

Desh Raj Gupta Vs. State

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Court : Delhi

Decided On : Oct-15-1987

Reported in : ILR1987Delhi153

Judge : Mahesh Chamdra, J.

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

Appeal No. : Probate Case No. 62 of 1985 and Interim Application No. 6136 of 1986

Appellant : Desh Raj Gupta

Respondent : State

Advocate for Pet/Ap. : L.R. Gupta,; Sanjeev Seth,; S.N. Marwah,;

Judgement :

Mahesh Chandra, J.

(1) By this Order I propose to dispose of LA. No. 6136 of 1986 filed by Shri Rajinder Kumar Gupta under Order 11 rule 21 read with Section 151 of the Code of Civil Procedure requesting that the Probate Petition No. 62 of 1985 filed by Desh Raj Gupta be dismissed for failure of the petitioner to comply with the undertaking given by him on 14th May, 1986 before the Joint Registrar(O) in LA. No. 3023 1986 filed under Order 11 rule 12 Civil Procedure Code for discovery of

certain documents. The application is opposed on behalf of the petitioner Desh Raj Gupta. I have heard the learned counsel for the parties and have gone through the file and after giving my considered thought to the matter before me I have come to the following findings:

(2) The petitioner Desh Raj Gupta son of late Lata Hansraj Gupta has filed this probate application under Section 276 of the Indian Succession Act, 1925 for the grant of Probate of the Will dated 28th May, 1985 alleged to have been executed by late Lata Hansraj Gupta and in the said application issues were framed on 26th February, 1986 and an application (1. A. No. 3023/1986) was filed by Rajinder Kumar Gupta L.R.No.4 under Order 11 rule 12 Civil Procedure Code with a request that the petitioner be directed to discover on oath the documents/material referred to in paras 3, 4 and 5 above'. A perusal of paras 3 and 4 shows that the records referred to therein are 'Medical records regarding treatment of Late Lata Hansraj Gupta at his residence and while reference to para 5 shows that it refers to 'documents and particulars regarding the date of the application and the name of the applicant etc. and the sanction letter are within the knowledge of Shri Desh Raj Gupta. The order dated 14th May, 1986 on I.A. No. 3023 of 1986 shows that it reads as under :

'THIS is an application under Order 11 Rule 12 Civil Procedure Code filed on behalf of L.R, No. 4 for discovery of certain documents. Counsel for the petitioner says that he will make discovery on oath and will file all the documents which are in his possession by tomorrow.'

In pursuance of this undertaking, duly sworn affidavit of Shri Desh Raj Gupta, under Order 11 rule 13 Civil Procedure Code was in fact filed on 15th May, 1986. along with the documents extending to 125 pages.

(3) The present application (I.A No 6136 of 1986) has been filed on 6th November, 1986 i.e. after about five months of the filing of the said affidavit by L. R. No. 4. Let us consider the provisions of the Code of Civil Procedure. Order 11 rule 12 C.P.C reads as under ;

'12. Application for discovery of documents-Any party may, without filing any affidavit, apply to the court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit provided that discovery shall not be ordered when and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

Order 11 rule 13 Civil Procedure Code provides as under :

'AFFIDAVIT of documents-The affidavit to be made by a party against whom such order as is mentioned in the last preceding rules has been made, shall specify which (if any) of the documents therein mentioned the objects to produce, and it shall be in Form No. 5 in Appendix Civil such variations as circumstances may require. Order 11 rule 21 Civil Procedure Code lays down as under :

'NON-COMPLIANCE with order for discovery-(1) where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defense, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect, and (an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard). (2) Where an order is made under sub-rule (1) dismissing any suit, the plaintiff shall be precluded from bringing a fresh suit in the same cause of action. A reading of Rules 12, 13 and 21 Civil Procedure Code shows that Rule 21 comes into play when an order has been passed under Rule 12 of Order 11 Civil Procedure Code. Likewise provisions of Rule 13 regarding the form of affidavit shall also be applicable 'when an order has been made' under Rule 12 of Order 11 Civil Procedure Code. In the instant case no such order has been made under Rule 12

of Order 11 Civil Procedure Code by the court; rather the application under Order 11 rule 12 Civil Procedure Code was not pursued further when the petitioner gave an undertaking before the court to file 'all the documents which are in his possession. Technically speaking therefore there cannot be said to be any violation within the meaning of Rule 21 of Order 11 Civil Procedure Code which has been committed by the petitioner in the instant case and as such provisions of Order 11 rule 21 do not come into play in the instant case.

(4) Let us now see if the undertaking has not been complied with by the petitioner. The undertaking is that the petitioner 'will make 'discovery on oath and will file all the documents which are in his possession Para 1 of the affidavit dated 15th May, 1986 filed by the petitioner shows that the petitioner has not only declared that he had in his possession documents relating to the medical record of late Shri Hansraj Gupta but further has also stated that 'All these documents are being filed along with this affidavit'. Para 2 of the said affidavit further shows that it has been categorically stated by the petitioner in the said para that 'according to the best of my knowledge information and belief I have now and never had in my possession custody or power, any other documents relating to the medical record of late Shri Hansraj Gupta other than those which are being filed herewith'. Keeping, in view these facts it is difficult to conclude that the petitioner has not complied with the undertaking given by the petitioner on 14th May, 1986 before the Joint Registrar (0) and for that matter it also cannot, be said that even assuming that the undertaking could partake as an order of the court, there was any violation thereof within the meaning of Order 11 rule 21 Civil Procedure Code .

(5) Let us now consider the contention of the learned counsel for L.R. No. 4 that no discovery has been made of the documents and particulars regarding the date of application and the name of the applicant etc. and the sanction letter with regard to Reserve Bank of India. Reference to para 5 of I.A. No. 2023 of 1986 would show that the first sentence thereof reads as follows :

That the applicant knows that foreign exchange was applied for and sanctioned by Reserve Bank of India for Purposes of treatment of L. Hans Raj Gupta abroad'

This shows that even these documents referred to in para 5 of the application related to the medical record and treatment of late L. Hansraj Gupta and in this view of the matter it cannot be said that the affidavit filed by the petitioner is deficient in any manner whatsoever and consequently also the provisions of rule 21 of Order 11 Civil Procedure Code are not attracted in this case.

(6) Lotus consider the matter yet from another angle. If it were for the sake of arguments accepted that the petitioner has not made discovery with regard to documents mentioned in para 5 of the application (I.A. No. 3023 of 1986) he in reply to para 3 of the application (I.A. No. 636 of 1986) has categorically stated that

'SO far as the documents regarding the Rbi are concerned it is submitted that the petitioner did not have any such documents in its possession at the time of filing of the documents above said, nor does he have any of the documents in possession as of today'

This reply is supported by a duly sworn affidavit of the petitioner, Desh Raj Gupta and for this reason as well it cannot be said that any case has been made out for proceeding under Order 11 rule 21 of the code of Civil Procedure against the petitioner.

(7) Learned counsel for the petitioner has drawn my attention to M/s. Babbar Sewing Machine Co. vs. Tirlok Nath Mahajan, : [1979]1SCR57 in which the scope of Order 11 rule 21 Civil Procedure Code was considered by the Hon'ble Supreme Court. It was observed in para 11 thereof as follows '

'.....'The penalty imposed by Order 11 Rule 21 is of a highly penal nature, and ought only to be used in extreme cases, and should in no way be imposed unless there is a clear failure to comply with the obligations laid down in the rule'.

Continuing, it was observed in para 14 thereof as follows :

'EVEN assuming that in certain circumstances the provisions of Order 11 Rule 21 must be strictly enforced, it does not follow that a suit can be lightly thrown out or a defense struck out, without adequate reasons. The test laid down is whether the

default is willful In the case of a plaintiff it entails in the dismissal of the suit and, therefore, an order for dismissal ought not to be made under Order XI Rule 21 Civil Procedure Code unless the court is satisfied that the plaintiff was willfully withholding information refusing to answer interrogatories or by withholding the documents which he ought to discover. In such an event, the plaintiff must- take the consequence of having his claim dismissed due to his default i.e. by suppression of information .which he was bound to give.....-'

It was similarly observed in para 15 thereof as follows :

'IT is well settled that the stringent provisions of Order XI Rule 21 should be applied only in extreme cases, where there is contumacy on the part of the defendant or a willful attempt to disregard the order of the court is established'.

On the facts this case it is difficult to accept that any of the conditions for invoking Order XI rule 21 Civil Procedure Code exist in the case in hand.

(8) Learned counsel for L.R. No. 4 has drawn my attention to The State of Madhya Pradesh vs . Sunder Lal jaiswal, 0044/1976 : AIR 1976 MP175 but it cannot be said that the principle of law enunciated therein is somewhat different.

(9) The provisions of Order XI rule 21 Civil Procedure Code are stringent provisions and as such deserve to be very strictly construed. These ought to be used only in extreme cases where the default of a party is willful contumacious and grossly violative of the order. When a formal order under Order 11 Rule 12 Civil Procedure Code is wanting, resort cannot be had to Order XI rule 21 Civil Procedure Code Mere undertaking to produce documents cannot partake as an order under Order 11 rule 21 Civil Procedure Code and violation, if there be any, of such an undertaking would not invite the penalty incorporated in Order XI Rule 21 Civil Procedure Code In this position of law, it cannot be said that Order XI Rule 21 Civil Procedure Code is attracted in the instant case and as such there is no merit in this application which appears. to have been motivated with view to delay the progress of the case.

(10) In view of my discussion and findings above, this application. is liable to be dismissed and is dismissed with costs which are assessed at Rs. 2500.00 to be paid by L. R No 4.

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