

**SUPREME COURT OF INDIA**

Amrit Lal Kapoor

Vs.

Kusum Lata Kapoor

C.A.No.4258 of 2010

(Aftab Alam and T.S.Thakur JJ.)

06.05.2010

**ORDER**

**T.S.Thakur, J.**

1. Leave granted.

2. This appeal calls in question an order dated 29th March 2006 passed by the High Court of Himachal Pradesh at Shimla whereby an order passed by the trial court closing the evidence of the defendants-appellants herein has been affirmed and C.M.P.M.O.No.54 of 2006 filed against the same dismissed.

3. In a suit for declaration of title and consequential relief in the nature of permanent prohibitory injunction, the defendants-appellants herein have set up a Will allegedly executed in their favour by late Shri Devraj Kapoor, deceased husband of plaintiff-respondent No.1. After the plaintiff had led her evidence in the suit, the defendants- appellants herein were called upon to adduce evidence in support of their case. While the defendants had yet to conclude their evidence, the parties reported to the Court that they were exploring the possibility of an amicable settlement amongst themselves. The compromise talks did not however fructify in any settlement with the result that on 16th December 2005, the parties reported failure of the attempt made in that direction whereupon the Court directed the defendants-appellants to produce all their witnesses except DW 1, Durga Singh on their own responsibility. The Court further directed that if the defendants failed to produce the evidence as directed the same shall be deemed to have been closed.

4. One of the witnesses which the defendants-appellants had cited, was Shri Ashwani Kumar Kapoor working in the Engineering Department in the State of Himachal Pradesh. Shri Ashwani Kumar Kapoor happened to be an attesting witness to the will propounded by the defendants. The appellants' case is that Shri Ashwani Kumar Kapoor made a written request to his superior for grant of casual leave and also for permission to leave the station to enable him to appear in the Court. In response to the said request the Executive Engineer concerned

by an endorsement dated 18th February 2006 declined the permission prayed for on the ground that H.P. State Assembly was in session. The appellants' case is that since the witness was a Government official and since his immediate officer had declined casual leave and leave to go out of station, the witness could not be present for getting his deposition recorded on 21st February 2006 when the trial Court closed the evidence of the defendants-appellants.

5. Aggrieved by the said order, the appellants preferred C.M.P.M.O. No.54 of 2006 before the High Court of Himachal Pradesh at Shimla which was summarily rejected by the High Court without so much as recording any reason in support of the said order. The present appeal assails the correctness of the said order as already noticed above.

6. Appearing for the appellants, Mr. Agrawala strenuously contended that closure of the evidence by the trial Court and the dismissal of the appellants' challenge to the said order by the High Court is wholly unjustified causing grave failure of justice and requiring interference by this Court under Article 136 of the Constitution. He argued that the trial Court and so also the High Court had failed to appreciate the circumstances in which Shri Ashwani Kumar Kapoor was prevented from appearing as an attesting witness to the will.

“He drew our attention to the order passed by the Engineer- in-Chief, PWD, Shimla directing all Superintendent Engineers to ensure that nobody leaves the Headquarter till the 10th session of the H.P. State Vidhan Sabha between 21st February 2006 to 7th April 2006 is over and to make special arrangements for sending replies pertaining to Vidhan Sabha Business to avoid delay. It was according to Mr. Agrawala, pursuant to the said instructions that the Executive Engineer had declined the leave applied for by Shri Ashwani Kumar Kapoor which had resulted in his non-appearance before the Court below. In as much as the Court had failed to appreciate the circumstances in the background whereof Shri Ashwani Kumar Kapoor had not been produced and it has committed a mistake causing failure of justice especially when Shri Ashwani Kumar Kapoor was the only attesting witness to the will propounded by the defendants.”

7. There is considerable merit in the submission made by Mr. Agrawala. Shri Ashwani Kumar Kapoor is an attesting witness to the Will which the defendants-appellants herein have set up in their defence. Non-examination of the said witness would, therefore, seriously affect their case. We cannot lose sight of the fact that the witness could not be produced not because of any deliberate neglect or inaction on the part of the appellants herein but on account of the refusal of casual and station leave prayed for by him. In the circumstances, interest of justice would be substantially served if a final opportunity is given to the appellants to produce the witness.

8. In the result this appeal is allowed, the order passed by the High Court and that passed by the trial Court are set aside and the matter remitted back to the trial court with the direction that the appellants shall be permitted to produce Shri Ashwani Kumar Kapoor as a witness in support of their case by issuing summons directly to the witness as also through his

immediate officer. Service of the summons shall be the responsibility of the appellants. We further direct that since the order closing the evidence of the appellants has been set aside by us, the appellants shall be free to examine any other witness in support of their case who is cited in the list already filed by them but who has not been produced so far. The production of any such witnesses shall, however, be the responsibility of the appellants. The parties to bear their own costs.