

B.N. Mullick and ors. Vs. Sita Ram Mullick and ors.

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Court : Delhi

Decided On : Oct-30-1998

Reported in : AIR1999Delhi153; 1999(48)DRJ561

Judge : Y.K. Sabharwal ACJ and; K.S. Gupta, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 26,

Appeal No. : FAO (OS) 194/96

Appellant : B.N. Mullick and ors.

Respondent : Sita Ram Mullick and ors.

Advocate for Def. : Mr. V.K. Makhija, Sr. Adv. with ; Mr. Vipin Nandwani and ;

Advocate for Pet/Ap. : Mr. Ravinder Sethi, Sr. Adv. and; Ms. Nandini Sahni, Adv

Judgement :

ORDER

Y.K. Sabharwal, J.

1. This appeal is directed against the order of learned Single Judge passed on 27th February, 1996 whereby the evidence in the two suits has been directed to be recorded on commission and Mr. V.K. Jain, Joint Registrar of this Court and a Member of Delhi Higher Judicial Service has been appointed as a Commissioner

for recording of evidence in these matters.

2. The main challenge of Mr. Sethi learned counsel for the appellants, is that assuming Court had power to direct recording of evidence on commission despite non-existence of grounds enumerated in Order 26 Code of Civil Procedure, the power has not been exercised on sound judicial principles. The thrust of the argument of Mr. Sethi is that delay in disposal of the suits by itself is and cannot be the sole ground to direct the recording of evidence on commission. Learned counsel contends that the only ground on which the impugned order was made was the likely delay in disposal of suits and thus the order is not sustainable in law.

3. After the insertion of Chapter X-A in 1991 in Delhi High Court (Original side) Rules, the power of the Court to direct recording of evidence on commission in cases outside the scope of Order XXVI CPC cannot be doubted. The Chapter introduced in 1991 reads as under:

CHAPTER X-A

Evidence on Commission at Court's Discretion.

'Commissions to examine parties & witnesses - Notwithstanding anything contained in Order XXVI of the Code of Civil Procedure, 1908, the Court may, at its discretion, in any suit, at any stage, direct that the parties and witnesses be examined on Commission. The evidence recorded on Commission shall be read as evidence in the suit.'

4. The aforesaid Chapter over rides the provisions of Order XXVI CPC as is clear from the opening non-obstante Clause. The provision of Order XXVI will not be an impediment for operation of the aforesaid rule.

5. In order to appreciate the main submission that delay alone cannot be taken as a ground for directing evidence to be recorded by a Local Commissioner, it would be necessary to briefly notice the nature of controversy which is subject matter of the suits.

6. The first suit is of the year 1983. It is pending for 15 years. The second suit is of year 1985 and is thus pending for 13 years. Both the suits have been consolidated. The earlier suit is for portion of properties between immediate and near family relations. The second suit is for recovery possession of immovable property. The parties are common in both the suits. Both group - plaintiffs and defendants have propounded different wills. One group has propounded a will of the year 1980 and the other a will executed in the year, 1982. Some allegations of forgery have also been made. It was also submitted by Mr. Sethi that one of the attesting witness of the will propounded by the other group, had even filed an affidavit which would show that the said will was not valid and legal. It was further submitted that an earlier application for appointment of Commissioner to record evidence had been dismissed.

7. The dismissal of earlier application by itself is not a bar for passing such an order. The facts show that immediate and near family relations are litigating for over 15 years. We were told by learned counsel for the respondents that on three occasions suits were listed for recording evidence in Long Cause but the evidence was not recorded. We are not attributing default on any of the parties for not recording of evidence. Let us not go into reasons for it. All the same it has to be borne in mind that the parties are at quite old. It was pointed out by Mr. Makhija that father of the parties Mr. Sita Ram Mullick during the pendency of the suit died on the year 1986 at the age of 97. One of the plaintiff Mr. B.N. Mullick is also stated to have died a few days after passing of the impugned order. Two of the other parties are stated to have also died during the pendency of this appeal. The suit is for portion of immovable properties and injunction. The dispute between parties is about the inheritance. No evidence has been recorded so far. The officer appointed to record evidence on commission is a Member of Delhi High Judicial Service.

8. Under the aforesaid circumstances, the question to be considered is whether learned Single Judge by passing the impugned order has exercised discretion on sound judicial principle or not and whether the impugned order is contrary to law laid down by a Division Bench of this Court in the case of Shri Deepak Kapur Vs . Ashok K. Ghose & Ors. : 1994(30)DRJ489 as contended by learned counsel for

the appellants. Reliance has been placed in particular on paragraphs 15, 19, 20, and 22, which may be reproduced as under:

Para-15

'Therefore, it cannot be said that under the Rule in Chapter X-A (in question), an absolute and unfettered desecration is given to the court to direct the parties and witnesses to be examined on commission. This power shall have to be read as an exceptional power to be exercised in rare cases. There may be several unforeseen circumstances in which a strict adherence to the provision of Order XXVI of the CPC may create difficulties in getting a witness to depose before the Court. Similarly, at a particular stage of the suit, a situation may crop up that a particular party or a witness shall have to be examined and such an examination in the Court may be found not possible immediately. One of the situations is that a party or a witness, due to security reasons cannot be brought to the Court at all; in another case, when the suit is taken up for arguments, it is realised that a witness shall have to be examined immediately and such an examination in the Court may cause further delay or may come in the way of the Court to go on with an urgent suit. It is difficult to make an advance catalogue of the circumstances, in which this power could be exercised. Each case shall have to be examined to see whether the situation requires a departure from the normal rules provided under Order XXVI of the Code of Civil Procedure. The non obstinate clause in the Rule in question (under Chapter XA of the High Court Rules) shall have to be understood as a proviso or as an exception to the power of the Court under Order 26 CPC. It is not a provision permitting a 'wholesale' delegation of Court's function to examine the parties and witnesses in a suit.'

Para-19

'The recent experiences of our courts that the Judge who records the evidence is not available to decide the suit when the suit reaches the final stage, is irrelevant while interpreting the Rule in question. Court should proceed with the presumption that the same Judge who holds the trial would decide the case ultimately.'

Para-20

'Examination of parties and witnesses in the Court should be considered as the normal rule; it is only under exceptional circumstances, a departure may be made from this rule. When the Court directs that all the parties and all the witnesses in the suit shall be examined on commission, there should be extraordinary circumstances to justify the said direction.'

Para-22

'The contest in the suit mainly involves prestige of parties. The relief sought in the suit does not pertain to any right to property or a public office or a private office in which the office holder would be entitled to some decent remuneration. The subject matter of the suit is not even concerned with family relationship. The Governorship of a Rotary Club is not a public office. In these circumstances delay in the disposal of the suit having regard to the large pendency of case on the Court is no ground to deviate from the normal rule of examining the witnesses in the open court. Likely delay in the disposal of the suit has become a normal feature in the Courts and if reduction of the delay is a valid ground to examine witnesses on commission, the said procedure shall have to be adopted in every suit. Then, the rule of exception would cease to be an exception and would become the normal rule. We do not consider the scope of Chapter X-A of the Original Side Rules, is to introduce a new regular procedure. Some of the basic features of the judicial functions in the trial of the suit are that the Judge should, as far as possible, be in a position to appreciate the depositions along with the demeanour of the witnesses; the admissibility or relevancy of the questions put to the witnesses and their answers and that of the documents are to be decided by the Court; the Court should have an opportunity to seek clarifications from the witnesses regarding any part of the deposition, if such a clarification becomes necessary; the trial of the suit should normally be held in a judicial (court room) atmosphere, which itself conditions the witness to depose truthfully. We emphasize that the normal rule is to examine the parties and the witnesses in the Court and their examination on commission is an acceptance to the normal rule. The discretion vested in the court to direct the examination of witnesses on commission has to be exercised judicially and this power has to be resorted to only under exceptional circumstances, Direction to examine all the parties and witnesses on commission,

without reference to any extraordinary reason for the departure from the normal rule is prima facie an illegal exercise of the discretionary power. Pendency of a larger number of cases in the courts by itself is not a valid ground to direct the examination of all the witnesses and parties in a suit on commission.'

9. It is evident from the perusal of rule in Chapter X-A, that the power to direct recording of evidence on commission is discretionary. It also cannot be doubted that the discretion is required to be exercised on sound judicial principles. The question whether in a particular case, it has been so exercised will depend on the facts and circumstances of the that case. As a legal proposition, there may be no difficulty in accepting the contention that the order directing recording of evidence on commission is to be the exception and not the rule. At the same time, however, it is not possible to accept the broad proposition that the delay cannot be a ground by itself to make such an order. It would depend on facts of each case. The Court may examine delay in the context of nature of dispute and other factors. It has not been held in Deepak Kapur's case that delay cannot be a ground for passing such an order. In Deepak Kapur's case the dispute was regarding the Governorship of a Rotary Club. In the present case right to inherit properties between immediate and near relations are in question. The nature of controversy in one of the important aspects to be borne in mind. This, in our view, is the real purport and ratio of Deepak Kapur's case, particularly, emanating from Para 22 extracted above.

10. In view of aforesaid conclusion, it is not necessary to go into the other contention urged by Mr. Sethi while dealing with a Division Bench decision in the case of Fashion Linkers & Other Vs . Savitri Devi & Another : 60(1995)DLT169 (DB), holding that the judgment in the case of Deepak Kapur has lost its efficacy for the reason that in SLP against Deepak Kapur case an order was made by Supreme Court leaving open the question of law decided by Deepak Kapur's case. In Fashion Linkers case it was held that the judgment in Deepak Kapur's case ceased to be a binding judgment because the legal issue as to the effect of the new Rule was left open by the Supreme Court in the order passed in appeal against Deepak's Kapur case. Mr. Sethi disputes correctness of the opinion expressed in Fashion Linkers case that judgment in Deepak Kapur is not binding.

We need not examine this contention as we are assuming that the law has been correctly laid in Deepak Kapur case, but in our opinion it has to be understood in the manner explained hereinbefore.

11. Before concluding, we may also notice that particularly, in intra court appeals for interference by the Appellate Court in the discretionary orders passed by Single Judge, strong case, has to be shown by the appellants to merit reversal of the impugned orders. Reference in this regard may be made to a decision of Supreme Court in the case of Uttar Pradesh Cooperative Federation Ltd. Vs . Sunder Bros. Delhi : AIR 1967 SC249 . It was observed that :

'In dealing with the matter raised before it at the appellate stage the appellate Court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in judicial manner's the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial Judge; but if it appears to the appellate Court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise or discretion. The principle is well established; but as has been observed by Viscount Simon, L.C., in Charles Oseption And Co. v. Johnson 1942 AC 130:

'The law as to the reversal by a Court of appeal of an Order made by a Judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual cases.'

12. In the present case, we do not think that any case has been made out justifying interference in exercise of discretion by learned Single Judge. The appeal is thus dismissed leaving the parties to bear their own costs. The parties shall now appear before the learned Commissioner on 23rd November, 1998.

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