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

+ **CS(OS) 186/1980**

TARUN KUMAR & ORS

..... Plaintiffs

Through: None.

versus

AJAY KUMAR & ORS

..... Defendants

Through: Mr. R. B. Phookan with Ms. Neha
Phookan, Adv for LR's of D2
(through VC)

CORAM:

MS. VANDANA JAIN (DHJS) JOINT REGISTRAR(JUDICIAL)

ORDER

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26.05.2022

Vide separate order passed in IA No. 5601/2022 (u/S 151 CPC
filed by LR of D3 & 4) is hereby dismissed.

Put up for the date already fixed in the case i.e. on 08.07.2022.

**VANDANA JAIN (DHJS)
JOINT REGISTRAR(JUDICIAL)**

MAY 26, 2022

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ORDER

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IA No. 5601/2022 (Under section 151 CPC filed on behalf of Legal Heir of D-3 & 4)

Vide this order, I shall dispose off an application under Section 151 CPC moved by LR of deceased defendant No.3 and defendant No.4 [hereinafter called applicant].

Learned counsel for applicant has argued that the present suit was filed in the year 1980 and the PE was closed on 19.02.2018, whereafter the matter was listed for defendants evidence. Mr. Vinay Kumar, son of defendant No.2 filed his affidavit of evidence and defendant No.3 filed his list of witnesses. Learned counsel for

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applicant has argued that the evidence of defendant No.2 could not be recorded as defendant No.10 expired in the meanwhile and the application for impleadment of her LRs was pending disposal.

It is argued that the health of defendant No.3 (about 81 years old) started deteriorating and he moved an application requesting to record his evidence out of turn before defendant No.2 through LC at residence of his wife at Delhi, so that his evidence could be completed at the earliest. Learned counsel has further argued that his cross examination was conducted at length for 19 days and 973 questions were put to him before he died due to serious ailments. Learned counsel has further submitted that the substantial cross examination of D-3 had already been conducted and it would be travesty of justice, if the LRs of deceased defendant No.3 are to lead their evidence all over again. Learned counsel has further argued that the plaintiff had taken several objections regarding the alleged forgery of medical certificate filed by defendant No.3 and harassed him due to which his cross examination could not be completed and he eventually passed away on 11.02.2020.

Learned counsel for applicant has relied upon Section 33 of The Indian Evidence Act, 1872 and has submitted that the evidence of defendant No.3 has been conducted with diligence despite his precarious health and therefore, the entire evidence of defendant No.3 be read in its entirety to avoid any duplication and prolongation of trial.

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It is further submitted that the application could not be moved in time as defendant No.3 alone had personal knowledge of the proceedings, files were voluminous, mandatory legal formalities were required to be completed by the LRs, COVID-19 lockdown started, daughter and wife of defendant No.3 contacted COVID and his wife was hospitalized due to post COVID complications and also underwent a hip replacement surgery and she is still under the care and supervision of 24 hrs house nurse and son of defendant No.3 is a permanent residence of USA and he is residing there since 1992.

By way of this application, the applicant has sought a direction to direct that the entire evidence of deceased defendant No.3 shall be read and further direct the defendant No.2 to lead evidence and thereafter, the evidence of the applicant/LRs of deceased defendant No.3 be taken up as per the turn.

Application is vehemently opposed by learned counsel for plaintiffs who has argued that the application qua the first prayer regarding the reading/admissibility of entire evidence of deceased defendant No.3 is pre-mature and cannot be decided at this juncture.

It is further argued that the substantial cross examination of witness could not take place and he was constrained to put large number of question to the witness to elicit the correct answer from him. He has objected to the averment made in the application regarding harassment having been caused to the witness and seeking unnecessary adjournments. He has further argued that though the witness wanted to be examined at New Delhi through Local

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Commissioner however, he produced a medical certificate from a Doctor in a Maternity Hospital at Jalandhar and that is why he raised the objections on the medical certificate. Learned counsel for plaintiffs has submitted that there was no delay on his part in cross examining deceased defendant No.3.

Learned counsel for plaintiffs has argued that as far as the first prayer is concerned, the same is pre-matured as well as unfounded at this stage and Section 33 of The Indian Evidence Act, 1872 does not envisage the same. He has relied upon the following judgments:-

1. *Diwan Singh & Ors vs Emperor (AIR 1993 Lah 561 (h) decided on 24.02.1933.*
2. *Balwant Singh vs Ram Charan Singh (AIR 1944 All 188 (191) decided on 13.04.1944.*
3. *S. C. Mitter vs The State (AIR 1950 Cal 435 (b) decided on 03.03.1950.*
4. *Somgutta Sivasankar Reddy vs Palapandla Chinna Gangappa decided on 23.11.2001.*
5. *Dever Park Builders Pvt Ltd vs Smt Madhuri Jalan (AIR 2002 Cal 281)*

He has argued that it is for the applicant to decide as to whether the applicant wishes to give any further evidence, which the applicant consider material or support and it can only be taken into consideration at the time of final arguments as to how much part of evidence of the deceased defendant No.3 would be admissible and how much weightage could be given to the same. He submitted that in his opinion, the cross examination of deceased defendant No.3 is not even half done and therefore, the first prayer of the applicant is liable to be rejected.



With respect to the second prayer, learned counsel for plaintiffs has argued that once the evidence of defendant No.3 has commenced and not concluded due to his death and the LR wishes to lead evidence further, the evidence of defendant No.2 cannot be taken up till the evidence of the applicant stand concluded and therefore, the second prayer is also liable to be rejected.

I have heard the arguments of learned counsel for parties and have perused the record carefully.

Section 33 of The Indian Evidence Act, 1872 is provided herein under:-

“Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.-Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided:

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.



Explanation.-A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.”

Learned counsel for plaintiffs has relied upon several judgments above whose ratio is the same. In **Somagutta Sivasankar Reddy (supra)**, the Hon’ble Court has observed that:-

“7. Thus, the evidence given by a witness, although he had not been cross-examined may be admissible in evidence. However, weight or probative value attached to such evidence would depend upon facts and circumstances of each case. Whether such evidence should be taken or not would depend upon the fact as to how far and to what extent the deposition has been made; Whether the witness has spoken about the relevant facts and the stage of examination in chief is also relevant.

9. Reference in this connection may also be made to the well-known treatise "Sarkar on Evidence" at page 2170:

The evidence of a witness who could not be subjected to cross-examination due to his death before he could be cross-examined, is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of case. [Food Inspector v. James N.T., 1998 Cri LJ 3494, 3497 (Ker)]. If the examination is substantially complete and the witness is prevented by death, sickness or other causes (mentioned in s 33) from finishing his testimony, it ought not to be rejected entirely. But if not so far advanced as to be substantially complete, it must be rejected [Diwan v. R, A 1933 L 561]. Deposition of a witness whose cross-examination became impossible can be treated as evidence and the court should carefully see whether there are indications that by a completed cross-examination the testimony was likely to be seriously shaken or his good faith to be successfully impeached [Horil v. Rajab, A 1936 P 34] XXXXXX.”



9. We, therefore, are of the opinion that the evidence of a person who has died after examination in chief and as by reason of his death, he could not be produced for cross-examination, although his evidence is admissible in evidence, the weight or probative value thereto would vary from case to case and in a given case may also be disregarded.”

The contentions of learned counsel for the plaintiffs are found to be correct to this extent that at this juncture, it cannot be assessed as to whether the substantial cross examination of deceased defendant No.3 before his death was recorded. It cannot be decided at this stage as to how much weightage is to be given to the evidence of deceased defendant No.3, in view of the fact that the counsel for plaintiffs has refuted the averments of applicant regarding conclusion of substantial evidence of defendant No.3. Any observation on this would tantamount to giving a finding on the merits which would prejudice the rights of the parties. It is for the applicant to consider, assess, evaluate and decide as to what and how much evidence has to be led by the applicant and no clear order with respect to this can be passed. It is pertinent to mention here that even till date, no affidavit of applicant has come on record, though in the instant application, the applicant has expressed her intention to depose in the case. Therefore, the first prayer cannot be allowed and is hereby rejected.

As far as the second prayer is concerned, no reasons have been assigned/mentioned in the application as to why the



seriatim in which cross examination is going on now needs to be disturbed at this juncture. No request has come from the side of defendant No.2 citing any reason for examining defendant No.2 first. It is also not pointed out that in case the applicant on behalf of deceased defendant No.3 is cross examined first, what prejudice is going to be caused to any of the party. Therefore, I do not find it prudent at all to change the sequence in which cross examination is being conducted. Therefore, the second prayer is also rejected.

IA stands dismissed.

VANDANA JAIN (DHJS)
JOINT REGISTRAR(JUDICIAL)

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