Reportable

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ FAO (OS) No. 454 of 2007

% *Reserved on : August 14, 2008*
Pronounced on : September 30, 2008

Ram Chandra Sabharwal & Ors. . . . Appellants

through : Mr. A.K. Mata, Senior Advocate
with Mr. J. Sarma and
Mr. R. Tyagi, Advocates

VERSUS

Satish Chandra Sabharwal & Ors. . . . Respondents

through : Mr. H.L. Tikku, Senior Advocate
Ms. Yashmeet and
Ms. Anupama, Advocates

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The respondent Nos. 1 & 2 herein have filed Probate Case No. 29/2006 on the Original Side of this Court. In the said petition, probate is sought on the basis of purported Will dated 4.6.1990 allegedly executed by Late Shri Shadi Lal Sabharwal. This Will is in respect of two properties owned by the testator: (a) Quarter Nos. 129-130, Vasdev Nagar, Andha Mughal, Pratap Nagar, Delhi – 110 007; and (b) Shop bearing No.1A, Qutab Road, Delhi – 110 006, wherein business in the name and style of M/s. Lok Seva Store is

carried out. The petitioners (i.e. respondent Nos. 1 & 2 herein), also filed an application (IA No. 5548/2006) under Order XXXIX Rule 1 & 2 of the Code of Civil Procedure, 1908 (for short, 'CPC') seeking *ad interim* injunction. It was alleged in this application that the respondent No.1 herein is in settled possession of the Qutab Road shop since 1973 and likewise the respondent No.2 is in settled possession of the residential house at Vasdev Nagar since 1950. It was alleged that the appellant Nos. 1 & 2 herein (respondent Nos. 3 & 4 in the probate case) were threatening to dispossess the said respondents from the aforesaid properties. The learned Single Judge, after hearing the parties, has allowed the prayer made in that application vide orders dated 13.8.2007 directing maintenance of *status quo* with regard to title and possession of the aforesaid two properties. Three persons have challenged the said order, namely, Shri Ram Chandra Sabharwal, Shri Laxman Chand Sabharwal and Smt. Varinder Sabharwal, who were arrayed in the probate petition as respondent Nos. 3, 4 & LR of respondent No.2 respectively.

2. There is not much of a dispute that the respondents No. 1 & 2 were in possession of the said properties, though, as noticed by the learned Single Judge, there was only a bald denial to the exclusive possession of the property by the respondent Nos. 1 & 2 herein. Therefore, insofar as issuance of *status quo* order regarding title and possession of the properties is concerned, it hardly poses any difficulty as the learned Single Judge rightly pointed out that at this stage only *prima facie* view of the matter was to be taken and even if the Will dated

4.6.1990 was to be disbelieved, the respondent Nos. 1 & 2 certainly have a claim of title in the suit property. Because of this reason, so far as the possession is concerned, it cannot be disputed that till adjudication of the respective rights and contentions, both the parties are required to maintain the same in the existing possession.

3. The issue, however, which has arisen for consideration is in different perspective. The appellants herein had taken objection about the maintainability of the probate petition itself on the ground that it was barred by the provisions of Order II Rule 2 of the CPC and, therefore, when such a petition was not at all maintainable, the respondent Nos. 1 & 2 were also not entitled to interim injunction. This plea of the appellants herein, however, has not convinced learned Single Judge and has been rejected. The appellants are mainly aggrieved by treatment of the issue predicated on Order II Rule 2 CPC in the impugned order.

4. The plea of the appellants, involving the provisions of Order II Rule 2 CPC, is founded on the following averments:

5. The respondent Nos. 1 & 2 had earlier filed probate petition on the basis of another Will dated 6.11.1990 purportedly executed by Late Shri Shadi Lal Sabharwal. In this Will, there was a reference to the Will dated 4.6.1990, subject matter of the present petition. As per the Will dated 6.11.1990, the testator had withdrawn the earlier Will dated 4.6.1990 and Will dated 6.11.1990 was his last Will and

testament. The probate petition based on the Will dated 6.11.1990 (referred to as the first petition) was challenged by the appellants herein on the ground that there was no such Will ever written by late Shri Shadi Lal Sabharwal and said Will was a forged document. After adjudication, the learned Addl. District Judge dismissed the first probate case vide his judgment dated 6.3.2000 holding that there was no evidence to prove Will dated 6.11.1990. The respondent Nos. 1 & 2 herein had filed appeal against the said judgment, i.e. FAO No. 181/2000, which was dismissed by this Court vide orders dated 14.10.2004. Letters Patent Appeal No. 1138/2000 against that judgment was also filed, which was dismissed by a Division Bench of this Court on 19.7.2002. Even Special Leave Petition filed by the respondent Nos. 1 & 2 herein met the same fate as that was also dismissed vide orders dated 15.2.2006.

6. On the basis of the aforesaid facts, the submission of the appellants herein was that cause of action had arisen in favour of the respondents herein to seek probate of Will dated 4.6.1990 when the first petition was filed as the appellants knew about that Will as well. Having omitted to file such a petition in the first instance, they were precluded from maintaining second petition on the cause of the action which was available at the time of filing of the first petition.

7. The learned counsel appearing for the respondent Nos. 1 & 2 herein had countered the aforesaid argument by submitting that the prayer for probate of the two Wills in the alternative was not maintainable

at the time of filing of the first petition inasmuch as probate can be obtained only of last Will and testament. Therefore, only when the first petition filed on the basis of Will dated 6.11.1990 failed, it gave rise to the cause of action to file petition on the basis of earlier Will dated 4.6.1990. The submission was that merely because Will dated 6.11.1990 was not held to be proved would not mean that Will dated 4.6.1990 is also a bogus document.

8. This contention of learned counsel for the petitioners, i.e. respondent Nos. 1 & 2 herein, has found favour with the learned Single Judge. The appellants are not satisfied and, therefore, they have approached the Division Bench by way of the present appeal.

9. It is obvious from the above that the question that falls for consideration is as to whether cause of action for filing the probate on the basis of Will dated 4.6.1990 was available when first petition was filed seeking probate of Will dated 6.11.1990.

10. Mr. A.K. Mata, learned senior counsel appearing for the appellants, submitted that when the first petition was contested by the appellants herein, a specific plea was taken that both Wills dated 4.6.1990 and 6.11.1990 are forged. In these circumstances, it was necessary for the petitioners in the first petition to seek probate of second Will in the alternative in the eventuality the Court has to come to the conclusion that probate on the basis of Will dated 6.11.1990 was not to be granted. He submitted that when there are

more than one will, probate should be taken in respect of all, otherwise provisions of Order II Rule 2 CPC would get attracted. He referred to the language of Order II Rule 2 CPC and submitted that *'entitlement'* and *'cause'* was one, namely, seeking probate of the last testament. According to him, *"cause is not the instrument but the declaration that a particular instrument is the last instrument of bequeath by the testator"*. In support of the submission that two wills can form the subject matter of the same probate petition, he referred to two judgments of other High Courts. One is the judgment of the Kerala High Court in the case of ***George & Ors.*** v. ***Varkey & Ors.,*** Complete Digital Judgments (CDJ) 2004 Ker HC 017. Other judgment is that of the Bombay High Court in ***Smt. Prachi Prakash Pandit & Ors.*** v. ***Sou. Pushpa Sharad Ranade & Ors.,*** CDJ 2004 BHC 1328. He also submitted that since the petitioners, while filing the first petition, had the prior knowledge of the right which they wanted to base on purported Will dated 4.6.1990, its inclusion in the first petition was a must and failure to do so would attract the principles laid down in Order II Rule 2 CPC and for this proposition of law, he referred to the Supreme Court judgment in the case of ***The State of Madhya Pradesh*** v. ***The State of Maharashtra & Ors.,*** (1977) 2 SCC 288. He also cited number of judgments indicating the procedure to be adopted in case where probate petition is contentious in the light of Order II Rule 2 CPC.

11. Learned counsel for the respondents, on the other hand, relied upon the reasons given by the learned Single Judge in coming to the conclusion that there was no cause of action *qua* Will dated 4.6.1990 while filing the first petition. Apart from submitting that probate could be obtained only in respect of last Will and testament of the testator and for this reason when the first petition was filed seeking probate of Will dated 6.11.1990 there was no occasion to seek probate of the Will dated 4.6.1990 as well, he also submitted that cause of action in respect of the two Wills was not even common inasmuch as the attesting witnesses of the two Wills are different and, therefore, different evidence would be required to prove those Wills. In such a situation, provisions of Order II Rule 2 CPC would not be applicable was the submission of learned counsel based on ***Mohammad Khalil Khan & Ors.*** v. ***Mahbub Ali Mian & Ors.,*** AIR (36) 1949 Privy Council 78. He also referred to the Supreme Court judgment in the case of (2005) 10 SCC 218 where the principles relating to Order II Rule 2 CPC have been explained in detail by the Apex Court. His last plea was that even if the Will dated 6.11.1990, on the basis of which the first probate petition was filed, was not proved, one could not draw a conclusion therefrom that the concerned person had died intestate.

12. After considering the submissions of the counsel for the parties, we are inclined to uphold the view taken in the impugned order. In the case of ***Mohd. Khalil*** (supra), the Privy Council held that the guiding principle was as to whether the cause of action which gives action for

and formed the foundation for the first suit in that case was different from the cause of action which gave action for and formed the foundation for the second suit. In order to answer this question, it laid down the following principles which are to be kept in mind :-

> "(1) The correct test in cases falling under O.2, R.2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit." *Moonshee Buzloor Ruheem* v. *Shumsunnissa Begum,* (1867-11 M.I.A. 551 : 2 Sar. 259 P.C.) (supra).
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> (2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. *Read* v. *Brown,* (1889-22 Q.B.D. 128 : 58 L.J.Q.B. 120) (supra)
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> (3) If the evidence to support the two claims is different, then the causes of action are also different. *Brunsden* v. *Humphrey*, (1884-14 Q.B.D. 141 : 53 L.J.Q.B. 476) (supra)
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> (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. *Brunsden* v. *Humphrey,* (1884-14 Q.B.D. 141 : 53 L.J.Q.B. 476) (supra)
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> (5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers …. to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

13. It is the common case of the parties that the aforesaid principles govern the field even today as in the subsequent pronouncements by the Apex Court and the High Courts these principles are not varied, but followed and explained. Further, there is no statutory definition of the phrase *'cause of action'*. There are certain judicial pronouncements explaining this. In the case of ***Sandeep Polymers Private Ltd.*** v. ***Bajaj Auto Limited & Ors.,*** MANU/SC/3031/2007

(Civil Appeal No. 7749 of 2004 decided on 20.07.2007), the Supreme Court dealt with this expression in greater detail and while holding that the cause of action is a bundle of facts which taken with the law applicable to them, gives the plaintiff a right to claim against the defendant, observed as under :-

> "13. In **Om Prakash Srivastava . Union of India & Anr.** (2006) 6 SCC 207, it was held as follows :
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> > 9. By "cause of action" it is meant every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. (See **Bloom Dekor Ltd. v. Subhash Himatlal Desai & Ors.,** (1994) 6 SCC 322.
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> > 10. In a generic and wide sense (as in Section 20 of the Civil Procedure Code, 1908) "cause of action" means every fact, which it is necessary to establish to support a right to obtain a judgment. (See **Sadanandan Bhadran** v. **Madhavan Sunil Kumar,** (1998) 6 SCC 514.
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> > 11. It is settled law that "cause of action" consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. (See South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises Pvt. Ltd. and others (1996) 3 SCC 443
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> > 12. The expression "cause of action: has acquired a judicially settled meaning. In the restricted sense "cause of action" means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in "cause of action" (See **Rajasthan High Court Advocates' Association v. Union of India & Ors.,** (2001) 2 SCC 294.

> 13. The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts, which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit. (See **Gurdit Singh v. Munsha Singh,** (1977) 1 SCC 791).
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> 14. The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one person to obtain a remedy in court from another person. (See Black's Law Dictionary). In Stroud's Judicial Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which if traversed, the plaintiff must prove in order to obtain judgment. In "Words and Phrases" (th Edn.) the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts, which given a party a right to judicial interference on his behalf. (See **Navinchandra N. Majithia v. State of Maharashtra & Ors.,** (2000) 7 SCC 640.
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> 15. In **Halsbury Laws of England** (Fourth Edition), it has been stated as follows :
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> "Cause of action has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person. The phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject matter of grievance founding the action, not merely the technical cause of action".

14. Once we apply these principles to the facts of the present case, our irresistible conclusion would be the same as arrived at by the learned Single Judge. It cannot be disputed that last Will and testament of the testator, in his/her lifetime, is the only relevant document in

order to ascertain bequeath given by the said testator. Earlier wills and codicils would have to be treated as withdrawn even if it is not specifically mentioned by the testator in his last Will, though generally such an expression is entered into between the testators in the last instrument.

15. Going by this principle, when the respondent Nos. 1 & 2 filed the first petition, which was founded on the purported Will dated 6.11.1990, was it necessary for them to seek the probate of earlier Will dated 4.6.1990. Answer is to be in the negative. It would be of interest to note that in the Will dated 6.11.1990 there is a specific reference to the Will dated 4.6.1990. However, still the respondent Nos. 1 & 2 sought probate of Will dated 6.11.1990 terming it as the last Will and testament of the testator. Once they had projected Will of 6.11.1990, it was not necessary for them to seek probate in respect of the Will dated 4.6.1990. May be in the objections filed by the appellants to the first petition they had challenged the validity of both the Wills. However, defence set up by the defendant is of no relevance, as held in the case of ***Mt. Chand Kour v. Partap Singh,*** (1887-1888) IA 156 : (16 Cal. 98 P.C.) :

> "Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

16. Merely because this probate petition founded on the Will dated 6.11.1990 was dismissed by the learned ADJ on the ground that no

sufficient evidence was led which could establish the valid execution and attestation of that Will, would not mean that the second petition seeking probate of Will dated 4.6.1990 would be bad in law. Only when it is held by the Court that Will dated 6.11.1990 was not validly executed as there was no evidence to establish that fact, the consequence whereof would be that there was no such Will dated 6.11.1990 executed by late Shri Shadi Lal Sabharwal, only then, purported Will dated 4.6.1990 can be treated as the last Will. Cause of action for filing the second petition, therefore, arises after the judgment in respect of the Will dated 6.11.1990 was pronounced holding the same as not the Will of late Shri Shadi Lal Sabharwal.

17. No doubt, judgments rendered by the courts while adjudicating upon the Will dated 6.11.1990 projected by the respondents 1 & 2 herein and casting aspersions on them can be taken advantage of, in accordance with and as permissible in law, by the appellants herein. But one cannot straightaway jump the conclusion that even the Will dated 4.6.1990 is not a Will of the testator. That issue has to be decided on the basis of evidence.

18. In ***Mohd. Khalil*** (suupra), one of the principles laid down by the Privy Council, as reproduced above, was that if the evidence to support the two claims is different, then the causes of action are also different. Admittedly, the attesting witnesses of the two Wills are different and, therefore, in the second petition, it would be altogether different evidence which would be led.

19. Reliance placed by learned counsel for the appellants on the judgments of the Kerala and Bombay High Courts in respect of the proposition that two Wills can be obtained in one petition, would be of no avail. We have gone through these judgments and find ourselves in agreement with the observations of the learned Single Judge, which are to the following effect :-

> "30. It is noteworthy that in these two cases, the issue which has been raised before this court was not an issue before the court. The court was also not required to answer an issue with regard to maintainability of a probate petition seeking grant of probate of a prior Will after the court had rejected the petition seeking probate of a subsequent Will. In the pronouncements relied upon by learned senior counsel for the respondents, it would appear that probate of two Wills in the alternative had been set up. In my view, these judgments lay down no binding principle of law or prohibition as has been urged before this court. Therefore, merely because petitions have been filed in different courts seeking probate of two Wills in the alternative would not invite the prohibition under Order 2 Rule 2 of the Code of Civil Procedure in case a separate case was brought in respect of the alternative claims. It is noteworthy that the prohibition in Order 2 Rule 2 of the Code of Civil Procedure does not take into its ambit and scope reliefs in the alternative based on different causes of action which may be available to the plaintiff. This would be more so when the relief sought in the subsequent case is based on the outcome of the adjudication in the previous suit which had been filed."

20. In view of our aforesaid reasons, the appellants are in no better position even when the principles laid down in the case of ***State of Madhya Pradesh*** v. ***State of Maharashtra*** (supra) are followed. That case lays down the principle to the effect that when plaintiff omits to sue or relinquishes the claim in a suit with knowledge that he had a right to sue for that relief, subsequent suit for the same cause of action is barred. Same judgment also decides that provisions of

Order II Rule 2 CPC would not apply if the cause of action in the subsequent suit is different from that of the former suit. Some of the other judgments, which were cited by learned counsel for the appellants, re duly dealt with by the learned Single Judge in the impugned judgment. Since we are agreeing with the analysis of those judgments, as undertaken by the learned Single Judge, it is not necessary to repeat that discussion and burden this judgment.

21. For the aforesaid reasons, we find no merit in this appeal, which is accordingly dismissed.

(A.K. SIKRI)
JUDGE

(MANMOHAN SINGH)
JUDGE

September 30, 2008
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