

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.299/10 & CM Nos.8006/10, 10840/10,
19782/10

Anjan Kumar Singhi & Anr.

...Appellant through
Mr. Sudhir Chandra, Sr. Adv.
with Mr. Sandeep Mahapatra
& Mr. Aditya Ganju, Adv.

versus

Ranjan Kumar Singhi & Ors.

...Respondent through
Mr. Krishnan Venugopal, Sr.
Adv. with Ms. Nilanjana
Guha, Adv. for Respondent
Nos.1 & 2/Mr. Ranjan
Kumar Singhi & Ms. Taruna
Singhi
Mr. Amit Sibal &
Mr. Rohit M. Alex,
Adv. for Respondent
No.3/Angoori Singhi.

WITH

FAO(OS) No.300/10 & CM No.10839/10

Anjan Kumar Singhi & Anr.

...Appellant through
Mr. Sudhir Chandra, Sr. Adv.
with Mr. Sandeep Mahapatra
& Mr. Aditya Ganju, Adv.

versus

Ranjan Kumar Singhi & Ors.

...Respondent through
Mr. Krishnana Venugopal,
Sr. Adv. with Ms. Nilanjana
Guha, Adv. for Respondent
Nos.1 & 2/Mr. Ranjan
Kumar Singhi and
Ms. Taruna Singhi
Mr. Amit Sibal &

Mr. Rohit M. Alex,
Adv. for Respondent
No.3/Angoori Singhi.

WITH

FAO(OS) No.412/10 & CM No.10849/10

Ranjan Kumar Singhi & Anr.

...Appellant through
Mr. Krishnan Venugopal, Sr.
Adv. with Ms. Nilanjana
Guha, Adv. for Appellants
No.1 & 2/Ranjan Kumar
Sanghi & Ms. Taruna Sanghi

versus

Angoori Singhi & Ors.

...Respondent through
Mr. Amit Sibal & Mr. Rohit
M.Alex, Adv. for
Respondent No.1/Angoori
Sanghi.
Mr. Sudhir Chandra, Sr. Adv.
with Mr. Sandeep Mahapatra
& Mr. Aditya Ganju, Adv. for
Respondents No.2 and 3/
Anjan Kumar Sanghi and
Usha Sanghi.

Date of Hearing : May 11, 2011

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Date of Decision: September 09, 2011

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MS. JUSTICE MUKTA GUPTA

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| 1. Whether reporters of local papers may be allowed to see the Judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

FAO(OS) No.299/10 & CM Nos.8006/10, 10840/10, 19782/10,
FAO(OS) No.300/10 & CM No.10839/10,

1. This litigation commenced in this Court pursuant to the filing of CS(OS) No.2615/2008 by Shri Ranjan Kumar Singhi and his wife, Smt. Taruna Singhi, who we shall hereinafter refer to as the Plaintiffs. The Prayers in the Plaint, *inter alia*, are for the execution of a Trust allegedly created by the Will of Shri Narendra Singh Singhi, father/father-in-law of the Plaintiffs, Late husband of Smt. Angoori Singhi, Defendant No.1, who is the mother/mother-in-law of the other parties. Shri Anjan Singhi, Defendant No.2 and his wife Smt. Usha Singhi, Defendant No.3 had filed IA No.3213/2009 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC for short) praying for the dismissal of the Suit. Since this application has been dismissed, FAO(OS) No.299/2010 has been preferred by Defendant Nos.2 and 3. The Plaintiffs filed IA No.3240/2009 under Section 151 of the CPC seeking an *ad interim* order against the mother/Defendant No.1, *inter alia*, for performance of her obligations as the sole Trustee. By the impugned Order, the learned Single Judge directed that the prayer for appointment of an alternate sole Trustee in place of Defendant No.1 will be determined at the time of disposing of the other pending application under Order XXXIX Rules 1 and 2 (IA

No.15449/2008) and the Defendants' application under Order XXXIX Rule 4 (IA No.3214/2009). These directions have been assailed by both the sides; by the Defendants in FAO(OS) No.300/2010 which we see as a nebulous prayer assailing the Order of the learned Single Judge in deferring the consideration of the prayer in IA No.3240/2010 for directions to the mother/Defendant No.1 for administering the alleged Trust and/or appointing any Trustee in her stead. It would have been appropriate for Defendant No.2 to have specifically prayed that the said IA No.3240/2009 should have been dismissed. The Plaintiffs have filed FAO(OS) No.412/2010 assailing the dismissal of their application, IA No.3240/2009 with the direction that an order should be passed whilst deciding the two pending applications mentioned above, that is, for grant of an *ad interim* injunction (Plaintiffs' application) and for vacation of *ex parte ad interim* injunction (Defendants' application).

PLEADINGS OF THE PARTIES

2. The Plaint is for the passing of a mandatory injunction or, in the alternative, for the appointment of a trustee under Sections 49, 59 and 60 of the Indian Trusts Act, 1882. The Suit Schedule Property are mentioned separately - (a) items of jewellery listed in Schedule A to the Plaint to be distributed equally between Plaintiff No.2 and Defendant No.3 and (b)

Curios and Antiques listed in Schedule B to the Plaint to be distributed equally between Plaintiff No.1 and Defendant No.2 in accordance with the Will of the Late patriarch of the family, namely, Late Narendra Singh Singhi. The Plaint further states that on 13.2.1970, Defendant No.1 applied to the High Court of Calcutta for Probation of the subject Will; Probate was granted on 12.3.1970. Thereafter, it is averred in the Plaint that an oral partition of the jewellery was effected between Plaintiff No.2 and Defendant No.3. Despite pleading so, it has then been averred that Defendant No.2 had not handed over physical possession of the jewellery in Schedule A to either of the daughters-in-law, viz. Plaintiff No.2 and Defendant No.3. Some of the jewellery in Schedule A is pleaded to be with Defendant No.1 at her residence in New Delhi. The remaining items are alleged to be located in the family house in Calcutta. We may clarify that the Will bequeaths 48/2, Gariahat Road, Ballygunge, Calcutta in equal share to the four daughters of Defendant No.1 (sisters of Plaintiff No.1 and Defendant No.2). The family home has been mentioned in the Plaint as 48/3, Gariahat Road, Ballygunge, Calcutta which is in the possession of Defendant Nos.2 and 3. Claims as regards this immovable property have neither been articulated in the Plaint nor argued before us. Disputes pertaining thereto may be hit by the provisions of

Order II of the CPC. The issuance of a letter dated 16.7.2008, addressed by Plaintiff No.1 to his mother leading up to a family meeting proposed for 29.9.2008, has been pleaded and specifically denied by Defendant Nos.2 and 3. Similar is the position in respect of the mother's letter dated 3.10.2008 to the effect that she was unable to act as the sole Trustee. The Prayers in the Plaint read as follows:-

- (a) To specifically execute the trust created by the Will of Late Shri Narendra Singh Singhi by issuing a mandatory injunction to the Defendant No.1 to perform her obligations as the trustee of the suit schedule property:
 - (i) with respect to the jewellery in Schedule A by physically handing over possession of the jewellery in accordance with the distribution between Plaintiff No.2 and Defendant No.3 reflected in Schedule A; and
 - (ii) with respect to the antiques and curios specified in Schedule B by distributing these items in equal shares between Plaintiff No.1 and Defendant No.2 respectively and entrusting physical possession to them in accordance with such distribution; or
- (b) In the alternative, to appoint a retired High Court Judge as a trustee in place of Defendant No.1 to discharge the duties of the trustee as referred to in prayers (a)(i) and (a)(ii) above; and

- (c) To have the trust executed by this Hon'ble Court until appointment of a new trustee in place of Defendant No.1;
- (d) Award costs of the Suit to the Plaintiff and against the Defendant; and
- (e) Pass such other order/further orders that this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

3. The Will dated 8.6.1966, which is the fulcrum of the *lis*, reads thus:-

THIS IS THE LAST WILL AND TESTAMENT OF I, NARENDRA SINGH SINGHI son of late Babu Bahadur Singh Singhi residing at No.48, Gariahat Road, Ballygunge in the suburbs of the town of Calcutta.

1. I appoint my wife Smt. Angoori Singhi to be the sole Executrix of this my Will.

2. I give devise and bequeath all my right, title and interest in the my property known as No.48/2, Gariahat Road, Ballygunge in the suburbs of Calcutta to my four daughters, namely Smt. Alope Rani Dudhoria, Smt. Monika Singh, Smt. Kanika Parekh and Smt. Anjalika Somany in equal share.

3. I bequeath my jewellery on trust to my wife to divide the same in two parts of equal share as far as possible; one such part to be given to the wife of my son Anjan Kumar and the other to be given to the wife of my son Ranjan Kumar after their respective marriages.

4. I bequeath my entire collection of curios and antiques on trust to my wife to distribute the same

amongst my sons in equal share at such time and in such manner as she thinks proper.

5. I give devise and bequeath all my properties, moveables and immoveables of whatsoever nature and wherever situate except those described in the preceding paras and subject to payment of my debts, liabilities and Estate Duty, if any, payable legally, to my two sons Anjan Kumar and Ranjan Kumar absolutely in equal share.

IN WITNESS WHEREOF, I the said NARENDRA SINGH SINGHI have hereunto set my hand to this my Will, the Eighth day of June, One thousand nine hundred and sixty six.

SIGNED by the abovenamed NARENDRA SINGH SINGHI as his last Will in the presence of us all being present at the same time who at his request and in his presence and in the presence of one another have hereunto subscribed our names as

witnesses:- Narendra Singh Singhi

Rajpat Singh Dugar.

Member of Parliament

84B, Sambhunath Pandit Street

Calcutta-20.

Anjan Kumar Singhi

48, Gariahat Road

Calcutta-19.

4. Two grounds have been raised by Defendant Nos. 2 and 3 in their IA No.3213/2009 under Order VII Rule 11 of the CPC. Firstly, that the Suit is not maintainable as the subject Will does

not envisage the establishment of a Trust; secondly, that since the Probate proceedings had admittedly been initiated in 1970 in the High Court of Judicature at Calcutta, legal action, as postulated in the Plaint, is not maintainable in Delhi. Both these legal positions are strenuously controverted by the Plaintiffs who have, in addition, asserted that the impugned Order, dismissing the application under Order VII Rule 11 of the CPC, is not appealable.

IS THE DISMISSAL OF AN APPLICATION UNDER ORDER VII RULE 11 APPEALABLE UNDER SECTION 10 OF THE DELHI HIGH COURT ACT, 1966.

5. Any discussion on this legal nodus would entail a discussion of *Shah Babulal **Khimji** -vs- Jayaben D. Kania*, (1981) 4 SCC 8, which essentially dealt with the availability of Letters Patent. The dispute had its origins in Bombay where avowedly Letters Patent was in vogue in the High Court. In stark contradistinction, High Court of Delhi has been established by the Delhi High Courts Act, 1966, and, therefore, **Khimji** may not be attracted. Two decisions of a Five-Judge Bench of the Delhi High Court have highlighted this important aspect, viz. *University of Delhi -vs- Hafiz Mohd. Said*, AIR 1972 Delhi 102 and *Union of India -vs- A.S. Dhupia*, AIR 1972 Delhi 108. **Hafiz Mohd. Said** was overruled by a brief Order, based on **Khimji**, in *Jugal Kishore **Paliwal** -vs- S.Satjit Singh*, (1984) 1 SCC 358.

However, ***Paliwal*** does not consider or discuss whether the jurisdiction of the Bombay High Court and other High Courts where Letters Patent have historically held sway is identical to the Delhi High Court and other High Courts which have been established by an Act of Parliament. The other Five-Judge Bench decision in ***A.S. Dhupia***, however, still holds the field. Be that as it may, does ***Khimji*** state so far as the dismissal of an application under Order VII Rule 11 of the CPC is concerned? If such an application is allowed, it will have the effect of the dismissal of a plaint, followed by the drawing-up of a decree. Such an order would obviously be momentous in the ***Khimji*** mould and, therefore, appealable. But, as is so often lost sight of, the availability of an appeal should not be confused with the forum for the appeal. It is often argued that the appeal could partake of the nature of a First Appeal from Order (FAO) because ***Khimji***, dealing with Letters Patent, clarifies that certain orders are appealable. Thus, in the event an application under Order VII Rule 11 of the CPC is successful, the entire controversy can be placed before the appellate forum by way of Regular First Appeal (RFA). In paragraph 113 of ***Khimji***, Their Lordships have clarified that – “most of the interlocutory orders which contain the quality of finality are clearly specified in Clauses (a) to (w) of Order XLIII Rule 1 and have already been

held by us to be judgments within the meaning of letters patent and, therefore, appealable. ... There may also be interlocutory orders which are not covered by Order XLIII Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment, the adverse effect on the party concerned must be direct and immediate rather than indirect or remote". Their Lordships went on to hold that where leave to defend is refused under Order XXXVII of the CPC, such an order would "undoubtedly be treated as a judgment within the meaning of letters patent so as to be appealable to a larger Bench". Their Lordships have not laid down that such an order should not be assailed as an RFA, or that both remedies are available. This conundrum no longer exists in view of *Ajay Bansal -vs- Anup Mehta*, (2007) 2 SCC 275 wherein it has been held that the "defendant in such a case can also be left to appeal against the decree and therein challenge the order refusing leave to defend in terms of Section 105(1) of the Code." The Court also referred to *V.S. Saini -vs- D.C.M. Limited*, AIR 2004 Delhi 219 in which it had been held that "a revision is not maintainable against the refusal to grant leave to defend a summary suit". It cannot be expected that a defendant

can assail such an order firstly by filing an FAO, and if unsuccessful, can nevertheless thereafter file an RFA. Having carefully cogitated upon ***Khimji***, we unhesitatingly state that a party cannot be allowed to simultaneously avail of two remedies. There can be no cavil that an RFA has the widest amplitude and would, therefore, provide the appropriate remedy as it would be the most efficacious; merely because *ad valorem* Court Fee may have to be paid, would not render it less efficacious. In *Kailashpati Steel Industries Ltd. -vs- Steel Authority of India*, 2008 (106) DRJ 532, the Division Bench had to consider a case where conditional leave to defend had been granted. This is an altogether different situation for the simple reason that a decree would not automatically follow, as is the case where leave to defend under Order XXXVII of the CPC is denied, or where an application under Order VII Rule 11 of the CPC is allowed. In ***Liverpool & London S.P. & I Association Ltd. -vs- M.V. Sea Success I***, (2004) 9 SCC 512, the Supreme Court referred to its decisions in *K. Kamraja Nadar -vs- Kunju Thevar*, AIR 1958 SC 687, *Azhar Hussain -vs- Rajiv Gandhi*, 1986 Supp. SCC 315, *Dhartipakar Madan Lal Aggarwal -vs- Rajiv Gandhi*, 1987 Supp. SCC 93 and *Samar Singh -vs- Kedar Nath*, 1987 Supp. SCC 663 and concluded that the rejection of an application under Order VII Rule 11 of the CPC would constitute a decision of moment

since the defendant would have to unnecessarily face the expense and anxiety of meritless litigation. Of course, the same can be said where leave to defend under Order XXXVII of the CPC has been allowed, but ***Khimji*** appears to set down that such an order is not appealable. The Plaintiffs before us have accepted that the rejection of an application under Order VII Rule 11 of the CPC is appealable as they intend to assail the enunciation of the law articulated in ***Liverpool***.

Merits of the application under Order VII Rule 11

6. The Defendant relies on the following headnote in *Vijai Pratap Singh -vs- Dukh Haran Nath Singh*, AIR 1962 SC 941 in the application itself:-

9. By the express terms of r. 5 clause (d), the court is concerned to ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed : it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. If accepting those allegations as true no case is made out for granting relief no cause of action would be shown and the petition must be rejected. But in ascertaining whether the petition shows a cause of action the court does not enter upon a trial of the issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may raise upon the merits; nor is the court

competent to make an elaborate enquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, prima facie, show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him. By the Statute, the jurisdiction of the Court is restricted to ascertaining whether on the allegations a cause of action is shown : the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit.

It is necessary to clarify that the Supreme Court was concerned with Order XXXIII of the CPC which is a fasciculus concerning indigent persons, but it would still remain apposite for the approach which should be taken by the courts while dealing with an application for the rejection of the plaint. As has been repeatedly reiterated by the Supreme Court, such an application has to be decided as a demurrer, that is, that the asseverations made in the Plaint must perforce, at that stage, be taken to be correct.

7. The learned Single Judge has relied on paragraph 12 of *Mayar (H.K.) Ltd. -vs- Owners & Parties, Vessel M.V. Fortune Express*, (2006) 3 SCC 100, which we reproduce for facility of reference:-

12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made

by the defendant in his written statement or in an application for rejection of the plaint. The Court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the Court exercising the powers under Order VII Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order VII Rule 11 of the Code cannot be exercised for rejection of the suit filed by the plaintiff-appellants.

8. Mr. Sudhir Chandra, learned Senior Counsel for Defendant Nos.2 and 3, seeks to rely on *Sopan Sukhdev Sable -vs- Assistant Charity Commissioner*, (2004) 3 SCC 137. The

Supreme Court had reiterated its consistent opinion to the effect that for the purposes of deciding an application under Order VII Rule 11 of the CPC, only averments in the plaint are germane and pleas taken in the written statement are wholly irrelevant. The Court, no doubt, further clarified that it is the duty of the Court and the real object behind Order VII Rule 11 of the CPC, to weed out, or more importantly, snuff out vexatious litigation. This is also the exhortation of the Apex Court in *T. Arivandandam -vs- T.V. Satyapal*, AIR 1977 SC 2421 in which it was observed that clever drafting would not justify keeping frivolous and unjustified litigation in the Court, since that would be stressful, vexatious and expensive to the defendant. Nevertheless, proceedings under these provisions, we reiterate, are in the nature of a demurrer.

9. If a précis of the Plaint is to be made relevant to the dispute before us, it would be that by his Will, Late Narendra Singh Singhi intended to “bequeath my jewellery on trust to my wife to divide the same in two parts of equal share as far as possible, one such part to be given to the wife of my son Anjan Kumar and the other to be given to the wife of my son Ranjan Kumar after their respective marriages.” The Plaint pleads the establishment of a Trust, of which the Testator had appointed Defendant No.1 as the sole Trustee. It is the common case of

the parties that Defendant No.1 had obtained a Probate of the said Will from the Calcutta High Court. The moot question is whether notwithstanding the Probate, the Will creates a valid Trust as the Plaintiffs contend. Several precedents and treatise on the subject have been relied upon by the Plaintiffs in support of the argument that paragraphs 3 and 4 of the Will, in fact, create and establish a Trust. On the other hand, there is also considerable weight in the argument of Defendant Nos.2 and 3 that the jewellery, antiques and curios had been bequeathed to Defendant No.1 with the Testator trusting and believing that the jewellery, curios and antiques so bequeathed will be divided equally between Plaintiff Nos.1 and 2 and Defendant Nos.2 and 3 by Defendant No.1.

10. The learned Single Judge has obviously been disappointed with the Plaintiffs, inasmuch as they have concealed from the Court two Declarations of Defendant No.1. The first Declaration, dated 31.3.1969, states, *inter alia*, as follows:-

7. Ever since the death of the said deceased, I have been acting as a sole Executrix and accepted the **Trust** created by the said Will dated the 8th June 1966 for dividing the Jewellery of the said deceased as aforesaid and have divided the same in two parts of equal share as far as possible and have delivered one such part comprising the Items Nos.1 to 27 of the said Valuation Report as set out in the Second Schedule hereunder

written to the said Sm. Usha Singhi wife of Shri Anjan Kumar to hold the same unto the said Sm. Usha Singhi absolutely.

The Complaint similarly suppresses reference to the second Declaration dated 31.3.1975 made by Defendant No.1 stating, *inter alia*, as follows:-

7. Ever since the death of the said deceased, I have been acting as a sole executrix and accepted the **Trust** created by the said Will dated the 8th June 1966 for dividing the Jewellery of the said deceased as aforesaid and have divided the same in two parts of equal share as far as possible. I had delivered vide my Declaration dated 31st March, 1969 one such part comprising Items Nos.1 to 27 of the said Valuation Report as set out in the Second Schedule hereunder written to the said Smt. Usha Singhi wife of Shri Anjan Kumar to hold the same unto the said Sm. Usha Singh absolutely. I have also since delivered the other such part comprising Items Nos.28 to 51 of the said Valuation Report as set out in the Second Schedule hereunder written to the said Sm.Tarun Singhi wife of Shri Ranjan Kumar to hold the same unto the said Sm. Taruna Singhi absolutely.

11. These Declarations are *prima facie* indicative of the position that Defendant No.1 had assumed the duties of the executor as well as a trustee, bringing the dicta in *CIT -vs- Estate of V.L. Ethiraj*, [1979] 120 ITR 271 sharply into focus.

The Division Bench of the Madras High Court held that the Will with which they were concerned had authorized the Official Trustee to act both as an executor and a trustee. Accordingly, as soon as the executor obtained probate, the estate vested in him as the constituted trustee; ergo, after the assessment year in which probate was granted, the Official Trustee should have discarded the robes of an executor and donned those of a trustee. This view, earlier assumed in *CIT -vs- Estate of Late Sri T.P. Ramaswami Pillai*, [1962] 46 ITR 666, has been affirmed in *K.R. Patel -vs- CIT*, (1999) 7 SCC 26, where Their Lordships opined that it depends on the construction of Will as to when the concerned persons' role and obligation novated and mutated from that of an executor to that of a trustee. It seems to us that this exercise cannot, in the present conspectus, be correctly and comprehensively be completed at an interlocutory stage, in the absence of unequivocal admissions regarding relevant facts.

12. The learned Single Judge has, however, not recorded any opinion on the implications which would logically ensue from the concealment of these two Declarations. In the Replication, the Plaintiffs have made a facile denial pertaining to the Declarations and have gone on to further plead that part of the jewellery mentioned in the Declaration has been found by the Local Commissioner to be in the possession of Defendant No.1.

Defendant Nos. 2 and 3 have also placed on record the Wealth Tax Returns of Plaintiff No.2 mentioning therein the jewellery referred to by the mother/mother-in-law, Defendant No.1 in her Declaration. It seems to us that the Plaintiffs are blameworthy of material suppression, and this cannot be wished away by a self-serving statement that the Plaintiffs were not aware of the details of their inheritance since they were not directly *privy* to the probate proceedings or those with any fiscal or tax Authorities. We cannot lose sight of the fact that Defendant No.1 is over ninety years of age and that it is not beyond the realm of possibility that the Plaintiffs, who are residents of Delhi, may have placed some of the jewellery with Defendant No.1 who, undoubtedly, is staying with their son in Delhi. What appears to have been overlooked is that the Declarations relate to jewellery and do not deal with the distribution of the curios and antiques which have been bequeathed to Defendant No.1 *albeit* "on trust to my wife to distribute the same amongst my sons in equal share at such time and in such manner as she thinks proper".

13. We may well favour the opinion that a formal Trust had not been established by the Will and instead all the jewellery and curios and antiques had been bequeathed to Defendant No.1, with the expectation that she would divide them equally

between her two sons. We must, however, hasten to add that this is not the only possible view and that the Plaintiffs' case is also plausible. Indubitably, it will be the bounden duty of the learned Single Judge, post Trial, to make an informed choice between one of the two possibilities predicated on the preponderance of evidence. However, there can be no gainsaying that the Appellate Court is not expected to make this choice at the stage of deciding an application under Order VII Rule 11 of the CPC. It may be justified to repeat that at the stage on which the *lis* presently stands, the Court must decide, on a demurrer, and if this is to be done, there are certainly at least two versions to choose from. Therefore, the impugned Order cannot be disturbed.

DOES THE DELHI HIGH COURT ENJOY
TERRITORIAL JURISDICTION

14. Mr. Sudhir Chandra, learned Senior Counsel for Defendant Nos.2 and 3, has repeated before us the arguments advanced before the learned Single Judge to the effect that since Probate had been granted by the Calcutta High Court, all further proceedings must be filed in that Court alone. This stand, it seems to us, overlooks the Plaintiffs' case that the Will had established a Trust and that if this be so, Defendant No.1 must be seen to have substituted the visage of a Executrix with that of a sole Trustee. We do not think that

Sections 300 and 301 of the Indian Succession Act, 1925, relied upon by Defendant Nos.2 and 3, restrict jurisdiction exclusively to the Calcutta High Court. This is especially so in view of the fact that the alleged Trustee, namely Defendant No.1, has uncontrovertedly shifted her residence from Calcutta to Delhi as far back as in 1995. Furthermore, the Court is concerned only with movable property, and the almost inflexible rules which regulate jurisdiction so far as immovable property is concerned, therefore, do not apply. Section 301 of the Indian Succession Act contemplates a situation where an application is made to suspend, remove or discharge any private executor or administrator and provide for the succession of another person to that office, thereby vesting in the new successor any property belonging to the Suit. A Will does not always create a Trust. Until a definite answer is given by the Court as to the coming into existence or otherwise of a Trust, of which Defendant No.1 is the sole Trustee, a final decision under Section 301 cannot obviously be given.

15. We have taken pains not to express our opinions on the emergence of a Trust or whether Defendant No.1 had completed all her obligations as an Executrix; or whether she had assumed the robes of a Trustee. In our opinion, it would be impossible for the learned Single Judge, and *a fortiori* ourselves, to come to

a definitive conclusion on these vexed questions without allowing the parties the rights and benefits of a Trial.

IS THE SUIT BARRED BY LIMITATION

16. On behalf of Defendant Nos.2 and 3, it is contended that Late Narendra Singh Singhi died in December 1967 and his last Will and Testament dated 8.6.1966 was granted probate by the Calcutta High Court on 12.3.1970. A decision on the limitation question will inexorably and inevitably depend on the view taken by the learned Single Judge *vis-à-vis* the establishment of a Trust by the said Will, of which Defendant No.1 is the Trustee. We have already held that it is not possible for the Court to pronounce a final view on the question of whether a Trust had not been established as contended by the Applicants/Defendant Nos.2 and 3. Section 10 of the Limitation Act, 1963 states that “no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.” Our research has led us to *Wali Mohammed -vs- Rahmat Bee*, (1999) 3 SCC 145 where Their Lordships have held that keeping in perspective “the Explanation to Section 10 of the

Limitation Act, 1963 the respondent's father who was managing the property has to be "deemed" to be a trustee in whom the properties vested specifically and inasmuch as the respondent was a donee and was not a transferee for valuation consideration, Section 10 applies and possession could be recovered from the defendant without any limitation as to time". The learned Single Judge has rightly held that, *prima facie*, the Plaintiff is not barred by limitation. This objection can only succeed in the event that Defendant Nos.2 and 3 successfully establish that a Trust was neither envisaged by the Will dated 8.6.1966 nor was accepted by the sole Trustee, namely, Defendant No.1. These will be triable Issues, all of which would be substantiated only at the Trial.

17. Reliance has rightly been placed on a decision of the Division Bench in *Maganlal Parikshawala -vs- Samson Shalom*, AIR 1938 Allahabad 197 wherein it was observed that regardless of what "the merits of the present petition may be, it is not a petition which in our opinion can be brought under S. 301, Succession Act. That section deals with the power of a High Court to suspend, remove or discharge any private executor or administrator. Now it may be that the will named three persons as executors but it does not follow the use of the word "executor" in the will was correct. It appears that the will

has set up a permanent trust and that the position of these persons named in the will was that of trustees. As they are trustees of property for an endowment of a public temple in our opinion the proper procedure would be to obtain sanction from the Legal Remembrancer and take proceedings under S. 92, Civil P.C..”

18. The primary purpose of Probate proceedings is only to bestow the courts’ imprimatur to the genuineness and authenticity of the Will in question. The proceedings are summary in nature and, therefore, routine and uncontested directions can be passed under Section 302 of the Succession Act (see *Arya Parti Nidhi Sabha -vs- Om Prakash*, AIR 1934 Lahore 120). Mr. Sudhir Chandra had succeeded over a decade ago in convincing the Division Bench in *Jai Krishan Srivastav -vs- Rajeshwar Dayal*, AIR 1997 Allahabad 419 that complicated questions of title, based on the interpretation of a Will, cannot be properly conducted in summary proceedings such as probate under Section 301 of the Succession Act. We are in respectful agreement with that appreciation of law. The disputes raised in the Plaint, therefore, remain inconclusive even though Probate had been granted by the Calcutta High Court.

19. Mr. Sudhir Chandra next contends that even if the Suit is assumed to be maintainable and the curtain is brought down on the provisions of the Indian Succession Act, this Court ought not to exercise territorial jurisdiction. The fifth paragraph of the Will devises and bequeaths all the Testator's properties, moveable and immoveable, except those covered by the preceding paragraph to Plaintiff No.1 and Defendant No.2 in equal share. It appears that whilst property bearing No.48/2, Gariahat Road, Ballygunge, Calcutta has been left to the daughters/sisters, property bearing No. 48/3, Gariahat Road, Ballygunge, Calcutta is in the possession of Defendant Nos.2 and 3. However, disputes ventilated in the Plaint pertain to paragraphs 3 and 4 of the Will and not paragraph 5. The properties covered by paragraphs 3 and 4 are moveables. Whilst Defendant Nos.2 and 3 admit that some of the valuables covered in paragraphs 3 and 4 of the Will were left behind in Calcutta when Defendant No.1 left for Delhi, the Plaint states that the entire division did not take place. Defendant No.1 supports the Plaintiffs in this regard and the Local Commissioner's Report evidences that some of the valuables were found in the possession of Defendant No.1. If the Plaintiffs case to the effect that a Trust had been created by the subject Will is accepted on a demurrer, as it must be, whenever a court is called upon to

decide an application under Order VII Rule 11 of the CPC, the residence of a trustee (in the present case Defendant No.1) will be extremely relevant for the purposes of deciding territorial jurisdiction. Even if we accept Mr. Chandra's submission that the cause of action arose in 1970, since the time prescriptions are irrelevant by virtue of Section 10 of the Limitation Act, and since the Trustee as well as some part of the property in question in the Suit is in Delhi, Courts in the Capital will be clothed with jurisdiction. The Plaintiff, no doubt, asserts that the bulk of the jewellery, curios and antiques are in Calcutta, but this factor will not oust the jurisdiction from Delhi. This is for the simple reason that the Plaintiffs are *dominus litus* and free to choose the venue as well as the forum which they find convenient. We come to this conclusion even though we are mindful of the *ABC Laminart -vs- A.P. Agencies*, AIR 1989 SC 1239. The Plaintiffs are allegedly aggrieved with the fact that Defendant No.1 is not discharging her duties as a Trustee. Therefore, the cause of action clearly arises in Delhi; some of the valuables, which are required to be distributed, are also uncontrovertibly in Delhi. The case is governed by Section 20 (c) of the CPC and does not fall entirely in Clause (b) of that Section. It is beyond cavil that the three contingencies envisaged in this provision are disjunctive and, therefore,

operate in their own respective spheres [see *New Moga Transport Co. -vs- United India Insurance Co. Ltd.*, (2004) 4 SCC 677]. Therefore, Mr. Chandra's objection that leave has not been obtained from the Court to sue the Defendants outside the territorial limits of the Court is unfounded.

20. For these manifold considerations, we find no error in the impugned Order so far as the dismissal of the application filed by Defendant Nos.2 and 3 invoking the provisions of Order VII Rule 11 of the CPC is concerned. As already noted, the facts as well as the law are intricate and complicated; determination of the Issues is possible after the conclusion of Trial.

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21. The learned Single Judge has, in the impugned Order, deferred a decision on the Plaintiffs' application for appointment of a trustee by way of replacement of Defendant No.1 predicated on her advanced age and her failure to discharge her alleged duties as the sole Trustee. The learned Single Judge had thought it expedient that this application should stand over till after the arguments pertaining to the applications seeking or vacating the temporary injunction are also heard. No useful purpose shall be served in assailing this part of the Order since, if we are to agree with the Plaintiffs, we can, at best, remand the matter back to the learned Single Judge with a direction to

decide this application. This is exactly the intendment of the learned Single Judge. Mr. Sudhir Chandra, learned Senior Counsel for Defendant Nos.2 and 3, had drawn our attention to the enunciation of the law by the Supreme Court which is to be found in *Bank of Maharashtra -vs- Race Shipping & Transport Co. Pvt. Ltd.*, (1995) 3 SCC 257, *State of Uttar Pradesh -vs- Visheshwar*, (1995) Supp. 3 SCC 590 and *P.R. Sinha -vs- Inder Krishan Raina*, (1996) 1 SCC 681. These Judgments caution courts from granting the principal relief by way of interlocutory orders. It seems to us that if the prayer is allowed at the interim stage on which the suit is presently stationed, the court would be granting the principal or primary relief at an interlocutory stage of the proceedings. We say no more since the application is proposed to be decided along with the injunction application filed by the Plaintiffs and the application for vacation of the injunction filed by Defendant Nos. 2 and 3. We are also reminded of the decision in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal -vs- Dunlop India Ltd.*, (1985) 1 SCC 260 which deprecated “the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned with the balance of convenience, the public interest and a host of other relevant

considerations.” We should also not lose sight of the dictum in *Wander Ltd. -vs- Antox India P. Ltd.*, (1990) Supp SCC 727, which recommends that discretion exercised by a court should not be interfered with in an appeal unless that exercise is manifestly perverse. This is not the case before us. We assert that the learned Single Judge shall decide the subject application together with the application under Order XXXIX Rules 1 and 2 of the CPC filed by the Plaintiffs and the application under Order XXXIX Rule 4 of the CPC filed by Defendant Nos.2 and 3.

22. For these manifold considerations, the Appeals are rejected. All pending applications are dismissed.

23. There shall be no orders as regards costs.

(VIKRAMAJIT SEN)
JUDGE

(MUKTA GUPTA)
JUDGE

September 09, 2011
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