

S.C. Jain Vs. Bindeshwari Devi

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Court : Delhi

Decided On : Apr-24-1997

Reported in : 67(1997)DLT189; 1997(42)DRJ239; 1997RLR416

Judge : R.C. Lahoti, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 114

Appeal No. : Civil Revision Appeal No. 335 of 1997

Appellant : S.C. Jain

Respondent : Bindeshwari Devi

Advocate for Pet/Ap. : Jagmohan Sharma and; M.L. Bhargav, Advs

Judgement :

R.C. Lahoti, J.

(1) By order dated 8.9.1996 the evidence of the defendant-portioned was directed to be closed. The petitioner sought for reviewing and recalling of the order with leave to adduce evidence. By the impugned order the said prayer made by the defendant has been refused. The aggrieved defendant has come up in revision.

(2) The present case betrays utter disregard of certain rules of procedure at different stages of proceedings in the hearing of the suits and consequent failure

of justice. It appears that the two suits pending between the parties have been dealt with at different stages by various judicial officers. Unfortunately, either none was aware of or none was enlightened by the learned counsel appearing for the parties with the settled practice and procedure governing consolidation of suits and trial of the suits thereafter. Casualties have taken place at more stages than one. While demonstrating the same I seize this opportunity for recapitulating the judge-made-law on consolidation of suits and crystallise the same so as to guide the members of the subordinate judiciary for future.

(3) First the facts in brief to the extent necessary for deciding the questions arising for decision herein.

3.1 There are two suits filed between the same parties and still pending. Suit No. 348/80 (new No 7/94) was filed on 14.5.80 by Bindeswari Devi widow of Maj. Bn Bhargava, the plaintiff, against Sagar Chand Jain, the defendant. The plaintiff claims to be owner of the suit premises and alleges the defendant having taken unlawful possession of a room on the second floor on 27-10-78. The plaintiff had earlier filed a suit for possession of the said room and damages at the rate of Rs. 100.00 per month for the period 27.10.78 to 27.11.78. That suit registered as suit No. 338/78 was decreed on 20-10-1979. Appeal preferred against the decree was dismissed. The defendant did not deliver possession over the property. In the background of the above said facts this suit was filed on 16.4.1980 for recovery of damages for use and occupation of the aforesaid room for the period 27.11.1978 to 27.3.80 at the rate of Rs 100 per month.

3.2. In the written statement, the main plea on which the suit is being contested by the defendant is that the defendant had paid Rs. 544.50 and delivered possession of the disputed room to the plaintiff on 29.8.80 in full and final satisfaction of decree in Suit No. 338/78. The plaintiff assured the defendant of not initiating any other civil or criminal action against the defendant. In view of the receipt dated 29.8.80 executed by the plaintiff in favor of the defendant the suit did not lie.

3.3 On 3.3.81 the trial court framed following issues on the pleadings of the parties : @SUBPARA = 1. Whether any cause of action does not exist in favor of the plaintiff as alleged @SUBPARA = 2. Whether the suit has become infructuous in

view of the objection in para 2 of written statement @SUBPARA = 3. Whether the plaintiff is not entitled to any damages as alleged in view of paras 1 and 4 of written statement as preliminary objections and on merits respectively ?

3.4Relief.

3.4The court directed the defendant to open the case and lead evidence in view of the onus lying on him.

3.5The defendant's evidence commenced on 2.9.81 and closed on 25.2.85. On 22.1.86, the plaintiff opened her evidence which continued being recorded on 21.4.86 and also on 19.8.93, on which date the evidence was closed.

3.6It appears that Bindeswari died on 15.9.84. She appears to have executed a will in favor of her daughter-in-law Satyawati Bhargava and grandsons Yoginder Nath Pradip and Narinder Nath. On 27.2.85, these four legal heirs filed a suit for recovery of Rs. 3600.00 as damages for use and occupation at the rate of Rs. 100 per month for the period 27.2.82 to 26.2.85. It is stated in the plaint that suit for recovery of damages for the period 27.11.78 to 27.3.80 was pending and claim for the period from 27.3.80 to 26.2.82 had gone barred by time. This suit has been registered as No. 409/85 (new No. 895/93).

3.7In the written statement, the execution of will by Bindeswari Devi in favor of the plaintiff and the entitlement of the plaintiffs to sue has been disputed. It was also pleaded that the defendant being not in possession of the room in question since 29.8.80, was not liable to pay any damages.

3.8On 3.9.87, the Court framed the following issues : @SUBPARA = 1. Whether the plaintiff is entitled to recover the suit amount as damages from the defendant ?

2.Whether the defendant had handed over the possession of the suit premises on 29.9.80 to Smt. Bindeshwari Devi testator for the plaintiff. @SUBPARA = 3. Whether the defendant had paid the amount of Rs. 540.50 to Smt. Bindeshwari Devi testator towards the final settlement of the suit or the decree.

4.Relief

3.9 An important event happened in between which needs to be taken note of. The two suits were pending in two different courts. On attention of the learned District Judge having been invited to this fact, be ordered withdrawal of the latter suit from the court where it was pending and sent it to the court where the earlier suit was pending.

3.10 On 28.4.94, the court disposed of an application under Section 151 Civil Procedure Code in Suit No. 895/93. The order does not mention whose application it was. I have not been able to lay my hands on such an application in the record of the suit. The relevant part of the order reads as under :

28-4-94

PRESENT: Counsel for parties.

VIDE Order of the learned District Judge dated 21.12.1993 the suit filed Bindeswari Devi vs Sagar Chand Jain had been transferred to this court to be tried with this case.

IT is stated in the application under S. 151 Civil Procedure Code that copy of the evidence led in case titled Bindeswari Devi vs. Sagar Chand Jain be placed on record in this suit. Counsel for plaintiffs states that he will be leading the same evidence in both the suits. I have heard the learned counsel for defendant and also perused the record. Both the cases/suit are consolidated and the evidence recorded in the case titled Bindeswari Devi vs. Sagar Chand Jain be placed on record in this case.

Put up for Pe on 20.7.1994. (underlining by me)

The case was then posted for plaintiff's evidence.

3.11. On 27.10.94, it is stated that further statement of Public Witness 2 and statement of PW3 were recorded. Cross examination was adjourned to 5.12.94 on which date it was completed on PW2. On 7.2.1995 and 29.3.95 cross examination of PW3 was completed. The case was posted for defendant's evidence. On 10.9.96 the defendant's evidence was closed as neither the defendant nor his

witnesses were present.

3.12 On 5.10.96, an application for recalling the above said order was moved. It is stated why the learned counsel for the defendant and the defendant's witness could not appear when the case was called. By the impugned order the application has been rejected.

3.13 I may now revert back to the proceedings in suit No. 348/80 (7/94). On 27.10.94, it is recorded 'further statement of Public Witness 2 and PW3 recorded. For cross examination adjourned to 5.12.94.' On 5.12.94, cross examination of Public Witness 2 was completed. On 29.3.95 cross examination of PW3 is completed. The case was then posted for defendant's evidence. On 10.9.96 the defendant's evidence was closed.

3.14 Let the narration of facts be left hereat.

(4) Consolidation of suits is a Judge made technique devised ex debito justitia. The fountain source of power in Section 151 of the Code of Civil Procedure which provides saving of inherent power of court-the guiding force and paramount consideration being achieving the ends of justice and preventing abuse of the process of the court.

(5) The Code of Civil Procedure does not specifically provide for consolidation of suits Clause (h) of sub-section (2) of S. 127 of the Civil Procedure Code provides for rules being framed by High Courts in the matter of 'consolidation of suits' appeals and other proceedings. No such rules framed by High Court of Delhi have been brought to my notice. Yet-Consolidation of suits in exercise of inherent powers with or without consent of the parties is a phenomenon well established and invariably the High Courts of the country before whom question of consolidation has arisen have chosen to speak of consolidation under inherent jurisdiction of the court. See Narayan v. Jankibai : AIR1915 Bom146 . Nankoo vs. Nagnur Air 1953 Hyd 130 , Philip vs Bata Shoe Co 1959 Ker Lt 1346. P.P.Gupta vs East Asiatic Co. : AIR1960 All184 , The State of Rajasthan vs Motiram, . Dr Guru Prasad Mohanty vs Bijoy Kumar Das, : AIR1984 Ori209 , Dasari Suryanarayana vs. Dasari Venkata Subbaiah : AIR 1960 AP75 . Sunder Lal Shaw

V. Kalidas 61 Cal Wn 793, Kali Charan Dutt V. Surja Kumar Mandal 17 Cal Wn 526.

(6) The object behind consolidation is to avoid multiplicity of suits or proceedings, to eliminate chances of conflicting decisions on the same point, to prevent delay and to avoid unnecessary costs and expenses. (The State of Rajasthan vs Moti Ram (supra), Bharat Nidhi Ltd Delhi vs. Shital Prashad Jain Air 1981 Del 251.

(7) There is ample authority available for the proposition that exercise of jurisdiction to consolidate suits is not dependent on consent of the parties; though the consent of the parties would ease the exercise of jurisdiction see Bharat Nidhi Ltd 1981 Delhi 251, Mahanga Singh vs. Banta Singh, 1973 P&h; L.R. 257, Qazi Mohamad Fazal vs. Mahkumar Mahton Air 1922 Pat 566, Dharam Das vs. Dharam Das : AIR1917 All336 (

(8) Most common examples where such power has been invariably exercised by the courts may be noted.

8.1 One is, to relieve the plaintiff from the rigours of applicability of Order 2 Rule 2 CPC. Two suits touching the same cause of action may be filed by the plaintiff on the same day and the defendant may plead bar to the maintainability of one of the two suits by relying on Order 2 Rule 2 CPC. Strictly speaking, the bar enacted by Order 2 Rule 2 Civil Procedure Code would not come into play on account of the two suits having been filed on the same day. The proper procedure in such eventuality would be to consolidate the two suits and try them together in exercise of inherent powers under Section 151 Civil Procedure Code [see Ganesh v. Gopal : AIR1943 Bom12 . Harish Chandra v. Kailash Chandra,].

8.2 The other most common example is when two suits having been filed the matter in issue in the later suit is also directly and substantially in issue in a previously instituted suit between the same parties. Either party may by placing reliance on S. 10 Cpc, seek stay of the subsequent suit or by placing reliance on S. 151 of the Civil Procedure Code seek stay of earlier suit on account of the latter instituted suit being wider in its scope and impact on the issues arising for decision in the earlier instituted suit. In appropriate cases the court may instead of staying

one of the two suits direct consolidation of the two suits. (see P.P.Gupta v. East Asiatic : AIR1960 All184 , Chander Bhan vs. Ram Lal 1970 WIn (UC) 542, J.C. Batra vs Radhey Shyam 1975 Rlr 164 In Manohar Lal v. Hira Lal : AIR 1962 SC527 their Lordships observed (vide para 39) :.

'The suit at Indore which had been instituted later, could be stayed in view of S. 10 of the Code. the provisions of that section are clear, definite and mandatory. A court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. When there is a special provision in the Code of Civil Procedure for dealing with the contingencies of two such suits being instituted recourse to the inherent powers under S. 151 is not justified'.

'.....It was open to the respondent to apply for the transfer of the suit at Asansol to the Indore Court, the two suits could have been tried together.' (underlining by me)

8.2.2 It is difficult to lay down any straight jacket formula by application of which the court may distinguish between the cases liable to be stayed under Section 10 or 151 of the Civil Procedure Code or which may expediently be consolidated. It will all depend on the wisdom of the judge faced with the problem to take a decision guided by judicial experience. Broadly speaking, if consolidation is likely to create complications at the trial or may prejudice rights of the parties either because the issues are not all common or because the parties are not common, the Court may not consolidate the suits. Consolidation may be preferred to stay in the court may deem it expeditious and advantageous to do so.

8.2.3 The only decision taking a view to the contrary is a single Bench decision of Jammu and Kashmir Hc i.e. Mst Mugli v. Khaliq Dar, Air 1979 Jk 74 wherein it has been held that an order consolidating the two cross suits instead of staying the subsequent suit under Section 10 Civil Procedure Code was illegal. The view taken does not appeal to me as it is opposed to the weight of the judicial authority. Indeed, none of the decisions referred to in this order by me was brought to the notice of the Court in Mst Mugli's case.

8.3 The third example is of cross suits. When the parties file suits against each other, though arising out of the same cause of action Consolidation would be expedient and advisable because of the identity of the cause of action and of the evidence likely to be adduced.

(9) A few decided cases may be referred to by way of illustrations of the facts and circumstances considered relevant to exercise power to consolidate suits.

9.1 Two suits with different parties on the same subject matter under the same circumstances and for the same kind of relief were consolidated for the purpose of hearing so as to merge them into one and treat them as one for all practical purposes in *Dharam Dass v Dharam Dass*, : AIR1917 All336 .

9.2 Appearance of sufficient unity or similarity in the matters in issue in the suits or the fact that the determination of the suits rests mainly on a common question making it convenient to have them tried as analogous cases, was held to be a relevant consideration for exercise of power to consolidate suits without the consent of the parties in *Hari Narain v. Ram Asish Singh* Air 1954 Pat 124 and *Nani Gopal v. Bhol Nath*, : AIR1973 Pat437 . In the latter decision the High Court of Patna has held that if the trial of two suits was likely to lead to a conflict of decisions on the same point it was a very important consideration to be kept in view for deciding the question of consolidation even without the consent of parties.

(10) Sufficient unity and similarity in the matter in issue in two suits being the judicially accepted test, power to consolidate does not stand for its exercise in need of identity of all the issues and reliefs in the two suits nor on the consent of the parties (*M/s Pt Anklesaria & Co v. Uoi* : (1974)76BOMLR19 .

(11) If the parties and the issues in the two suits are common, though different reliefs have been claimed, the consolidation of suits would result in the two suits losing their distinct entity; for all practical purposes after consolidation the two suits would be treated as one capable of being disposed of by one judgment and one decree. (See the *State of Raj vs. Moti Ram*, supra; *Manohar Vinayak v. Laxman Anandrao Db*, *Sheoram v. Hiranman* ; *Sarswati Bai v. Durga Sahai* 1983 Mplj 475.

(12) Though the circumstances warranting exercise of jurisdiction in favor of consolidation may be available yet the court may decline to consolidate the suits or the trial thereof. If the party opposing the consolidation may be able to demonstrate prejudice to, his case by consolidation.

(13) In appropriate cases where there may not be absolute identity of the parties and/or issues or for any other just reason the court while exercising its inherent jurisdiction under Section 151 Civil Procedure Code may direct consolidation of the suits only for the purpose of trial. In such a case the suits would remain two but the evidence recorded in one case would be read in the other case too. The consolidated trial having been concluded after hearing the parties the court may write one common judgment or two separate judgments for the two suits. In the eventuality of the two suits having been disposed of by one judgment, two separate decrees shall have to be drawn up for the two suits. The judgment shall remain on the record of one suit though for the sake of convenience copy thereof may be placed on the record of the other suit.

(14) One thing has to be clearly borne in mind that the evidence though recorded in one suit is available to be read in the other suit by virtue of consolidation. However the court cannot merely place the copies of the statement recorded in one suit on the record of the other suit and read the copies as depositions in the other suit. Such a procedure if adopted will be strange and unknown to law and hence illegal. In *Uoi v. Punam Chand*, 1972 Mplj 160, the Court had failed to make a direction that evidence in the one suit shall be read in the other. In the record of the other suit, what was placed was mere carbon copies of the depositions of witnesses in the first suit. It was held that the trial was vitiated and the error defect or irregularity in procedure was not curable in spite of the well settled-principle that the procedural law was to be construed liberally. It is to be noted that there was no order for consolidation of suits under Section 151 CPC.

(15) In *Hari Narain vs. Ram Ashish Singh* 1957 Patna 124, the defendants in the three suits were the same but the plaintiffs were different. Some evidence was recorded and documents exhibited in one suit where after the consolidation was ordered. It was held that the evidence and the documents in that one suit will not

be binding on the plaintiffs in other suits as they were not parties to the first suit unless such plaintiffs agree that such evidence oral and documentary should be read at the hearing of the three suits; otherwise the evidence will have to be taken afresh.

(16) The two suits if ordered to be consolidated in entirety, the court may frame consolidated issues before commencing the trial.

(17) Of necessity the order for consolidation has to be made before the commencement of trial i.e. before the recording of the evidence has commenced in any of the two suits. If evidence in one suit has been recorded fully, consolidation would be redundant. If evidence has been recorded partly in one suit and then a consolidation is ordered obviously difficulty would arise whether the evidence already recorded in one suit is available to be read in the other suit. This will not be permissible if recording of the evidence has substantially progressed even in part. In such a fact situation a better exercise of discretion would be not to yield to the prayer for consolidation; the only exception being the consent of the parties whereby they may agree to have the evidence already recorded in one suit to be read as evidence in the other suit as well. Though the court may in appropriate cases after having been satisfied of the need of consolidation order consolidation of the suits and also direct the evidence to be recorded afresh eliminating from consideration the evidence previously recorded.

(18) The jurisdiction to consolidate the suits can be exercised by the court only when the two suits are before it. If the suits be pending before different courts and a party may be desirous of seeking consolidation then its appropriate remedy is to move the High Court or the District Court, as the case may be, for transferring the two suits in one court. The High Court or the District Court may exercise its power of transfer if satisfied of the necessity of doing so-to avoid multiplicity of the trial of the same issues and conflicting decisions (see *District Collector Kozhikode v. Karela Verma Civil Thampuram* : AIR1960 Ker199).

(19) In *Halsbury's Laws of England (Fourth Edition) Vol.37*, practice and procedure relating to consolidation has been summed up and so stated in para 69,71 (at pp 60-62)

69.Consolidation

Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort, and to make the conduct of several actions more convenient by treating them as one action.

The jurisdiction to consolidate arises where there are two or more causes or matters pending in the same Division and it appears to the Court

:

(1)that some common question of law or fact arises in both or all of them, or

(2)that the rights to relief claimed in them are in respect of or arise out of the same transaction or series of transactions, or series of transactions, or

(3)that for some other reason it is desirable to make an order consolidating them or an order alternative to consolidating them.

In these circumstances the court may order those causes or matters to be consolidated on such terms as it thinks just. The circumstances in which actions may be consolidated are broadly similar to those in which parties may be joined in one action.

(20) Accordingly, actions relating to the same subject-matter between the same plaintiff and the same defendant, or between the same plaintiff and different defendants, or between different plaintiffs and different defendants or between different plaintiffs and the same defendant, may be consolidated on the application of either a plaintiff or a defendant.

On the other hand, there may be circumstances which may make it undesirable or even impossible, or at least impracticable, to make an order for consolidation. Thus, two actions cannot be consolidated where the plaintiff in one action is the same person as the defendant in another action unless one action can be ordered to stand as a counter claim in the consolidated action. Again, it is generally impossible to consolidate actions where the plaintiffs in two or more actions are

represented by different solicitors. Moreover, a consolidation order will as a matter of discretion be refused where it would be likely to cause embarrassment at the trial. @SUBPARA = The Court has power to make an order for partial consolidation. Thus, where there are several actions by different plaintiffs, each of whom has a separate claim for damages for personal injuries the actions may be consolidated on the issue of liability, but thereafter each plaintiff is left to pursue his separate claim for damages independently.

The Court has power to deconsolidate actions which have been consolidated, in other words to restore the separate identity of each of the actions comprised in the consolidation order.

The power of consolidation of several actions may be exercised in such actions as administration actions, Admiralty actions and defamation actions.'

71. Alternatives to consolidation where the court considers that it is not desirable or appropriate to make an order for the consolidation of two or more causes or matters, it has power to order the several actions to be tried at the same time or one immediately after another, or it may order any one of them to be stayed until after the determination of any other of them. Such orders are very useful in that, for example, they will save the expense of two attendances by counsel, solicitors and witnesses, and the trial judge will be enabled to try the several actions in such order as may be convenient or even at the same time and with the consent of the parties, which will normally be readily given, to treat the evidence in one action as evidence in the other or others. Any party in the second action who is not also a party in the first will be permitted to take part in and to attend the trial of the first and cross-examine the witnesses.

(21) Three neighbouring concepts, often confused with each other, may be made precise. They are (i) a direction for analogous or simultaneous hearing of the suits; (ii) consolidation of suits in their entirety and (iii) consolidation of suits for the purpose of trial.

21.1A direction for analogous or simultaneous hearing of the suits requires the court to take up the two suits for hearing on the same date. The identity of the

suits remains distinct and independent from each other. It is not merged either wholly or even partially. The hearing takes place separately in each suit though on the same date. Such are the cases where on account of similar or same question of law arising for decision in different suits or the same material witness being required to be examined in different suits, for the sake of convenience the court directs the suits to be taken up for hearing on one day. There may be cases where in spite of the parties and or the subject matter being different, not attracting applicability of Section 10, Section 151 Cpc, the Court feels that while hearing one suit, it must keep a watch on the progress of or developments in the other suit, and therefore, directs the two suits to come up for hearing on the same day.

21.2 Consolidation of suits in entirety results into merger of the two suits into one, the two suits losing their independent existence for all practical purposes after the order of consolidation. Take for example a suit for recovery of rent filed by the same landlord against the same tenant in respect of the same property and the same tenancy but for different periods, say three years each or take a case of two suits attracting applicability of Order 2 Rule 2 Civil Procedure Code but having been filed on the same day. Consolidation of suits may enable a court striking out consolidated issues. The two suits can be disposed of by one common judgment followed by one decree.

21.3 Consolidation of suits for trial merely or partial consolidation enables the evidence in the two suits being recorded in one suit only and the evidence so recorded being read in the other suit as well. In spite of the consolidated trial having taken place the two suits remain separate and distinct from each other. They may be disposed of by one judgment or two judgments on the same evidence but in any case two decrees shall have to be drawn up at the end. Take for example the case of cross suits filed on a cause of action arising out of the same transaction. One suit may be dismissed and the other may be decreed. The two decrees in the two suits will be different. One out of the two parties may appeal against one and may not appeal against the other if the bar of res judicata is not attracted while doing so. Take the case of an owner of limited estate having made several alienations in favor of different persons and the transactions having been challenged by the reversioners in different suits against different purchasers

some suit may be decreed some may be dismissed though evidence may be common and common questions of law and facts arise. In spite of consolidation for trial of the suits and disposed of by the court pronouncing one or more judgments separate decrees shall have to be drawn up.

(22) Having so stated the law, I now revert back to the facts of the case at hand.

(23) In Suit No. 348/80 (7/94) also the court passed the same order of consolidation on 20.4.94. However, in the operative part the court has said :

'....ANDthe evidence recorded in the case be placed on record in the suit titled 'Yoginder Nath v. Sagar Chand Jain' meaning thereby what the court meant was that the evidence though recorded in the 1980 suit, yet copy thereof shall be placed on the record of 1985 suit so as to be read therein also.

23.1What has actually happened in the suits is nothing short of total mess. The statements of PW1 Rk Singh handwriting expert dated 22.1.86, Public Witness 2 Yoginder Nath Bhargava dated 20.4.86, additional examination in chief dated 27.10.94 are all found placed in the record of 1980 suit. Copies of these statements have not been placed on the record of `1985 suit.

23.2Carbon copy of the additional examination in chief of Yoginder Nath Bhargava dated 27.10.94 is placed on the record of 1985 suit.

23.3Cross-examination on Public Witness 2 conducted on 27.10.94 is handwritten and placed on the record of 1985 suit. Presumably, this is the original. Its copy is typewritten and placed on the record of 1980 suit.

23.4Statement of Jc Joshi, PW3, (dated 27.10.94) is placed in original on the record of 1985 suit and carbon copy placed on the record of 1980 suit. Some statement of this witness was recorded on 19.8.93 also. The original thereof is to be found in 1980 suit. No copy is available on the record of 1985 suit. Statements of DW1 Shagun Chand, DW2 Rajinder Kumar and Dw 3 Pawan Kumar were recorded on 2.9.81. Cross-examination of Dw 3 was conducted on 15.4.82. Statement of Dw 4 Mrs Rk Vig handwriting expert was recorded on 26.7.83 and 25.1.85. All these statements of the defendant's witnesses are to be found in

original and on the record of 1980 suit only.

(24) The defendant's evidence having been already concluded in 1980 suit, there was no question of the suits being then consolidated. If consolidation was by consent of the parties (as it appears to be) then the court should have better made a specific record of the same. Also the consent of the parties for evidence already recorded in one suit being read as evidence in the other suit should have been expressly stated. The court would have been better advised to frame consolidated issues in view of order of consolidation and then to direct the evidence being recorded afresh. In the facts and circumstances of the case better and safest course would have been to direct stay of the subsequent suit awaiting decision of the earlier suit. But for the issue as to entitlement of the plaintiffs in the 1985 suit to sue, all other issues (though they are not properly framed in the 1980 suit) are common. The parties too are common inasmuch as the plaintiff in the 1985 suit are claiming under the will executed by the plaintiff in 1980 suit. On the death of Bindheswari Devi (the plaintiff in 1980 suit), the LRs have been brought on record who are none else then the plaintiff in the 1985 suit.

(25) How to wriggle out of the cobweb of the mess so created In view of what has been recorded in the two suits in the orders dated 28.4.94 it is clear that the parties had agreed to the evidence recorded on one suit being placed on the record of the other suit meaning thereby that the evidence recorded in the suits up to that date was to be read in both the suit. The parties have conceded to such a procedure being adopted and they cannot be allowed to resile from the same. The order for consolidation appears to be based on consent. However, it is strange to note the carbon copies of the statements (placed on whichever of the two records) having been signed as originals. There was no need of doing so as in view of consolidation the evidence recorded in one suit was the evidence in the other suit also.

(26) No useful purpose would be served by now directing either separation of trial or stay of one of the two suits in view of the time already lost and none of the parties having disagreed with or challenged the order of consolidation. In the peculiar facts and circumstance of this case, it would be in the interest of justice to

allow the defendant an opportunity of adducing such other evidence as he may propose to adduce. From the contents of the application dated 5.10.96 styled as one under S. 114/151 Civil Procedure Code it is clear that the only witnesses which the defendant proposed to examine and which were in attendance were the defendant himself and his father JI Jain. The defendant should be allowed an opportunity of examining the two but subject to terms.

(27) The revision is allowed. The impugned order rejecting the defendant-petitioner's application dated 5.10.1996 is set aside. The parties shall appear before the trial court on 12-5-1997, on which date the trial court shall appoint a date for recording the defendant's evidence. The defendant shall be bound to remain present and keep the witness JI Jain in attendance and examine the two at the time when the case is called for hearing. The court may not grant adjournment for the purpose.

(28) The following additional directions are also made in the interest of justice:
@SUBPARA = i) The evidence recorded in either suit whether before or after the date of consolidation shall be read as evidence in both the suits (in view of the parties having conceded to that course).

(II)The statement of Shagun Chand shall be recorded as an additional statement to the deposition already recorded on 2.9.81. He need not depose afresh either in examination-in-chief or in cross examination or in re-examination to such facts as to which he has already deposed. The statement of JI Jain shall of course be recorded now and read as evidence in both the suits.

(III)If the additional evidence recorded pursuant to this order relates to the issues, the burden of proof whereof lies on the defendant, the plaintiff shall be allowed opportunity of adducing evidence in rebuttal.

(IV)The statements of witnesses and documents lying scattered on the records of the two suits shall all be collected and placed at one place on the record of 1980 suit which shall be read as evidence in both the suits.

(V) On conclusion of trial, the court shall decide the two suits by one judgment. One decree sheet only need be drawn up.

Byway of abundant caution I could like to state that the directions contained in this para are not intended to be used as a precedent inasmuch as such directions have been made only to suit the exigencies of the case at hand and to meet the ends of justice herein.

(29) Revision stands disposed of accordingly. No order as to costs.

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