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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 02.08.2024

+ TEST.CAS. 67/2021

MS. ASHA MISHRA @ ASHA MISRAPetitioner

Through: Mr. Alok Kumar, Sr. Advocate with
Mr. Amit Kumar Singh, Mr. Varun
Maheshwari and Mr. Manan Soni,
Advocates.

versus

STATE THROUGH STANDING COUNSEL & ANR.

.....Respondents

Through: Mr. Divyam Nandrajog, Panel
Counsel for GNCTD with Mr. Aman
Wasan, Advocate for R-1.
Mr. Akshay Makhija, Sr. Advocate
with Mr. Pramod Dayal, Mr. Rakesh
Kumar and Mr. Seerad Deep Singh,
Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J. (ORAL)

**I.A. 8058/2024 (by the respondent no.2 under Order VIII Rule 1A (3)
CPC incorrectly mentioned as under Order VII Rule 14(3) CPC**

1. The present application has been filed by the respondent no. 2 seeking to place on record the following additional documents: -

i) Copy of passport of the respondent no. 2/applicant showing his



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visit to India in the month of May, 2021;

- ii) Copy of the receipts of the last rites of the deceased testator issued by Moksh Dham Shamshan Bhumi, Thakran Patti, Jharsa Village, Sector 32 near Medanta Hospital, Gurugram.
- iii) True typed copy of details of WhatsApp chats on the mobile numbers of the respondent no. 2, viz – 9146212812 and 8826288477 during the period 04.05.2021 till 29.08.2021.
- iv) Two orders passed by late Shri Vishnu Bhagwan (testator), as Financial Commissioner, Haryana.

2. The undisputed facts are that the present petition seeking probate of the Will dated 12.12.2020 by Late Vishnu Bhagwan has been filed by his second wife / petitioner. The subject Will bequeaths the entire moveable and immovable estate of the testator to his wife, the petitioner herein. The Will also contains recital that in the event his second wife i.e. the petitioner predeceases him, the entire estate shall stand bequeathed to one Sh. Krishna Narain, the grandson of the petitioner from her first marriage.

3. Be it noted that the respondent no. 2 is the only son of the testator from his first marriage, but neither any bequest has been made in favour of the respondent no. 2 nor any reason has been assigned in the Will for his exclusion from the bequest. This is the reason for contest by the respondent no. 2 in the present petition.

4. Mr. Akshay Makhija, learned Senior Counsel appearing on behalf of respondent no. 2 / applicant submits that the present matter is a Testamentary Case in which the respondent gets an opportunity to raise objections by way reply and against which the petitioner also gets an



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opportunity to respond by filing a replication.

5. He submits that in the present case as the petitioner has filed her replication, the respondent no.2 did not get an opportunity to further respond to the averments made in the replication filed by the petitioner. Elaborating his submission in the context of the present case, he submits that the petitioner in her replication has set up a case that during the ailment of the deceased late Shri Vishnu Bhagwan in the first week of May 2021, the applicant/respondent no. 2 did not take care of his ailing father. Further, the petitioner, in her replication, has also denied the following averments made by the applicant / respondent no. 2 in his reply/objections that -

- (i) the applicant / respondent no. 2 had arranged his father's tele-medical consultation and through his resourceful friend got his father admitted in Max Hospital, Gurugram in May, 2021.
- (ii) the applicant / respondent no. 2 lost no time in securing emergency VISA and came to India and landed in Delhi in May, 2021.

6. He submits that the applicant / respondent no. 2 lost his father on May 13, 2021 and the respondent no. 2, in fact, performed his father's last rites at the cremation ground near Medanta Hospital, Gurugram. He, therefore, contends that the stand taken by the petitioner in her replication needs to be demolished through documents-based evidence and for the said purpose, the present application has been filed to place on record the additional documents as mentioned above.

7. He further submits that placing on record of said additional documents has become all the more necessary as the statement was made on



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behalf of the petitioner on 16.01.2024 that the petitioner does not wish to step into the witness box and examine herself. Dilating on his submission, he submits that had the petitioner agreed to examine herself as a witness, the applicant / respondent no. 2 would have got an opportunity to confront her with the additional documents now sought to be placed on record. He submits that no prejudice will be caused to the petitioner as she will have a chance to cross-examine the applicant / respondent no. 2 and his witnesses with respect to the additional documents now sought to be placed on record. To buttress his contention, learned Senior Counsel has placed reliance on the following decisions of the Hon'ble Supreme Court in: -

- i. ***Sugandhi (Dead) by Legal Representatives and Another vs. P. Rajkumar, represented by his Power Agent Imam Oli, (2020) 10 SCC 706;***
- ii. ***Levaku Pedda Reddamma & Ors. vs. Gottumukkala Venkata Subbamma & Anr., Civil Appeal No. 4096/2022 dated 17.05.2022;***
- iii. ***K.K. Velusamy vs. N. Palanisamy, (2011) 11 SCC 275.***

8. *Per contra*, Mr. Alok Kumar, the learned Senior Counsel appearing for the petitioner vehemently opposes the application and submits that as many as three IAs for filing additional documents, viz; (1) I.A. 3464/2024; (2) I.A. 13615/2022 and (3) I.A. 13671/2022 were earlier filed by the respondent no.2 before the commencement of trial but after the filing of the replication and the same were allowed by this Court on 23.05.2022 and 07.09.2022, respectively but no endeavour was made by the respondent no.2 to place on record the additional documents which are subject matter of the



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present application. He submits that the said applications were allowed with the consent of the learned counsel for the petitioner. Also, no justification has been put forth by the respondent no.2 for not filing the present set of documents at an earlier stage.

9. He submits that the replication was filed by the petitioner on 07.02.2022, the admission/denial of documents was concluded on 06.04.2023, the issues were framed on 22.11.2023 and the statement was made by the petitioner's counsel to the effect that the petitioner will not be examining herself as witness on 16.01.2024, whereas the present application came to be filed on or about 08.04.2024. He submits that the attesting witnesses have already been examined by the petitioner and the Petitioner's Evidence stood closed on 20.03.2024. He further submits that the petitioner is about 80 years of age and both the witnesses are above that age and thus, if the present application is allowed, the same will lead to *de novo* trial.

10. In support of his submissions, Mr. Alok Kumar has placed reliance on the following decisions of this Court in:

- i. Scindia Potteries & Services Pvt. Ltd. Vs. J.K. Jain Anr. 2012 SCC OnLine Del 5296;*
- ii. Asia Pacific Breweries Vs. Superior Industries, 2009 SCC OnLine Del 503;*
- iii. Harkesh Singh Vs. Ved Raj, 2010 SCC OnLine Del 397.*

11. I have heard the learned Senior Counsel for the applicant / respondent no. 2 as well as learned Senior Counsel for the petitioner / non-applicant.

12. Undisputedly, the present application has been filed by the applicant / respondent no. 2 at a stage when the petitioner's evidence has already been



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concluded and the matter is fixed for the evidence of the respondents. Though it is not the case of the applicant / respondent no.2 that the said documents were not in his knowledge or possession but a justification has been put forth that the documents are necessary to establish the case of the applicant / respondent no. 2 that he had arranged his father's tele-medical consultation and thereafter got him admitted in Max Hospital, Gurugram on 04.05.2021 and that he had secured emergency VISA and came to Delhi on 08.05.2021 and also that he performed the last rites at the cremation ground, in order to negate the denial of assertions made by the respondent no.2 in her objections filed to the petition.

13. Having considered the aforesaid circumstances and the justification put forth by the applicant/respondent no.2, this Court is of the view that the documents which are sought to be placed on record as additional documents are necessary for doing substantial justice. A fair opportunity needs to be afforded to the applicant / respondent no. 2 to contest the claim for grant of probate *apropos* the Will of his father which contains bequest with regard to his father's valuable estate including as many as seven immoveable properties, to the exclusion of the applicant / respondent no. 2, who is the only child / son of the deceased testator.

14. Incidentally, as noted above, the bequest with regard to the entire estate of the deceased testator in the Will is in favour of the petitioner, who is the second wife of the deceased. It is not the case of the petitioner that there is any issue from her second marriage with the deceased testator. The Will also makes a bequest that in the event of the second wife (i.e., petitioner herein) pre-deceasing the testator, the entire estate will go to the



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grand-son of the petitioner from her first marriage. In the considered opinion of this Court, no serious prejudice will be caused to the petitioner if the respondent no. 2 is allowed to place on record aforesaid additional documents as the petitioner will have fair chance to cross-examine the witnesses of respondent no. 2, who steps into the witness box to place the said documents.

15. It is settled law that the Court should take a lenient view whilst deciding an application for production of documents under sub-rule (3) of Rule 1A of Order VIII CPC. It is also trite law that while dealing with the procedural law the old adage of procedural laws being handmaid of justice must be kept in mind. The procedural rules must not be read to defeat the basic purpose of statute or hamper justice unless the violation of procedure would itself amount to grave injustice.

16. At this stage, reference to the decision of Hon'ble Supreme Court in *Sugandhi (supra)* is apposite, wherein the Hon'ble Supreme Court under somewhat similar situation while dealing with an application under Order VIII Rule 1A (3) of the CPC filed by the appellants therein before the Trial Court at the stage of defendants' evidence, held as under:-

“7. Sub-rule (1) mandates the defendant to produce the documents in his possession before the court and file the same along with his written statement. He must list out the documents which are in his possession or power as well as those which are not. In case the defendant does not file any document or copy thereof along with his written statement, such a document shall not be allowed to be received in evidence on behalf of the defendant at the hearing of the suit. However, this will not apply to a document produced for cross-examination of the



plaintiff's witnesses or handed over to a witness merely to refresh his memory. Sub-rule (3) states that a document which is not produced at the time of filing of the written statement, shall not be received in evidence except with the leave of the court. Rule 1(1) of Order 13 CPC again makes it mandatory for the parties to produce their original documents before settlement of issues.

8. Sub-rule (3), as quoted above, provides a second opportunity to the defendant to produce the documents which ought to have been produced in the court along with the written statement, with the leave of the court. The discretion conferred upon the court to grant such leave is to be exercised judiciously. While there is no straitjacket formula, this leave can be granted by the court on a good cause being shown by the defendant.

9. It is often said that procedure is the handmaid of justice. Procedural and technical hurdles shall not be allowed to come in the way of the court while doing substantial justice. If the procedural violation does not seriously cause prejudice to the adversary party, courts must lean towards doing substantial justice rather than relying upon procedural and technical violation. We should not forget the fact that litigation is nothing but a journey towards truth which is the foundation of justice and the court is required to take appropriate steps to thrash out the underlying truth in every dispute. Therefore, the court should take a lenient view when an application is made for production of the documents under sub-rule (3)."

(emphasis supplied)

17. Similarly, in *Levaku (supra)*, the Hon'ble Supreme Court took a liberal view in allowing the application under Rule 1A (3) of Order VIII CPC by observing as under:-

"The defendant Nos. 2 to 5 are in appeal aggrieved against the order passed by the High Court affirming the order passed by



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the trial Court refusing to permit the appellant to produce additional documents in terms of Order VIII Rule 1 of the Code of Civil Procedure.

We find that the trial Court as well as the High Court have gravely erred in law in not permitting the defendants to produce documents, the relevance of which can be examined by the trial Court on the basis of the evidence to be led, but to deprive a party to the suit not to file documents even if there is some delay will lead to denial of justice.

It is well settled that rules of procedure are hand-maid of justice and, therefore, even if there is some delay, the trial Court should have imposed some costs rather than to decline the production of the documents itself.”

(emphasis supplied)

18. Insofar as contention of Mr. Alok Kumar, learned Senior Counsel for the petitioner that allowing the application of the applicant/respondent no. 2 would lead to *de novo* trial, be it noticed that the trial is still in the midway. The petitioner has examined only two attesting witnesses to the Will and has already expressed an intention not to examine herself as noted in order dated 16.01.2024. The evidence of the respondents is yet to commence and the documents which are now sought to be produced by the applicant / respondent no. 2 are only to be proved by the respondent no. 2 himself or through his witnesses, therefore, there is hardly any need for the petitioner to lead any fresh evidence.

19. However, since this Court is inclined to allow the application of the respondent no.2 in the fact situation of the present case, it would be just and fair to afford the petitioner as well, an opportunity to lead additional evidence, if any, before the applicant / respondent no. 2 is given an



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opportunity to lead evidence in order to rebut the evidence produced by the petitioner.

20. Although there is substance in the submission of learned senior counsel for the petitioner that the respondent no. 2 could have produced the additional documents as sought to be produced by way of instant application at an earlier stage and allowing the application will further delay the proceedings to an extent, but this Court has already come to the conclusion that the documents sought to be placed on record are necessary for arriving at a just decision of the suit, therefore, the delay as well as inconvenience caused to the petitioner can be compensated by directing the applicant / respondent no. 2 to pay cost to the petitioner.

21. Insofar as the decisions relied upon by the petitioner are concerned, suffice to say, that the view taken by this Court is inspired by two latest decisions of the Hon'ble Supreme Court having similar facts as well as under the same provision as is involved in the present case, whereas the decisions relied by the petitioner do not advance the case of the petitioner as the same are distinguishable.

22. In *Scindia (supra)*, this Court had observed that the defendant no.1 therein had filed the application for taking on record additional documents only after producing 14 witnesses for their examination as well as after filing his own affidavit by way of evidence. Whereas in the present case, it is an undisputed fact that the respondents' evidence has not yet commenced and even the respondent no.2 has not filed his evidence by way of an affidavit.

23. Similarly, the decision in *Asia Pacific Breweries (supra)* is also



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distinguishable, inasmuch as it was observed by this Court that the documents sought to be placed on record by the plaintiff company therein under Order VII Rule 14 of CPC were already in power and possession of the company at the time of filing of the plaint and no justifiable ground was made by the plaintiff company to show as to why such documents were not filed by the plaintiff with the plaint. The Court did not consider the aspects of substantial justice and the prejudice likely to be caused to the adversary party, if additional documents are allowed to be brought on record, as has been considered in *Sugandhi (supra)*.

24. Likewise, the decision in *Harkesh Singh (supra)* is also distinguishable as the petitioners therein (defendants before the trial court) had only pleaded 'inadvertence' as a ground for not producing additional documents at the time of filing of the written statement and thus, it was observed by the Court that 'inadvertence' is no ground for allowing an application for production of documents at the stage of evidence, which is not the case here.

25. It is also apposite to note that the jurisprudence in respect of granting of leave to the defendant to file additional documents in terms of Order VIII Rule 1A (3) CPC, has evolved after the decisions of the Hon'ble Supreme Court in *Sugandhi (supra)* and *Levaku (supra)* which in unequivocal terms provide that the court should take a lenient view when an application is made for production of documents under sub-rule (3) of Rule 1A of Order VIII of CPC.

26. In view of the above discussion and the *dicta* of the Hon'ble Supreme Court, the present application is allowed and the additional documents are



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taken on record subject to payment of cost of Rs.1,00,000/- to be paid by the respondent no.2 to the petitioner. Resultantly, the applicant / respondent no. 2 is allowed to prove the said additional documents in accordance with law. The petitioner shall lead additional evidence, if any, before the commencement of the respondents' evidence.

27. The application stands disposed of.

I.A. 8820/2024 (An Application under Section 148 CPC read with Order VIII Rule 1(3) and Section 151 CPC on behalf of the respondent no.2 for enlargement of time to file evidence by way of affidavits)

28. Since the IA 8058/2024 filed by the respondent no. 2 has been allowed, the respondent no.2 is granted six weeks time from today to file his evidence by way of affidavits.

29. The application stands disposed of.

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30. List before learned Joint Registrar on 23.09.2024 for fixing the date for evidence.

CRL.M.A. 25998/2023 (under Section 340 Cr.PC read with Section 195 Cr.PC by the respondent no. 2 against the petitioner and Sh. Purshottam Goyal (alleged attesting witness to the propounded Will) and Smt. Krishna Lal (alleged attesting witness to the propounded Will));

I.A. 20630/2023 (under Order XXVI Rule 9 read with Section 151 CPC on behalf of respondent no. 2 for appointment of Local Commissioner to visit and report on status of properties owned by Vishnu Bhagwan in Delhi and Gurugram);

I.A. 25559/2023 (under Section 151 CPC filed by the petitioner seeking directions to the Local Commissioner appointed vide order dated 12.12.2023); and

I.A. 832/2024 (under Section 151 CPC filed by respondent no. 2 for



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further directions with respect to order dated 12.12.2023).

31. List on 13.11.2024.

VIKAS MAHAJAN, J

AUGUST 2, 2024/mk