

(2015) 03 DEL CK 0357
In the Delhi High Court
Case No : CS (OS) No. 1311 of 2001

Scindia Potteries and Services P. Ltd.

APPELLANT

Vs

J.K. Jain and Others

RESPONDENT

Date of Decision : 23-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1A

Citation : (2015) 03 DEL CK 0357

Hon'ble Judges : Najmi Waziri, J

Bench : Single Bench

Advocate : Ajay Kapur, Senior Advocate and Harshbir Singh Kohli, for the Appellant; Sanjiv Kakra and Irfan Ahmed, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Najmi Waziri, J.

OA No. 67/2013

1. The present Original Appeal impugns the order of the learned Joint Registrar (JR) dated 16.3.2013 passed in IA No. 3750/2013 whereby the defendants"/ appellants" request for amending the list of witnesses so as to lead the evidence pertaining to late Rajmata Vijaya Raje Scindia (hereinafter referred to as "Mrs. Scindia") was rejected. The reasons for rejection was that learned JR was not convinced that despite due diligence, defendant No. 1 could not have named the said two record clerks in the list of witnesses; rather the record would reflect that defendant/appellant was never diligent; that the application had been brought with the oblique purpose of somehow protracting the trial and ensuring that the same is not concluded within the time limit thrice set by the Hon"ble Single Judge of this court and to that extent it is abuse of process. While arriving at the aforesaid conclusion, the learned JR considered the following arguments:

"5. During arguments, learned senior counsel for defendant No. 1 reiterated the above circumstances and submitted that it is only to prove the pleaded defence

that the two additional witnesses are sought to be summoned; that the said additional witnesses would establish that owing to impairment of her cognitive faculties, Rajmata could not have participated in any board meeting and could not have executed a Will which is propounded by the plaintiff. Learned senior counsel for defendant No. 1 contended that the only issue to be kept in mind is the relevance and once it is established that the evidence sought to be adduced through the additional witness is relevant, the court ought not shut the doors on the applicant. Learned senior counsel for defendant No. 1 also contended that procedural law being only handmaid of justice, so long as the trial is open, the court ought to allow the additional evidence as and when the same comes to the knowledge of either side. During the arguments, learned senior counsel for defendant No. 1 on instructions did not dispute that the witness who produced the medical records of Rajmata in CS(OS) No. 182/02 was the present applicant's own witness and even the learned trial counsel in both the cases is same. Learned senior counsel for defendant No. 1 also argued that even till date it remains in the realm of speculation as to whether the original medical records of Rajmata were preserved by the hospitals or not, so in the initial stages it was not possible to name these witnesses in the list. Learned senior counsel for defendant No. 1 argued that there is no undue delay in moving this application also and that the only test to be applied is as to whether with due diligence defendant No. 1 could have named the said additional witnesses in the original list or not. Not every delay can be treated as a dilatory tactic, as per learned senior counsel for defendant No. 1.

6. Per contra, learned senior counsel for plaintiff took me through the various orders on record of this case to bring home his point that the only purpose behind this application is to somehow frustrate the conclusion of trial. Learned senior counsel for plaintiff sought to establish by referring to the record that defendant No. 1 is deliberately avoiding to step into the box despite having already examined more than 30 witnesses in support of his case. Learned senior counsel for plaintiff argued that no new fact has been revealed subsequently to defendant No. 1, as such there is no occasion to permit amendment of list of witnesses. In addition, learned senior counsel for plaintiff also sought to rely upon the documents annexed with the written synopsis reflecting that the records now sought to be summoned through the additional witnesses have already been weeded out, which would show that even if the application is allowed, the entire exercise would be futile. Learned senior counsel for plaintiff further alleged that defendant No. 1 deliberately kept silent on these hospital records so that once the records are weeded out, he could express helplessness in court to prove his case. However, since those documents were never earlier on record and have been filed for the first time alongwith the synopsis of submissions on this application, learned senior counsel for plaintiff in all fairness did not insist for reliance on the said documents. Learned senior counsel for plaintiff also argued that there is absolutely no provision in the Civil Procedure Code, contemplating any amendment to the list of witnesses.

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14. Plaintiff's evidence concluded on 28.05.2010 after examination of 4 witnesses and vide order dated 03.06.2010, defendant No. 1 was granted liberty to appear in the box subsequent to the examination of his official witnesses and with direction to file evidence affidavits within two weeks and the matter was posted for three evidence dates from 16.07.2010 to 20.07.2010; but apparently on account of failure to file summoning application, on 16.07.2010 the next two dates were cancelled.

15. After repeated adjournments and in view of last opportunity, 66 page chief affidavit of defendant No. 1 dated 30.11.2010 was filed on 30.11.2010 but with additional documents running from page 67 to page 275. As the said additional documents were tried to be filed without obtaining any leave, after a few hearings, defendant No. 1 filed an application under Order VIII Rule 1A CPC being IA 3213/2011, which was disposed of vide order dated 22.03.2011 by my predecessor Joint Registrar, declining to take on record some of those additional documents on the grounds that no sufficient explanation had been advanced by defendant No. 1 for having failed to file the said documents at appropriate stage. Order dated 22.03.2011 of my predecessor was upheld by the Hon"ble Single Judge in the chamber appeal vide order dated 09.10.2012 and the appeal filed against the said order of the Hon"ble Single Judge was disposed of vide order dated 12.02.2013 by the Hon"ble Division Bench when after addressing the argument, both the sides agreed that only one of the additional documents being a trust deed be taken on record.

16. In the meanwhile, 22.11.2011, in the contempt proceedings, learned counsel for defendant No. 1 agreed to ensure that proceedings would be expedited so far as conclusion of defendant's evidence is concerned and the Hon"ble Single Judge directed the Joint Registrar to complete the recording of evidence within six to nine months. However, thereafter vide order dated 16.11.2012 on my request the Hon"ble Single Judge extended the time to conclude evidence by another three months with effect from 01.12.2012 and further extended the said period by another period of three months with effect from 04.02.2013.

17. Till date 31 witnesses have already been examined on behalf of defendant No. 1, though the matter is being taken up on almost day to day basis subject to also keeping in mind the convenience of both the learned counsel; not just the learned counsel, even defendant No. 1 personally has been accommodated repeatedly to suit his convenience but he has till date not stepped into the box on one or the other pretext despite repeated directions as would be reflected from record.

18. As further would be reflected from record, with an effort to conclude the trial within the repeatedly extended period, defendant No. 1 was also directed to submit a specific schedule for examination of specific witnesses and even directions were issued to the registry to ensure *dasti* summons without defaults

with diet money to be paid in court so that the witnesses could be examined on day to day basis. But initially defendant No. 1 avoided to submit the schedule, as reflected from order dated 12.02.2013 and 13.02.2013 and the schedule submitted further reflected a deliberate effort to protract the suit, so fresh schedule was called for and finally submitted on 15.02.2013, though for one or the other reason even that schedule is not being strictly adhered to.

19. The purpose behind the above described journey undertaken by this suit is not merely to reflect the belated action of defendant No. 1 in seeking amendment to the list of witnesses, but to analyze the gravity of plaintiff's argument that defendant No. 1 is for oblique purposes trying his level best to somehow protract the suit. As also mentioned above, there are umpteen observations on the judicial ordersheets of this case to the effect that defendant No. 1 is somehow trying to protract the proceedings. Deliberate efforts to protract the trial per se is anathema to the due diligence test that would be relevant in the present case. In this regard, it would also be important to refer to the decision of Hon"ble Single Judge in OA 78/2011 vide order dated 09.10.2012, thereby observing that simply because it is stated that the documents were archived by defendant No. 1 in a library situated in the suit premises does not mean that he ought not to have shown due diligence of browsing through his own records for identifying such documents that were considered relevant to substantiate his defence; the Hon"ble Single Judge after a detailed discussion based on the previous record in this case came to the conclusion of complete lack of diligence on the part of defendant No. 1. I am not oblivious that the said observations of the Hon"ble Single Judge were as regards the additional documents and not strictly as regards the issue involved in the present application, but the said order dated 09.10.2012 of the Hon"ble Single Judge amply describes the lack of diligence as well as deliberate efforts of defendant No. 1 to somehow protract the trial, which applies to the present situation as well.

20. It would also be necessary to examine the issue of due diligence on the part of defendant No. 1 de hors the above described conduct of defendant No. 1 in protracting the trial.

21. In para 9 of the written statement, defendant No. 1 described the alleged ill health of Rajmata followed by her hospitalization in the intensive care unit of Apollo Hospital, New Delhi. Further, in para 14 of his chief affidavit, defendant No. 1 specifically testified on oath that he was "the personal doctor" of Rajmata and explained at length the alleged illness of Rajmata including her hospitalization in the Apollo hospital as well as Breach Candy Hospital. This chief affidavit was sworn by defendant No. 1 way back on 30.11.2010. In other words, as per defendant's own statement on oath made in way back in the month November, 2010, he was always fully aware in details, that too being the personal doctor of Rajmata about her illness and hospitalization. I fail to convince myself that at the stage of filing the list of witnesses way back in the year 2006,

defendant No. 1 with due diligence could not have named the record clerks of Breach Candy and Apollo hospitals in the list of witnesses.

22. Learned senior counsel for defendant No. 1 argued that in the year 2006 it was not clear as to whether the said two hospitals had preserved the medical records or not and same is the status today. As per defendant No. 1 also, it remains in the realms of speculation as to whether the said record clerks would produce the records or not. In contrast, plaintiff has filed alongwith the synopsis a letter reflecting that Breach Candy records have been destroyed. Although, as mentioned above, the said letter having not been filed earlier ought not be looked into, but keeping in mind the defendant's own stand of uncertainty as regards availability of records, I find substance in the submission of learned senior counsel for plaintiff that allowing defendant No. 1 to amend the list of witnesses at this stage would be an exercise in futility, which cannot be afforded in view of the fact that conclusion of trial has already over shot twice the period fixed by the Hon'ble Single Judge.

23. At the same time, it also remains undisputed that even in CS(OS) No. 182/02 the alleged medical records were produced by the present applicant's own witness. defendant no.1 / applicant was under a duty to disclose as to when for the first time the said records came in his possession or in the possession of the witness produced by him in order to substantiate his stand that despite due diligence he could not seek to produce the relevant evidence by naming the witnesses now sought to be named in the list of witnesses. It is nobody's case that the witness who produced the Breach Candy Hospital records in CS (OS) No. 182/02 was from the said hospital; as per both the sides the said records were produced by the witness who was produced by the present defendant No. 1 himself.

24. There can certainly be no dispute to the proposition advanced by the learned senior counsel for defendant No. 1 that not every delay can be termed a dilatory tactic. But the present case exhibits much more than mere delay. Had it been established that at the stage of filing the original list of witnesses the defendant No. 1 was unaware of hospitalization of Rajmata in Breach Candy and Apollo, it would have been a case of delay simplicitor and not necessarily a delaying tactic. Here, as described above, defendant No. 1 was always (at least ever since filing of written statement), fully aware of both the phases of hospitalization, but chose to remain silent till fag end of trial and now realizing that culmination of trial is in sight, has brought this application. It clearly shows that the present application is nothing but dilatory tactics."

2. Mr. Kakra, the learned counsel for the appellant submits that the impugned order revolves around the conduct of the defendant while what was required to be seen was whether the appellant was prevented, in any manner, from amending the list of witnesses earlier; that in a collateral suit, being CS (OS) No. 182/2002, the present plaintiff is defendant No. 1; that initially, the list of witnesses did not include the names of persons or officials from Breach Candy

Hospital, Mumbai and Apollo Hospital, New Delhi; that the reason for the delay in moving the application was that the appellant was unaware of the existence of the medical records of late Mrs. Scindia from the aforementioned hospitals; that apropos the aforesaid records it would be in the fairness of the proceedings and in the interest of justice that the appellant be allowed to bring the medical records for leading evidence in present suit also. In support of his contention, the learned counsel relies upon paras 9 and 10 of the WS, which read as under:

"9. Late Rajmata's health worsened in February, 1998 when she was struck by severe attack of Myasthenia Gravis resulting into paralysis of all her body muscles. She did not even have the capacity to breathe on her own and remained on artificial respiration for months together in Intensive Care Unit of the Apollo Hospital, New Delhi. the effect of the disease coupled with the heavy medication, the aging factor and cerebral dementia, accompanied by Alzheimer disease resulted in her total loss of capacity to understand or remember anything. With the passage of time, the late Rajmata's health deteriorated further and her movements got further limited. Late Rajmata was mostly confined by her daughters to her residence and/or in hospital and others were barred from visiting her on the excuse of her frail condition and failing health.

10. Rajmata's friends, advisors, lawyers, auditors of the Company and political and business associates were not permitted to interact with the late Rajmata after she came back from Apollo Hospital after a prolonged stay there. The explanation was that her health was vulnerable and moreover she did not recognize anybody or remember anything."

3. The learned counsel for the appellant submits that late Mrs. Scindia's medical condition would need to be examined so as to determine whether she was capable of taking a rational decision with respect to certain Board Meetings and the Annual General Meeting. He further submits that if this appeal is not to be allowed then the appellant be permitted to read the evidence led in this regard in CS (OS) No. 182/2002. This is strongly objected to by the learned Senior Advocate for the plaintiff on the ground that the lis is not between the same parties and not apropos the same subject matter and besides the suit has not yet been conjoined or directed to be tried together. There is merit in this argument. Therefore, this prayer of the appellant is untenable. He also submits that this is a crying example of dilatory tactics and contemptuous conduct of the defendant.

4. Opposing the appeal, Mr. Ajay Kapur, the learned Senior Advocate for the plaintiff submits that this is nothing but yet another attempt to protract the proceedings in the suit which is already pending for almost 14 years. He refers to the statement made by defendant No. 1 on 15.2.2013 wherein he had clearly stated before the Court that except for the list of witnesses mentioned in their schedule they did not wish to examine any other person. Yet surprisingly three (3) weeks thereafter, an application was moved on 2.3.2013 seeking to amend the list of witnesses. He submits that there have been directions by the Court earlier that the evidence shall be completed in a time bound manner. He refers to

the WS of the defendants filed in July, 2002, wherein it is clearly admitted that in para 9 of the Written Statement, defendant No. 1 described the alleged ill health of late Mr. Scindia followed by her hospitalization in the Intensive Care Unit of Apollo Hospital, New Delhi. Furthermore, in para 14 of his affidavit-in-chief, defendant No. 1 specifically testified on oath that he was "the personal doctor" of late Mrs. Scindia and explained at length the alleged illness of late Mrs. Scindia including her hospitalization in the Apollo hospital, New Delhi as well as Breach Candy Hospital, Mumbai. The Court notices that this affidavit was sworn by defendant No. 1 on 30.11.2010. In other words, as per the defendant's own statement on oath made in November, 2010, he was always fully aware about the details of late Mrs. Scindia's illness and her hospitalization, in light of the fact that he was her personal doctor. The Court is unable to agree, that at the stage of filing the list of witnesses, way back in the year 2006, the defendant No. 1 upon exercising due diligence, could not have named the record clerks of Breach Candy Hospital and Apollo Hospital in the list of witnesses.

5. The Court would notice that issues were framed on 16.5.2005. The defendant sought amendment of the same by filing an application, which was disposed off on 7.9.2005 with the observation that "no additional issues need to be framed but the issue framed in respect of the alleged irrevocable licence will be decided in the manner as stated above." The issue "Whether the bequest under Will dated 20.9.1985 executed by (Late) Rajmata Smt. Vijaya Raje Scindia does not disentitle the plaintiff from seeking the relief of prohibitory and mandatory injunction" was abandoned by the defendants. Hence, the only issues which are to be decided in this case are the twelve (12) issues framed on 16.5.2005 as well as the observations made on 7.9.2005.

6. The Court also notices that this is the 249th listing of this case. Four earlier orders have been passed to the effect that the evidence be completed at the earliest. A list of 38 witnesses had been filed by the appellant of which 31 witnesses have been examined almost on a day-to-day hearing before the learned Joint Registrar. The case is almost nearing its completion for recording of evidence. The appellant knew fully well about the condition of late Mrs. Scindia and could have easily incorporated in their defence all such pleadings which they deemed necessary for the purpose of setting out their case. On 30.10.2014, in the midst of day-to-day examination of the witnesses, the defendant failed to turn up only on the ground that some close acquaintance had fallen ill in Mumbai although he was conscious of the fact that directions had been given from time to time to conclude the defendant's evidence. Nonetheless the defendant was granted another opportunity to lead evidence. This Court notes that there is no order that the two suits be clubbed/ conjoined and heard together.

7. There is no merit in the appeal, hence it is dismissed.

CS (OS) No. 1311/2001

The parties shall appear before the learned Joint Registrar on the date already

fixed. The evidence shall be led on a day-to-day basis and every endeavour shall be made to complete recording of evidence by the ides of May, 2015.

The Registry will make every endeavour to trace out the record of CWP No. 1295/1988 in terms of this Court's order dated 19.7.2013 in the next four (4) weeks. This shall, however, not come in the way of completion of evidence by 15.5.2015.