
(2013) 11 DEL CK 0372

In the Delhi High Court

Case No : IA No. 11837 of 2013 (u/S. 24 r/w S 151 CPC) in CS (OS) 491 of 2008

DR. (Mrs.) Pramila Srivastava

APPELLANT

Vs

Smt. Asha Srivastava and Others

RESPONDENT

Date of Decision : 20-11-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 14, 24

Citation : (2014) 140 DRJ 56

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Sanjiv Kakra, Ms. Vaishali Kakra and Mr. Irfan Ahmed, for the Appellant; Sandeep P. Agarwal, Jeevesh Nagrath and Mr. Nitesh K. Sharma, Advocates for D1, 2, 3 and 5 with D2 in Person, for the Respondent

Final Decision : Disposed Off

Judgement

Jayant Nath, J.

IA No. 11837/2013(u/S. 24 r/w S151 CPC)

1. This is an application filed by the plaintiff u/s 24 of the CPC seeking consolidation of the present suit with the Testamentary Case No. 89/2008 titled as "Gautam Srivastava vs. State and Others". It is the contention of the plaintiff that the parties to the present suit are also the parties to the aforesaid probate proceedings. Defendant No. 2 has relied upon Will dated 26.04.2005 alleged to have been executed by Late Sh. R.P. Srivastava. Hence, it is stated that the issue as to whether the said Will executed by Late Sh. R.P. Srivastava is a genuine and valid Will and last testament of Late Sh. R.P. Srivastava is germane for disposal of the present suit and the probate proceedings. Hence the present application for consolidation. The present suit is filed seeking a decree of partition, separate possession and for rendition of true and complete accounts of the properties of R.P. Srivastava & Sons HUF. The controversy pertains to the estate of Late Sh. R.P. Srivastava who had married twice. The plaintiff is the widow of the pre-

deceased son of Late Sh. R.P. Srivastava from his first wife. Defendant No. 1 herein is the widow and the second wife of Late Sh. R.P. Srivastava. Defendants No. 2 and 3 are the children of defendant No. 1 and late Shri R.P. Srivastava.

2. The probate case bearing Test Case No. 89/2008 is filed by defendant No. 2 as Executor of the stated Will of Shri R.P. Srivastava dated 26.4.2005, wherein it is claimed that the entire estate was bequeathed by late Shri R.P. Srivastava to defendant No. 1.

3. It is noteworthy that the plaintiff had filed a similar application earlier also being IA No. 10410/2012. This application was allowed by this Court on 25.09.2012 and it was observed that no prejudice would be caused to the defendants if probate petition is tried with the present suit and a direction was passed to consolidate the said matters.

4. Against the said order dated 25.09.2012, the defendants had filed FAO(OS) No. 587/2012. The said order dated 25.09.2012 was stayed by the Division Bench on 07.12.2012. On 29.01.2013, the appeal was admitted and the interim order was made absolute. On 14.03.2013, the plaintiff made a submission that he seeks withdrawal of the prayer made in IA No. 10410/2012 for consolidation of two cases and seeks liberty that in case the present suit expeditiously comes up for trial, he would be at liberty to move the Single judge for appropriate directions. Relevant portion of the said order reads as follows:-

Learned counsel for the respondent fairly states that in view of the stages of the two proceedings being different, he seeks to withdraw the prayer made in I.A. No. 10410/2012 for consolidation of the two cases which has been allowed by the learned Single Judge vide impugned order dated 25.09.2012. He, however, seeks liberty that in case he is able to bring up his partition suit expeditiously for trial and in the meantime the stage of probate proceedings are such that its trial would not be delayed, he would be at liberty to move the learned Single Judge for appropriate directions. The second prayer he makes is that the appellant should not also try to delay CS(OS) No. 491/2008.

Learned counsel for the appellant has no objection for the aforesaid two prayers.

5. The present application is filed in view of the said liberty given by the Division Bench. It is stated that as now both the proceedings are at the same stage, there would be no delay in trial of either of the matters, if they are consolidated.

6. Learned counsel for the plaintiff has strenuously urged that defendant No. 2 herein who is the petitioner in probate case has filed a list of 20 witnesses in the probate case. The said defendant No. 2 along with defendants No. 1, 3 and 5 have filed a list of witnesses of 38 witnesses in the present suit. It is urged that there are 34 witnesses between the parties which are common in the present suit and the probate proceedings. It is further urged that earlier when the Division Bench was seized of the matter, in the present suit issues had not been framed. Now, it is stated that on 19.07.2013 issues were framed by the Court. A

Court Commissioner, namely, Sh. S.M. Chopra, retired ADJ has been appointed to record evidence. The same Court Commissioner is recording evidence in the probate proceedings. It is further urged that in the probate proceedings, as of now only the first witness of the petitioner therein (defendant No. 2 herein) is being cross-examined. Hence, it is stated that in terms of the liberty granted by the Division Bench, the present suit and the probate proceedings are approximately at the same stage of trial and hence, the present application has been filed urging that the two matters be consolidated and heard together. He relies upon judgment of the Hon''ble Supreme Court in the case of *Nirmala Devi Vs. Arun Kumar Gupta and Others*, to contend that a probate petition can be clubbed with a suit.

7. Learned counsel appearing for defendants No. 1 to 3 and 5 has strenuously urged that the beneficiary of the Will in the probate petition, namely, the second wife of Late Sh. R.P. Srivastava is a senior citizen being above the age of 80 years. It is submitted that the present application is only an attempt to delay the whole proceedings. The probate petition throws up limited questions of law and facts which could be expeditiously disposed of. On the other hand, the present suit has raised various issues which would require a detailed trial and needlessly delay the proceedings in the probate petition. Reliance is placed on the following three judgments to contend that in such circumstances as that of the present case, the Court would normally not exercise power u/s 24 of the Civil Procedure Code.

(i) *Sandeep Behl and Anr. Vs. Shubh Kumar Range and Ors.*, I.A. No. 14577/2011 in CS(OS) 2114/2010 decided on 18.07.2012.

(ii) *Thakur Dass Virmani and Others Vs. Smt. Raj Minocha and Another*,

(iii) *Col. Suresh Chand & Anr. Vs. Shri Satish Dayal*, I.A. no. 11307/2009 in CS(OS)2319/2006 decided on 28.01.2010

8. It is also urged that one of the reasons for the delay which has taken place so far is that on account of the liberty given by the Division Bench, the plaintiff has been deliberately delaying and prolonging the cross-examination in the probate proceedings and various hearings have taken place where cross-examination of the first witness is continuing. It is submitted that the plaintiff cannot be permitted to take advantage of his own wrong.

9. In rejoinder, the learned counsel for the plaintiff has stated that the issues raised in the present suit are substantially common with the probate petition. The basic issue is whether Late Sh. R.P. Srivastava had executed the Will dated 26.04.2005 and the only other basic issue is whether the properties which are subject matter of said alleged Will were part of the R.P. Srivastava & Sons HUF. It strenuously urged that these are the basic two issues and unless the matters are heard together, the parties would be put to needless expense and delay inasmuch as 34 witnesses who are common would have to be examined and cross-examined twice over. Reliance is placed on various documents to show that

Late Sh. R.P. Srivastava had represented some of the properties to be HUF properties. It is further urged that the present suit has been filed earlier in point of time and it is further urged that the delay in cross-examining the witness in the probate proceedings has taken place on account of vague and evasive replies which are being given by the witness of the petitioner in the probate petition.

10. Reference may be had to Section 24 of the CPC which reads as follows:-

24. "General power of transfer and withdrawal. -(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage.

(a) Transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) Withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) Try or dispose of the same, or

(ii) Transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) Retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under subsection (1), the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.

(3) For the purpose of this section--(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court; (b) "proceeding" includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.

11. The Hon"ble Supreme Court in the case of Chitivalasa Jute Mills Vs. Jaypee Rewa Cement, in para 12 held as follows:-

12... Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial and decision. The parties are relieved of the need of adducing the same or similar

documentary and oral evidence twice over in the two suits at two different trials. The evidence having been recorded, common arguments need to be addressed followed by one common judgment...

12. In the present case, a perusal of the issues framed here and in the probate proceedings would show that there is commonality of issues involved. The issues in the present suit were framed on 19.07.2013 which reads as follows:-

1. Whether Late Shri R.P. Srivastava had signed and executed a legal and valid will dated 26.04.2005? If so its effect. OPD-1, 2, 3, 5.

2. Whether the properties mentioned in paras 8 and 9 of the plaint were the self acquired properties of Late Sh. R.P. Srivastava? If so its effect. OPD-1, 2, 3,5

3. Whether the properties mentioned in paras 8 and 9 of the plaint were the properties of "R.P. Srivastava & Sons (HUF)" and have also been acquired from the funds of "R.P. Srivastava & Sons (HUF)"? If so its effect. OPP

4. To what share, if any, is the plaintiff entitled to in respect of the properties mentioned in paras 8 and 9 of the plaint? OPP

5. Whether the plaintiff is entitled to a decree of partition and separate possession in respect of the properties mentioned in paras 8 and 9 of the plaint? OPP.

6. Whether the defendant is liable to render true and complete accounts of the properties of "R.P. Srivastava & Sons (HUF)" and/or Sh. R.P. Srivastava? OPP

7. Whether the plaintiff is entitled to decree of Mandatory injunction as prayed for in the plaint? OPP

8. Whether the plaintiff is entitled to decree of permanent injunction as prayed for in the plaint? OPP.

9. Whether, there was any HUF between Late Mr. R.P. Srivastava and his family by the name of R.P. Srivastava & Sons (HUF), and if yes, who were its members? OPP.

10. Whether the plaintiff has undervalued the suit and has failed to pay the requisite court fees? OPD

11. Relief.

13. In the probate proceedings, the following issues were framed:-

1. Whether the Will dated 26.04.2005 was duly executed by Late Shri R.P. Srivastava? OPP

2. Whether Late Shri. R.P. Srivastava was not in a sound state of mind when he executed the Will dated 26.04.2005, as alleged in the objections? OPO.

3. Whether the petitioner is entitled to probate of the Will dated 26.04.2005?

14. Clearly, the basic controversy between the parties centres around the legality and validity of the Will dated 26.04.2005 alleged to have been executed by late Sh. R.P. Srivastava. This is a common issue on which parties will have to lead evidence in this suit and in the probate petition.

15. The other issues as mentioned above which pertain to the present suit revolve around the controversy as to whether the properties mentioned in the plaint are self-acquired properties of Late Sh. R.P. Srivastava or are part of the RP. Srivastava & Sons (HUF) and if so, the effect of the same. Even if the probate is granted, for the beneficiary of the Will to enjoy the fruits of the Will, the issue as to whether the properties in question belonged to Mr. R.P. Srivastava or M/s. R.P. Srivastava & Sons (HUF) is an issue that will have to be crossed.

16. Reference may be had to the judgment of Hon"ble Supreme Court in the case of Nirmala Devi Vs. Arun Kumar Gupta and Others, relied upon by the learned counsel for the plaintiff which states as follows:

4... Therefore, now remains the question whether the probate proceedings could be clubbed with the suit. Learned counsel for respondent No. 1 submitted that the civil suit is of the year 1987 and that despite various orders of the High Court, it has remained pending and the probate proceedings are initiated by the appellant in 1997 regarding the Will of 1984. Be that as it may, the decision in the probate proceedings on the question of proof of the Will, will have a direct impact on the suit. Only on this short ground and without expressing any opinion on the merits of the controversy between the parties, we request learned District Judge, Gopalganj to make it convenient to dispose of the Probate proceedings being Probate Case No. 11 of 1997 along with civil suit being T.S. No. 27 of 1987...

17. Similarly reference may be had to the judgment in the case of Virender Gupta Vs. Nitender Gupta and Others, where Division Bench of this Court directed consolidation of probate proceedings and the suit for partition and rendition of accounts. This Court held as follows:-

7. We find that the issues framed in Suit No. 1675/84 are all embracing and they fully cover the entire dispute between the parties. We see no legal bar to both the probate petition and the suit being tried together. We see no need to decide the controversy raised in the appeal in the probate proceedings. We accordingly order that suit No. 1675 of 1984 and the probate case No. 46/83 shall be tried together. The evidence shall be recorded in Suit No. 1675 of 1984.

18. Keeping in view the legal position, it would be in the interest of parties that the two matters be consolidated and heard together. This is especially so keeping in view the fact that large number of witnesses of the parties are common and will be deposing in the present suit and also in the probate petition for both the cases. The Court Commissioner appointed by this Court to record evidence is the same. Separate trials will mean that a large number of witnesses will depose separately twice over in the probate and in this Suit. This would be a waste of

judicial time and needless expense to the parties. The possibility of conflicting decisions also cannot be ruled out.

19. Further, at the earlier stage when this Court had passed order dated 25.09.2012, the present suit was still at the stage of completion of pleadings. Today, issues have been framed and the matter has been referred to the Court Commissioner for recording evidence. On the other hand, the probate petition is pending at the initial stage of recording of evidence inasmuch as the cross-examination of the first witness has not been completed.

20. The judgments relied upon by learned counsel for the defendant do not help the case of the defendant. The reliance of the learned counsel appearing for the defendant on the case of Sandeep Behl and Anr. Vs. Shubh Kumar Range and Ors. (supra) is misplaced. In that case, the probate proceedings were at an advanced stage and on the verge of conclusion as the evidence of only the objectors therein was left to be recorded, whereas the evidence of the petitioner therein had already been recorded. In the suit which was sought to be consolidated even admission/denial of documents had not been taken place. It was on those facts as the proceedings in the probate proceedings were at an advance stage, the court directed that this Court should await the outcome of the probate case so as to ensure that there is no conflict of decisions in the suit with that of the probate case.

21. Similarly in the case of Thakur Dass Virmani & Ors. Vs. Smt. Raj Minocha & Anr., (supra), this Court had merely held that pendency of a suit for partition is no bar for grant of probate or letters of administration. In that case, this Court was dealing with an appeal against an order granting letters of administration. It was in this context that this Court had held that pendency of a suit for partition is no bar for grant of petition or letters of administration. This case does not deal with the consolidation of two matters.

22. In the case Col. Suresh Chand & Anr. Vs. Shri Satish Dayal (supra) this Court declined to consolidate the suit and probate petition in view of the submission of the learned counsel for the plaintiff therein that evidence of the testimonial cases can be completed in a short span and in case the testimonial cases are permitted to be clubbed with the two suits, the testimonial cases would be delayed. It was further held that the nature of the evidence in the said suits and the real controversy in the suits is different. On those grounds, the court declined to consolidate the two suits.

23. In view of the above, there is merit in the present application. The same is allowed. It is directed that the present suit be heard along with probate case No. 89/2008 which is pending in this High Court. Both the matters are being tried by the same Court Commissioner.

24. Recording of evidence has already commenced in the testamentary case. Whatever evidence the parties led may be treated as common for disposal of both the matters. Defendant No. 2 is presently leading evidence in the

testamentary case and will complete his evidence. The other defendant and plaintiff may thereafter lead their evidence in the sequence to be decided by the Court Commissioner. The application is accordingly disposed of.

CS(OS) 491/2008 and IA No. 16136/2013 (u/O 7 R 14 CPC)

List before the Joint Registrar on the date already fixed i.e.