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

+ TEST.CAS. 55/2006

SATISH DAYAL

..... Petitioner

Through: Mr. Akshay Makhija, Ms. Mahima
Bahl & Mr. Surat Singh, Adv.

Versus

STATE & ORS.

..... Respondents

Through: Mrs. Mala Goel, Adv. for R-2.
Ms. Sumati Anand, Adv. for R-3.

AND

TEST.CAS. 16/2008

COL. SURESH CHAND & ANR.

..... Petitioners

Through: Mrs. Mala Goel, Adv. for P-1.
Ms. Sumati Anand, Adv. for P-2.

Versus

STATE & ANR.

..... Respondents

Through: Mr. Akshay Makhija, Ms. Mahima
Bahl & Mr. Surat Singh, Adv. for LR
of R-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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26.02.2019

IA No.10909/2018 (of the legal representatives of respondent no.2 under Order XVI Rule 1 of the CPC) in TEST.CAS.No.16/2008.

1. The counsel for the petitioner in TEST.CAS. No.16/2008 objects to the witnesses sought to be summoned by the legal representatives of the respondent no.2, who are petitioners in TEST.CAS.No.55/2006.
2. The nomenclature used hereafter is with respect to status of parties in Test Cas. 16/2008.
3. The legal representatives of respondent no.2/applicants seek to summon eleven Part-B witnesses and one Part-C witness.

TEST.CAS. 55/2006 & TEST.CAS. 16/2008

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4. The counsel for petitioner contends that she is not objecting to the witnesses no.1 and 2; that with respect to witness no.7, the legal representatives of respondent no.2/applicants may produce the certified copy of the concerned record and the same be read in evidence; that with respect to witness at serial no.11, the document in proof whereof the said witness is sought to be summoned is admitted and thus there is no need of proof thereof.

5. I have enquired, whether besides the counsel for respondent no. 2/applicants and the counsel for petitioners, anyone else is privy to the lis.

6. It is informed that though petitioner no.2 in TEST.CAS.No.16/2008 is represented through a different counsel but the interest is the same as the counsel for petitioner no.1.

7. The summoning of the witness no.7 is dispensed with, permitting the respondent no.2/applicants to, within six weeks file certified copies of the concerned documents and on the same being filed, the same will be read in evidence. Similarly, the summoning of witness at serial no.11 is also dispensed with, recording that the document in proof whereof the said witness is sought to be summoned stands admitted and will be read in evidence.

8. The counsel for the respondent no.2/applicants, with respect to the remaining witnesses states, that (i) witnesses no.3 to 5 are required to be summoned to prove the regular, continuous telephonic contact between the petitioners and the attesting witnesses to the document of which probate is sought in TEST.CAS.No.16/2018; it is argued that in cross-examination of the witnesses of the petitioners, it was so suggested and which they denied



and thus it is necessary to summon the call records. On further enquiry, whether the call records would exist; it is stated that vide the earlier order in these proceedings, the same were directed to be preserved; (ii) with respect to witnesses at serial no.6, it is stated that the objection of the respondent no.2/applicants to the document of which probate is sought in TEST.CAS.No.16/2018 is on the ground of the same being forged and fabricated; the record summoned through witness at serial no.6 demonstrates the petitioners to have elsewhere also indulged in fabrication and forgery of records and the said witness is necessary to prove the propensity of the petitioners for fabrication of documents; (iii) the witness at serial no.8 is given up by the counsel for the respondent no.2/applicants; (iv) with respect to the witness at serial no.9, the counsel for the respondent no.2/applicants contends that the records required to be summoned from the said witness are of the operation of the bank locker of the deceased and proof thereof is required by the respondent no.2/applicants to prove the signatures of the deceased and to show that the deceased, at the contemporaneous time, was affixing his signatures; and, (v) with respect to witness at serial no.10, the same is sought to be summoned to show the dealings of the petitioners with the properties of the HUF during the lifetime of the deceased who was then the *karta*.

9. The counsels for the petitioners on the contrary has contended that the witnesses are not relevant. With respect to the witness at serial no.9, it is stated that the petitioners had also summoned the record of operation of the same bank locker and the applicants had not cross-examined the said witness.



10. The counsel for the respondent no.2/applicants controverts that the petitioners had summoned the same record as sought to be summoned through witness at serial no.9.

11. The counsels for the petitioners are however unable to show from the record that same record as sought to be summoned from witness of serial No.9 was summoned by petitioners also.

12. I have considered the rival contentions. For the reasons disclosed, the witnesses at serials no.3 to 6 and 9 are found to be relevant for adjudication of the matter in controversy and the objection of the petitioners to summoning thereof is overruled.

13. The application is allowed in aforesaid terms.

IA No.12424/2018 (of the legal heirs of respondent no.2 under Section 151 CPC) in Test Cas.No.16/2008

14. The counsel for the respondent no.2/applicants contends that the applicants intended to examine a handwriting expert and had named Mr. R.N. Abhilashi in their list of witnesses and had also obtained permission from this Court for the said handwriting expert to take the photographs; however now at the stage of evidence, it was realized that the report of Mr. R.N. Abhilashi was not produced and the original thereof is not traceable though a copy is in possession of the applicants; that the respondent no.2/applicants got in touch with Mr. R.N. Abhilashi but he has informed that is now very old and has shifted to Doha and will be unable to appear.

15. The respondent no.2/applicants thus seek to substitute Mr. R.N. Abhilashi with another handwriting expert and seek permission for another handwriting expert to take photographs of the court record.



16. The counsels for the petitioners oppose. It is contended that permission for Mr. R.N. Abhilashi to photograph the documents was taken as far back as on 8th December, 2008 and now the petitioners cannot be saddled with another handwriting expert. It is also contended that save for the statement of the advocate for the respondent no.2/applicants, there is nothing else to show the same and no affidavit of the advocate has been filed. It is also contended that e-mail of Mr. R.N. Abhilashi cannot be believed as the same is not accompanied with an application under Section 65B of the Evidence Act, 1872.

17. The undisputed fact that the respondent no.2/applicants in their list of witnesses had mentioned the handwriting expert and also obtained permission for the handwriting expert to photograph the court record is indicative of the applicants having always desired to examine a handwriting expert. I have considered whether any prejudice can be said to be suffered by the petitioner with the report of the handwriting expert being not placed on record and I am unable to fathom any such prejudice. Once litigations remain pending for tens of years, the Courts have to discount the factor of, experts engaged becoming old and ceasing to practice and moving out of Delhi.

18. The application is thus allowed.

19. The applicants are permitted to substitute the handwriting expert but on the condition that no delay is caused thereby. The applicants to convey the name of the handwriting expert intended to be examined, to the counsel for the petitioners on or before 10th March, 2019 and to have the said expert



photograph the record on or before 20th March, 2019 and the report of the said expert be filed positively on or before 15th April, 2019.

20. Needless to state that for the purpose of photographing, the seal of the documents stated to be lying in a sealed cover be removed and the documents be resealed again after photographing by the handwriting expert.

21. The application is disposed of.

IA No. 6126/2012 (of the petitioner no.1 under Section 151 CPC) and IA No.2332/2019 (of the legal heirs of respondent no.2 for condonation of 42 days delay in filing rejoinder to IA No.12424/2018) in TEST.CAS.No.16/2008

22. These applications are infructuous and are disposed of.

TEST.CAS.No.55/2006 & TEST.CAS.No.16/2008

23. List before the Joint Registrar for scheduling further dates of trial on 23rd April, 2019.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 26, 2019

‘gsr’..

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