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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ TEST.CAS. 3/2011
NAVEEN CHANDER KAPUR Petitioner
Through: Mr.Dhiraj Sachdeva, Adv.
versus

STATE & ORS Respondents
Through: Mr.Peeyoosh Kalra with Mr.S.K. Jha,
Adv. for R-3 to 5.
Ms.K. Sindhuja, Adv. for R2.

CORAM:

JOINT REGISTRAR (JUDICIAL) MS. SURYA MALIK GROVER (DHJS)

ORDER

% **17.03.2021**

Learned counsel for respondents has submitted that attesting witness cannot be examined prior to petitioner in view of Order XVIII Rule 3A CPC which provides that party must be examined prior to any other witness, however, in case he wants to get himself examined at a later stage, party must move written application, which has to be decided on merits. Further, it is submitted that it is the basic principal of law that where procedure has been laid down, the same must be followed, and should not be deviated in normal circumstances. Learned counsel has referred to case law viz ***Sanj Dainik Lokopchar and Ors. vs. Golkulchand Govindlal Sananda (MANU/MH/2847/2018), Multivahuji vs. Kalindivahuji & Ors. (MANU/GJ0128/1994) and Vijay Ganpati vs. State of Haryana and Ors. (MANU PH/2846/2019)*** and submitted that in view of Sections 268 and 295 of Indian Succession Act read with Order XVIII R. 3A CPC, in a contentious application for grant of probate and letters of administration, the provisions of Code of Civil Procedure must be followed, hence, attesting



witness cannot be examined prior to the petitioner, unless reasons therefor are recorded.

On the other hand, learned counsel for petitioner submits that objection has been raised belatedly as the attesting witness was present on three prior occasions and not a whisper was uttered, hence objection is merely a dilatory tactic. Even otherwise, objection is stated to be meritless in view of the settled law as laid down in the case of ***Walter D'Souza vs. Alba D'Souza, Anita D'Souza pronounced by Hon'ble Bombay High Court in testamentary suit No.33/1998 in Testamentary Petition No.774 of 1997 pronounced on 14.11.2014***, wherein, it was held that notwithstanding Order XVIII R.3A, in a probate petition, attesting witness can be examined prior to the petitioner in view of S.68, 69 and 71 of Indian Evidence Act.

I have given careful consideration to the submissions advanced by learned counsels for the parties in the light of judicial record and the case law filed by the respective parties.

So far as the issue of stage of taking of objection, whether has been raised belatedly, I am of the view that as trial is yet to commence, respondents can legally raise objections regarding the examination of attesting witness prior to the party.

Coming to the next issue, as to whether any written application is required to be moved as argued by respondents counsel, Order 18 Rule 3A of CPC does not mandate a written application by a party who wants to get itself examined at a later stage. However, duty has been cast upon the court to record reasons for permitting a party to appear as his own witness at a



later stage. As such, permission can be given to the party on the basis of oral request or written application, as the case may be; however, the reasons should be in writing.

Finally, as to whether in the instant petition seeking probate of Will, the petitioner has been able to bring forth sufficient reasons for recording the evidence of attesting witness prior to his own testimony?

Before deciding the question, case law cited by parties must be considered.

In ***Sanj Dainik Lokopchar & Ors. (supra)***, where the plaintiff moved an application seeking permission to examine his son/power of attorney before he stepped into the witness box, it was held that the legislative intent of bringing on statute Rule 3A is to ensure that a litigant should not be permitted to bide his time and to fill in the lacuna or cover the loopholes after the other witnesses are examined. Further, it has been observed that normal rule may be deviated from only in exceptional circumstances and for recorded reasons. The object of laying down Order XVIII R 3A CPC and when the general rule can be deviated from has been discussed at length in the present judgement, however, the ratio of this case cannot be applied to the instant facts, as the cited case is one for damages for defamation while the case in question is a testamentary case, wherein probate of will has been sought.

In the case of ***Multivahuji vs. Kalindivauji and Ors. (supra)***, while discussing Section 295 and 268 Indian Succession Act, it was observed that in probate case, where contentious issues had been raised, the procedure as



laid down in Civil Procedure Code would be applicable as nearly as may be. The judgement is helpful to the respondents only to the extent that it supports their stance that in the present probate proceedings, Order XVIII Rule 3A CPC shall be applicable, which in any case, has not been disputed by the petitioner.

Lastly, in the case of ***Vijay Ganpati vs. State of Haryana (supra)*** plea was raised by the respondent at a later stage, after the cross-examination of PW 4 and PW5 had ended, that the cross-examination of petitioner should have been completed prior to PW4 and PW5 and hence, violative of Order XVIII R 3A CPC. Hon'ble Punjab & Haryana High Court held that as the order in question does not record any reasons in writing for permitting cross-examination of PW4 and PW5 prior to petitioner, the cross-examination is liable to be expunged, however, as no serious objection in writing was raised at the relevant time, the revision was dismissed. Again, the said judgment is not applicable to the given facts, as the evidence was recorded in the said matter without a reasoned order, while in the present case; the objection to recording of evidence of attesting witness has been raised prior to the commencement of trial.

Coming to the judgment cited by learned counsel for the petitioner, in ***Walter D'Souza's case (supra)***, where in a testamentary case, similar issue was raised i.e. the petitioner wanted to get attesting witness examined prior to himself in a probate case, permission was granted to him. The facts of the said case are squarely applicable to the instant case. The relevant paras of the said judgement are reproduced as under:



“17. Order 18 Rule 3-A of the CPC states as a general rule that the Plaintiff in any civil proceeding must give evidence first. A Court undoubtedly has the power to make an exception. However, it must be remembered that a testamentary action, though contested, is not a civil suit. It is merely tried as one, that is to say that its determination is in the form and in the manner of a civil suit, and that is only a matter of procedure. The provisions of Order 18 Rule 3-A of the CPC, clearly procedural, must yield to the substantive law in [Sections 68, 69 and 71](#) of the Evidence Act. There is no inflexible rule that the Plaintiff must always be examined first. Even in a civil suit Courts enjoy discretion in that behalf. In a contested testamentary action, [Section 68](#) of the Evidence Act appears to me to demand such an exception.

18. Further, [Section 295](#) of the Succession Act and Rule 403 of the Rules only say that the procedure in a contested testamentary action is to be "as nearly as may be" that of a civil suit. They do not require that the procedure shall be rigidly that of a civil suit. It is, therefore, in my view incorrect to say that in testamentary matters, the plaintiff must invariably enter the witness box first. Indeed, the correct position in law seems to me to be exactly the reverse.

In view of aforesaid discussion, the issue is decided in favour of the petitioner.

To conclude, I am of the considered opinion that this is a fit case where the petitioner can be permitted to be examined after the examination of the attesting witnesses in view of Sections 68, 69 and 71 of Indian Evidence Act which provide that where a Will is sought to be proved, its execution must be proved first.

List the matter for recording deposition of attesting witness on **05.05.2021 and 19.05.2021 at 2.00 PM.**

**SURYA MALIK GROVER (DHJS)
JOINT REGISTRAR (JUDICIAL)**

MARCH 17, 2021/neelam