

(2018) 01 DEL CK 0295

In the Delhi High Court

Case No : Civil Miscellaneous (Main) No. 1450 Of 2017, Civil Miscellaneous Application No. 46554, 46556 Of 2017

Ombir Singh & Anr

APPELLANT

Vs

Jaspali Chauhan & Ors

RESPONDENT

Date of Decision : 10-01-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Order 47 Rule 1, Order 18 Rule 3

Citation : (2018) 01 DEL CK 0295

Hon'ble Judges : R.K.Gauba, J

Bench : Single Bench

Advocate : Deepak Khosla

Final Decision : Dismissed

Judgement

R.K.Gauba, J

1. The petitioners are second and third respondents in the probate case (PC No.42222/16) instituted by the first respondent, the second to fourth respondents also being party to the said proceedings. The probate case was put to trial on the basis of issues framed on 18.05.2007 wherein the prime issue was as to whether Late Shri Ram Chander had executed a valid Will on 08.09.2004 while in sound state of mind, the burden of proof being that on the first respondent (the petitioner of the case) who had set up the said will, its validity having been questioned by the parties which contest. The first respondent as the petitioner had led evidence which stood concluded in the year 2009. Thereafter, the petitioners herein, as contesting respondents to the probate case led evidence. At that stage, witnesses came to be examined including B.N. Srivastava (RW6), a handwriting expert, the prime objective of such evidence being to prove that the document set up as the will did not bear the thumb impression of the purported testator.

2. After the contesting respondents to the probate case had led evidence, the

first respondent herein, she being the petitioner, moved an application under Order XVIII Rule 3 of the Code of Civil Procedure, 1908 (CPC) seeking liberty to lead evidence in rebuttal referring particularly to the evidence of the contesting respondents based on the expert opinion. The said application was resisted by the petitioners herein on the ground that the right to lead evidence in rebuttal not having been reserved in the year 2009, such right could not be granted, placing reliance on decision of a division bench of Punjab and Haryana High Court in *Surjit Singh & Ors. vs. Jagtar Singh & Ors.*, 2007 (2) CCC 115 (P&H) (DB).

3. The learned Additional District Judge before whom the probate case is pending, however, found it just and proper to grant one opportunity to the first respondent herein to adduce evidence in rebuttal, this in the form of a handwriting expert engaged by her for comparison of the purported thumb impression of the deceased testator on the questioned document with certain admitted documents. The Additional District Judge in exercising the said discretion referred to the ruling of this Court reported as *Wazirpur Small Industries Association Regd. Vs. Union of India*, 2010 (4) AD (Delhi) 262, inter alia, to the effect that the provision contained in Rule 3 of Order XVIII of CPC providing right to rebuttal does not specify that the option has to be given by the plaintiff after its evidence is concluded, such right being given irrespective of the exercise of option at that stage, it being possible for the plaintiff to decide whether there was necessity of leading evidence in rebuttal only after the conclusion of the evidence of the defendant.

4. The order dated 20.04.2017 granting liberty to the first respondent herein to lead evidence in rebuttal was challenged by the petitioners initially by CM(M) 582/2017 before this Court, which, however, was allowed to be withdrawn with liberty granted to the petitioners to approach the trial Court by way of review application, as per order dated 24.05.2017. The petitioners later moved an application for review under Order XLVII Rule 1 CPC which has been dismissed by the additional district judge by her order dated 23.10.2017.

5. The petition at hand seeks to assail the initial order dated 20.04.2017 and the order on the review application passed on 23.10.2017.

6. Having heard the learned counsel for the petitioner and having gone through the record with his assistance, this Court finds no substance in the petition. In the given facts and circumstances, the court of additional district judge has exercised the judicial discretion vested in it by the law to afford the opportunity to lead evidence in rebuttal for just and proper reasons. The opinion of the finger print expert adduced in evidence by the petitioners herein cannot be treated as clinching or final say on the subject. The opinion of the expert engaged by the first respondent, if available, would better facilitate the forming of a definitive and informed opinion by the Court.

7. In the face of the view expressed by this Court in *Wazirpur Small Industries Association Regd.* (supra), the judicial discretion exercised by the trial Court

cannot be said to be erroneous and, therefore, there is no case made out for any interference by this Court.

8. For the above reasons, the petition is dismissed.