20th September, 2019.

17. List on 16th December, 2019 before the Court for review of progress in evidence."

4. The court directed that trial in both the proceedings shall be conducted



jointly. It was further directed that affidavit by way of evidence of the witnesses shall be first filed in the testamentary case and the affidavits would be evidence in relation to the issues raised in the partition suit as well.

5. The cross-examination was to take place together in both the proceedings.
6. The petitioner sought to file the affidavit of evidence only of the attesting witness, namely Mr. Nitin Khurana, to the Will dated 07.05.2013 of late Smt. Vinod S. Ichhpuniani.
7. On 16.12.2019, the Coordinate Bench passed the following order:-

“1. By the order dated 16.07.2019, the proceedings in the testamentary case and the partition suit were directed to be tried jointly. By way of that order, issues were framed in both proceedings and the following directions were passed :-

“.....”

2. Pursuant to the said order, the petitioner in Test.Cas. 33/2017 has filed the affidavit of evidence of Sh. Nitin Khurana, one of the attesting witnesses to the will of Smt. Radhika S. Ichhpuniani dated 07.05.2013. The learned Joint Registrar by an order dated 20.09.2019 had given a further opportunity to the petitioner in the testamentary case for filing of the affidavits of evidence of other witnesses, including the petitioner. On the next date, i.e. 28.11.2019, the attesting witness was present but was not in a position to depose as he was not well. It appears from the orders passed by the learned Joint Registrar that learned counsel for the petitioner had sought time to file the affidavits of evidence of the remaining witnesses. Although that request was opposed, learned counsel for the petitioner was granted five days to file the affidavits of evidence of the remaining witnesses. The affidavits, including



the affidavit of the petitioner, have not yet been filed

3. *Mr. Bhuvan Gugnani, learned counsel for the petitioner in the testamentary case, submits that the petitioner therein cannot be compelled to lead evidence which would also go to his defence in the partition suit. He submits that, at this stage, the petitioner must be permitted to lead evidence only with regard to the testamentary case. However, he also submits that other than the execution of the valid will of the mother dated 07.05.2013, the petitioner in the testamentary case has not taken any other defence in the partition suit.*

4. *In my view, this argument is not open to the petitioner at this stage. The order dated 16.07.2019, clearly records that both proceedings raise a common issue as to the execution and validity of the will in question. Once this issue is decided, it would be dispositive not just of the testamentary proceedings but also of the principal defence taken in the partition proceedings. The order dated 16.07.2019 proceeded on this basis. That order has neither been challenged nor has any application been made for variation thereof.*

5. *Having regard to Order XVIII Rule 3A of the Code of Civil Procedure, 1908, the petitioner in the testamentary case must record his evidence first, followed by any other witness on his behalf.*

6. *Although Mr. Gugnani has cited the judgment of the Gujarat High Court in Samir Jayendrabhai Shah vs. Heirs of Deceased Dr. Pravinbhai Hargovinddas Shah [SCA Nos.3288 of 2014, 3830 of 2014, 3832 of 2014 and 3833 of 2014, decided on 13.03.2014], with regard to the procedure to be adopted when a probate case and a testamentary case are being heard together, in view of the above, it is not necessary to consider the matter further.*

7. *In these circumstances, Sh. Aman Ichhpuniani (the petitioner in the testamentary case) is directed to file affidavits*



of evidence of any other witnesses whose testimony he wishes to adduce in terms of the list of witnesses filed, within one week. The petitioner will also make himself available for recording of his statement before the Joint Registrar on 22.01.2020. The evidence of the attesting witness, Sh. Nitin Khurana, and any other witnesses will be recorded thereafter.

8. List before the Joint Registrar for proceedings in furtherance of this order on 22.01.2020. List before the Court for monitoring of evidence on 31.03.2020.”

8. The petitioner despite the orders dated 16.07.2019 and 16.12.2019 did not file his own affidavit of evidence but filed SLP (Civil) Diary No. 2907/2020 impugning the orders dated 16.07.2019 and 16.12.2019. The SLP was dismissed.
9. On 17.11.2022, this Court passed the following order regarding the genuineness and validity of the Wills propounded by the petitioner:-

“I.A. 5614/2022 (O-VIII R-1A(3) of CPC) in CS(OS) 3442/2014

1. The present application has been filed on behalf of the defendant seeking to place on record the additional document, being Will dated 26th October, 2000 executed by late Sh.S.K. lchhpuniani, being the father of the parties.

2. The present suit was filed in 2014 seeking partition of the estate of father of the parties. Written statement was filed on behalf of the defendant on 28th October, 2015. Along with the written statement, the defendant had filed a Will of the father of the parties dated 26th October, 2000.

3. I.A. 2676/2020, was filed on behalf of the plaintiff no.1 on 22nd February, 2020 seeking framing of an additional issue with regard to the validity of the aforesaid Will. The said issue with regard to the validity of the aforesaid Will was framed vide order dated 26th May, 2022.



4. *The present application has been filed by the defendant on 29th March, 2022, after the aforementioned application had been filed on behalf of the plaintiff for framing of additional issue. It is stated in the present application that during lockdown, the defendant while cleaning his files and cupboards found a folder containing another Will of their father dated 26th October, 2000, which the defendant seeks to place on record by way of the present application. Reliance is placed by the defendant on an email dated 3rd March, 2014 written by plaintiff no.2 to the plaintiff no.1 and the defendant in which the plaintiff no.2 has stated that she recollects that their father had executed a Will.*

5. *Counsel for the plaintiff no.2 has neither filed any response to the present application, nor has appeared today, though the appearance of the counsel has been noted on last date of hearing on 29th August, 2022.*

6. *Counsel for the defendant submits that he had also informed the counsel for plaintiff no.2 with regard to hearing of the present application today, still the counsel has chosen not to appear.*

7. *Counsel for plaintiff no.1 vehemently opposes the present application. It is submitted that defendant has throughout taken contradictory stands in the present suit. In the email dated 6th March, 2014, defendant had categorically stated that he had not found any Will of his father despite thoroughly searching the house. However, despite such an assertion, a Will dated 26th October, 2000 was filed along with the written statement. Yet, another Will dated 26th October, 2000 executed by the father of the parties, but without any attesting witness, was filed by the defendant herein in TEST.CAS. 33/2017. Now, seven years after filing the Will with the written statement in the present suit, another Will of the father is sought to be filed along with the present*



application. It is further submitted that the application is highly belated and no cogent reason for not filing the said Will within time has been provided. Lastly, there is no foundation in the written statement with regard to the existence of the Will, which is now sought to be produced.

8. *Counsel for the defendant submits that the contents of the Will now sought to be filed are exactly the same as the Will filed earlier along with the written statement.*

9. *I have heard the counsels for the parties.*

10. *Even though, the counsel for the defendant submits that the contents of the Will sought to be filed with the present application are exactly the same as the contents of the earlier Will filed along with the written statement and the date of the both the said Wills is same, the important factor to be flagged is that in the present Will defendant himself and the plaintiff no.2 are the attesting witnesses, whereas in the earlier Will there were other attesting witnesses. I find it hard to believe that the defendant would not recall of a Will being in existence, if he was himself an attesting witness to the said Will and that the said Will has been suddenly discovered by him seven years after the other Will was filed. It is pertinent to note that in the written statement filed by the defendant there is no pleading that another Will was executed by their father in which the defendant was an attesting witness.*

11. *A petition for grant of Letters of Administration, being TEST.CAS. 33/2017 was filed by the defendant on 12th July, 2017 which is being tried jointly with the present suit. It is pertinent to note that yet another Will dated 26th October, 2000 executed by the father of the parties has been placed on record in the said testamentary case by the defendant, in which there are no attesting witnesses.*

12. *In view of the discussion above, I am of the view that the defendant is taking contradictory stands. Despite stating in*



his email dated 6th March, 2014 that he has searched the entire place and did not find a Will of their father, three different Wills have been produced by the defendant at different points of time. By way of the present application, the defendant is seeking to introduce a new document and set up a new case which cannot be allowed. It appears that the defendant is fabricating different versions of the Will to suit his convenience.

13. Even otherwise, the defendant has failed to show sufficient cause for filing of the Will at this stage. It is an admitted position that the defendant was always in power and possession of the said document. The defendant has failed to show due diligence by not going through his records at his own residence for identifying such documents that he considered relevant for substantiating his defence in the present case. The present application has been filed at a highly belated stage, so as to delay the adjudication of the present suit.

14. The present application is an abuse of process of this Court and wastage of the precious judicial time.

15. Accordingly, the present application is dismissed with costs of Rs.50,000/-.

CS(OS) 3442/2014

16. Counsel for the defendant submits that in view of the non-appearance of plaintiff no.2 today, he may be proceeded against ex parte.

17. This aspect shall be considered on the next date of hearing.

18. In view of the additional issue being framed by this Court on 26th May, 2022, let a fresh list of witnesses be filed by the defendant within six weeks from today.

19. The defendant shall also file affidavits of evidence of all other witnesses within six weeks.



20. *List before the Joint Registrar on 17th January, 2023 for fixing dates of trial.*
21. *Counsel for the defendant submits that the defendant is based out of India.*
22. *On the aforesaid date the defendant shall indicate to the Joint Registrar the dates when the defendant can appear for recording of his evidence. **TEST.CAS. 33/2017***
23. *List before the Joint Registrar on 17th January, 2023 along with CS(OS) 3442/2014.”*
10. This order was also challenged in SLP(Civil) Diary No. 842/2023 which was dismissed.
11. On 22.08.2023, this court granted a last and final opportunity of 30 days to the petitioner to file his affidavit of evidence and also directed that in case the affidavit is not filed, the right of the petitioner to file the affidavit of evidence shall stand closed. The order dated 22.08.2023 reads as under:-
- “1. *Learned counsel for the defendant prays for and is granted 30 days time by way of a last opportunity to file the affidavits of evidence of the defendant.*
2. *It is made clear that, in case, the defendant fails to file the affidavit of evidence within the time so granted, the right of the defendant to file the same will stand closed.”*
12. After more than 5 months till date, the affidavit of evidence of the petitioner has not been filed.
13. In this view of the matter, since the petitioner has not filed any evidence by way of affidavit despite the orders dated 16.07.2019, 16.12.2019 and 22.08.2023, there is no evidence before this court to



grant the prayers sought for in the present case except the evidence of the attesting witness.

14. For the said reasons, the application is allowed and the captioned case, i.e. TEST.CAS. 33/2017, is dismissed for lack of evidence.

FEBRUARY 1, 2024 / (MS)

JASMEET SINGH, J