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Delhi High Court

Case No: CS (OS) 2721 of 1997

Smt. Kailash Kumari		APPELLANT
	Vs	
Smt. Rajni Monga and Others		RESPONDENT

Date of Decision: Aug. 20, 2010

Acts Referred:

- Evidence Act, 1872 - Section 138

Hon'ble Judges: Aruna Suresh, J

Bench: Single Bench

Advocate: S.P. Mehta and Naveen C. Bajaj and Party in Person, for the Appellant; Kirti Uppal and Abhay Mani Tripathi, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Aruna Suresh, J.

IA No. 4498/2010 (under Section 151 CPC r/w. Section 138 of the Indian Evidence Act)

1. Present suit has been filed by the plaintiff seeking cancellation of gift deed, declaration and permanent injunction against the defendants in respect of the Property No. D-1/27, Vasant Vihar, New Delhi. After pleadings were complete and issues were framed, the Court directed examination of the witnesses on commission and it accordingly appointed Mr. Shivinder Chopra, Advocate as the Local Commissioner. After cross- examination of PW-4 Mr. Naveen C.Bajaj was complete, plaintiff sought reexamination of the witness. Local Commissioner accordingly directed the plaintiff to approach the Court for such permission. This has resulted into filing of the instant application for consideration.

2. plaintiff has sought permission to re-examine PW-4 on following points of cross-examination:

1. The date of paralytic attack to PW-4 and his date of departure to Jammu.

2. The year of registration of General Power of Attorney.

3. Meeting of PW-4 to Smt. Kailash Kumari and Mr. C.S. Manchanda first time.

4. Signatures of Smt. Kailash Kumari on the correction of Will.

3. Mr. Kirti Uppal, counsel appearing on behalf of defendants has objected to re-examination of PW-4 on the ground that there is no ambiguity in the cross-examination of the witness, which necessitates his reexamination.

4. Mr. S.P.Mehta, counsel appearing on behalf of plaintiff has submitted that plaintiff had suffered paralytic attack and therefore, he could not properly comprehend the questions put to him in the cross-examination and answer them accordingly. He has submitted that re-examination of PW- 4 is being sought as permitted u/s 138 of the Indian Evidence Act on the questions of cross-examination, which were not the subject matter of examination-in-chief of PW-4 and General Power of Attorney and Will executed by the deceased plaintiff. He has asserted that plaintiff has a right to re-examine the witness on the questions put to him in cross-examination beyond the subject matter of the examination-in-chief.

5. Mr. Uppal has refuted the submissions made by counsel for the plaintiff. He has argued that PW-4 is an advocate who is still in practice as per his own statement and his cross-examination suggests that he was not mentally affected by the paralytic attack, which he allegedly suffered on 20th March 2009, though the witness has deposed that he suffered paralytic attack in 2008. He has submitted that cross-examination of the witness is not limited to the examination-in-chief and there is no ambiguity in the cross- examination nor any new facts have been brought on record which warrant re-examination of the witness. He has urged that the application is without merits and has been filed with a view to fill in the lacunae in the affidavit produced on record by the plaintiff, which cannot be permitted by this Court.

6. Section 138 of the Indian Evidence Act gives a right to a party to re-examine a witness. However, this right is conditional. In every case a party cannot be allowed to re-examine the witness with a view to fill in the lacunae in his evidence.

7. Admittedly, PW-4 N.C.Bajaj is a practicing lawyer and is mentally alert. He has admitted that till date he is engaged in the registration of documents. Thus, it is clear that he is actively pursuing his profession and paralytic attack suffered by him in no manner has affected his mental faculties. Being a lawyer, he is well versed with the procedure, appreciation and consequences of evidence in the form of his testimony on merits of the case. Therefore, under these circumstances to say that

he was suffering from a paralytic attack and therefore, could not comprehend the questions, put to him, in the right perspective while giving his reply or that his reply under the circumstances was not as per the facts and documents on record, is not acceptable.

8. As PW-4, in his cross-examination he has deposed that he suffered paralytic attack in the year 2008. Counsel for the plaintiff has urged that he needs to re-examine the witness as he has not correctly given the year of paralytic attack which he suffered. He has placed on record a photocopy of discharge summary prepared at Khetarapal Nursing Home. This discharge summary pertains to PW-4 and the date of admission as noted in the discharge summary is 20th March, 2009 at 3.00 PM. The witness was discharged on 26th March, 2009 at about 2.00 PM. On the basis of this document, it is argued that witness had suffered paralytic attack in 2009. History of the patient as written in the discharge summary is relevant. It reads:

History: Patient admitted with the C/o Sudden onset of weakness Left side of body after fall on ground. Had CVA in test 2008.

9. Thus, it is clear that N.C.Bajaj suffered his first paralytic attack in 2008 and the witness, being an intelligent person, had given the year of paralytic attack as ''2008'' based on his sharp memory. In consonance with his statement that he suffered a paralytic attack in the year 2008, he has deposed that he shifted to Jammu in the month of April 2008 and since then he is residing there. Therefore, I am of the view that no clarification of the year of witness having suffered paralytic attack is required by way of reexamination of the witness.

10. The witness has deposed that Smt. Kailash Kumari had got registered a Power of Attorney in favour of her son, Mr. Hardeep Kumar and he was a witness to the said Power of Attorney. Mr. Chander Shekhar Manchanda was the second witness to the said Power of Attorney. He has deposed that Power of Attorney was registered in the year 1987, when he met Chander Shekhar Manchanda for the first time. Power of Attorney Ex.PW- 1/B was registered on 21st May, 1997 and it was executed by Smt. Kailash Kumari on 21st May, 1997 itself. PW-4 Mr. N.C. Bajaj is an attesting witness to the said Power of Attorney. Under the circumstances, when statement of the witness is categorical and clear, I do not find the need of any re- examination of the witness for seeking any clarification or explanation from him.

11. Witness has deposed that he met Smt. Kailash Kumari for the first time when she came to him for registration of the Will through Mr. Mehta. He has emphasized that he remembered almost every person who had come to him for registration of his documents by name and face and he remembers his clients even after their work is complete as he maintains contact with the person for whom he had worked.

12. It is pertinent that PW-4 N.C. Bajaj was previously associated with Mr. Mehta as his junior and worked with him for few years. He had met Smt. Kailash Kumari one or two times with Mr. Mehta. Under the circumstances, I find no reason to permit

re-examination of the witness who has deposed on his sharp memory and also because of his constant contact with his clients even after their work was complete.

13. PW-4 in his cross-examination has deposed that he did not tell Smt. Kailash Kumari to counter-sign all the places in the Will where corrections were made. When asked, he has deposed that it is not in normal practice that signatures on corrections are necessary. However, he did not remember names of the persons who had signed the documents.

14. I fail to appreciate, as to how re-examination of the witness has become necessary. It is pertinent that witness in his cross-examination on 16th March, 2010 has stated that his affidavit was prepared on instructions of Mr. S.P.Mehta, Advocate. plaintiff cannot be allowed to fill in the lacunae in the statement of PW-4 by invoking provisions of Section 138 of the Indian Evidence Act.

15. Under these facts and circumstances, I find no merit in the application and the same is accordingly dismissed.

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16. Awaiting proceedings of the Local Commissioner, list on 2nd December, 2010.