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

+ CS(OS) 568/2021, I.A. 14174/2021, I.A. 14175/2021, I.A. 1134/2023,
I.A. 6039/2023

MANISH RACHHOYA

..... Plaintiff

Through: Ms.Smita Maan, Mr. Vishal Mann,
Advs.

versus

KAMAL KANT RACHHOYA

..... Defendant

Through: Mr. Atul Singh, Adv.(VC)

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

19.01.2024

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I.A. 18612/2023 (Order 26 Rule 2 for appointment of local commissioner for recording evidence)

1. The present application has been filed under Order 26 Rule 2 read with Section 151 CPC for appointment of Local Commissioner to record the evidence of the parties.
2. Learned counsel for the plaintiff submits that the issues were framed in this case on 22.08.2023. Learned counsel submits that the plaintiff is ready to bear the cost of recording of the entire evidence i.e. of the plaintiff and the defendant. It has further been submitted that plaintiff himself is settled in United Kingdom and P.W.3 namely Kirti Rachhoya is settled in USA. Learned counsel submits that therefore for expeditious disposal, it would be in the interest of justice, a Local



Commissioner be appointed for recording of evidence.

3. Learned counsel for the defendant has vehemently opposed the same and has submitted that the suit involves serious question pertaining to execution of the will based on which the rights and title of the properties would be determined. It has been submitted that the parties are siblings and considering the proximity of their relation and hostile conduct of the parties, the evidence cannot be conveniently recorded by a Local Commissioner. It has further been submitted that appointment of Local Commissioner for recording of evidence cannot be claimed as in matter of right merely because a party volunteers to pay the cost of the commission.
4. Learned counsel for the defendant has relied upon the **Nikhil Gupta Vs. Tanu Gupta**, 2022 SCC OnLine Del 1919. In this case, the Court while entertaining a revision petition challenging the order rejecting the prayer for appointment has inter alia held that the discretion to appoint the Local Commissioner may be exercised only in the cases as enumerated under the law. Learned counsel submitted that none of the averments made by the plaintiff falls within the fourth corners of Order XVIII Rule 19 and Order XXVI Rule 4A.
5. Learned counsel has further relied upon the Full Bench of this Court in **Pushpa Devi v. Bimala Devi & Ors.**, 1999 SCC OnLine Del 1036. In this case, it was inter alia held that if the parties do not or a party does not consent for the appointment of Local Commissioner for recording of evidence, then discretion must be exercised judiciously or for valid reasons. The Full Bench also inter alia held that the mere fact that the matter is old and languishing would not by itself be a



ground justifying referring the recording of evidence to a commissioner.

6. Learned counsel has further relied upon the judgment of this Court on ***M/s. H. Dohil Constructions Co. (P) Ltd. Vs. Rohit Lal & Ors.***, 2014 SCC OnLine Del 4037 where this Court has discouraged the practice of appointment of Local Commissioner for recording of evidence on the ground that this would deprive the Court of appreciating the demeanor of the witness. Further reliance has also been placed upon ***Savita Devi v. Lalit Kumar***, 2018 SCC OnLine Del 11694 wherein it has been held that there cannot be any dispute to the proposition that the preferred forum for recording of evidence is the Court. However, the legislature, in its wisdom, taking into account the pendency of the matters before the Court and long dates given for the recording of evidence, introduced a procedure for appointment of Local Commissioner for recording of evidence.
7. I consider that the judgments cited by the learned counsel for the defendant are respectively distinguishable on the facts and circumstances. In ***Nikhil Gupta*** (supra) the Court rejected the application while exercising the revisional jurisdiction. It is also pertinent to mention here that in that case, the learned Trial Court has given valid reason for not appointing the Local Commissioner. Similarly, in ***Pushpa Devi*** (Surpa), the primary question for consideration before the Full Bench was that whether the Local Commissioner can be appointed even without consent and even in cases where the suit is not very old and there is no grave urgency and peculiar circumstances require such a course to be followed.



8. Similarly, in *M/s H Dohil Constructions* (Supra) the Coordinate Bench of this Court made a general observation regarding the witness to be recorded by the learned Local Commissioner.
9. In the present case, the petitioner is based in UK and another private witness is in USA. It has also pointed out that the attesting witnesses to the Will are also senior citizens being more than 75 years of age. The objection of the defendant is predominantly that the parties are of close relation and on account of hostile conduct, the Local Commissioner may not be appointed for recording of evidence.
10. I consider that this cannot be a sole reason for denying the appointment of Local Commissioner. If the plaintiff is ready and willing to bear the cost and there are valid reasons for appointment of Local Commissioner, it would be in the interest of both the parties that the evidence may be recorded expeditiously.
11. Learned counsel for the plaintiff has stated at BAR that she is ready and willing to bear the expense of Local Commissioner.
12. Sh. B.B Chaudhary, Former District & Sessions Judge (Mobile No. 9910384611) is appointed as Local Commissioner. The fee of Local Commissioner for recording of entire evidence is fixed at Rs.7.5lakhs.
13. Parties may approach the Local Commissioner within the period of two weeks.
14. The Local Commissioner is requested to conclude entire evidence within the period of six months.
15. In view of the above, the present application stands disposed of.



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16. List the matter before the Joint Registrar (judicial) on 02.02.2024.

DINESH KUMAR SHARMA, J

JANUARY 19, 2024

Pallavi