

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

+ **C.R.P. 161/2009**

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Reserved on: 22nd January, 2015
Decided on: 30th January, 2015

ASHA KHANNA & ORS

..... Petitioners

Through: Mr. N.N. Aggarwal, Mr. Ashish and
Ms. Manpreet Kaur, Advocates.

versus

PANKAJ KHANNA & ORS

..... Respondents

Through: Mr. Vikas Mahajan, Mr. Vishal
Mahajan and Mr. Rohan Gupta,
Advocates for R-1, 2, 7 and 8.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Petitioners are aggrieved by the order dated 20th October 2009 whereby their application under VII Rule 11 read with Section 151 CPC filed as respondents in Probate Case No.218/2006 was dismissed.

2. After the death of Shri Mulakh Raj Khanna disputes and differences arose between his son J.N. Khanna, Prem Khanna and Pran Khanna and the original owner of property No.BB-15 measuring 509/58 sq.yds now known as Greater Kailash Enclave -II regarding a construction agreement entered between Roshan Lal Kapoor with Shri Mulakh Raj Khanna and M/s. Mulakh Raj Khanna (HUF) through its Karta Shri Mulakh Raj Khanna. A sole arbitrator was appointed wherein award was made by the arbitrator on 20th

March, 1982 and 5th April, 1982. On 9th April, 1982 J.N. Khanna filed an application before the District Judge Delhi for making the award dated 20th March, 1982 rule of the Court. Prem Nath Khanna and Pran Nath Khanna were impleaded as respondents 2 and 3, however despite service no objections were filed and the award was held to be legal and valid and thus made the rule of the Court and a decree was passed thereon. The award and decree was passed in the following terms:

“(1) That Shri Roshan Lal Kapoor should transfer the plot bearing No.N-B/15 E.P. Railway Refugee Rehabilitation Cooperative House Building Society, Greater Kailash Enclave II, New Delhi with superstructure on it in favour of Shri J.N. Khanna for the consideration of ₹30,000/-, which he has already received and acknowledged and the amount on the construction has admittedly been spent by late Shri Mulkh Raj Khanna and Mulkh Raj Khanna and Sons HUF.

(2) That Shri Roshan Lal Kapoor shall apply to the concerned authorities such as competent authority under the Urban Land (Ceiling and Regulations) Act and also to the Delhi Development Authority for getting permission to execute the sale deed.

(3) That any amount of unearned increase payable to the Delhi Development Authority shall be borne by Shri J.N. Khanna and his sons, M/s. Ravi, Rajiv and Sanjay Khanna”.

3. Almost 7 years thereafter on 16th August, 1989 Prem Nath Khanna and Pran Nath Khanna filed a suit No.172/1989 titled as *Shri Prem Nath Khanna & Ors Vs. Shri Jatinder Nath Khanna & Ors.* for partition and rendition of accounts before the Court of Senior Sub-Judge Amritsar against J.N. Khanna, his sons, their sisters and also against their own sons.

4. Thereafter the respondents herein filed a petition for grant of probate in respect of Will dated 29th October, 1976 purported to have been executed by deceased Mulakh Raj Khanna. The petitioners contested the said petition by filing written statement. During the course of proceedings in the probate case, civil suit No. 172/89 titled as *Prem Nath Khanna & Ors. Vs. Satinder Khanna & Ors.* pending before the Senior Sub-Judge, Amritsar was decided vide judgment and decree dated 13th February, 2009 wherein the Will dated 29th October, 1976 the probate of which was sought in the present case was held to be not a legal and valid Will of late Mulakh Raj Khanna and was held to be a fabricated document. Thus, an application under Order VII Rule 11 CPC read with Section 151 CPC was filed on 20th March, 2009 by the petitioners herein praying that the probate petition was barred by provisions of Section 11 CPC and was liable to be rejected under Order 7 Rule 11 CPC.

5. In the suit No.172/89 titled as *Prem Nath Khanna & Ors. Vs. Satinder Khanna and Ors.* the plaintiffs were Prem Nath Khanna and Pran Nath Khanna both S/o late Mulakh Raj Khanna and the defendants were Jatinder Nath Khanna (D-1) S/o Mulakh Raj Khanna, Rajeev Khanna (D-2), Sanjay Khanna (D-3), Ravi Khanna (D-4) sons of Jatinder Nath Khanna, , Neeraj Khanna (D-5), Amit Khanna (D-6), Kaushal Khanna (D-7) all S/o of Prem Nath Khanna, Pankaj Khanna (D-8) S/o of Prem Nath Khanna, Smt. Sudesh Mehra (D-9) and Smt. Vijay Bahl (D-10), daughters of Mulakh Raj Khanna. It was stated in the plaint that the plaintiffs along with their father Mulakh Raj as its co-parceners constituted a joint Hindu Family under the name and style of “HUF MULAKH RAJ KHANNA” which owned following:

“i) Factory sheds and stores in building bearing No.881-E/XVI with boundary as North passage, South Pran Nath Khanna HUF, East Verma Mills and West Prem Nath Khanna HUF and such property is situated in Krishna Nagar, Amritsar.

(ii) Back portion of the residential building No.BB-15 with boundaries as North Lane, South Main Road, East Bungalow of Mr. Malik of plot No.BB-16 and West Bungalow of Mr. Sood on plot No.BB-14 situated in Greater Kailash Enclave-II, New Delhi, shown in red colour in the site plan attached.”

6. In the suit it was further stated:

“It is submitted that the frontal portion of the residential building No.BB-15, situated in Greater Kailash, Enclave-II, New Delhi, shown in Yellow colour in the site plan attached belong to Mulakh Raj Khanna exclusively. In the HUF property stated above, the plaintiff’s father namely Mulakh Raj Khanna had one fourth share, whereas the plaintiff No.1 along with his sons i.e. defendant No.5 to 7 had one fourth share and plaintiff No.2 along with his son defendant No.8 had one fourth share. Similarly defendant No.1 along with his sons i.e. defendant No.2 to 4 had one fourth share. Before the death of Shri Mulakh Raj Khanna, the father of the plaintiffs, Shri Mulakh Raj Khanna made his last Will dated 29.10.1976, whereby he devised his front portion of the building No.BB-15, Greater Kailash Enclave-II, New Delhi, the ground floor thereof, half to defendant No.5 to 7, being sons of defendant No.1 and half to defendant No.8, being son of plaintiff No.2 and first floor to defendant No.2 to 4, being sons of defendant No.1. His one-fourth share in HUF property was given to his two daughters, who are defendant No.9 and 10, in equal share. Thus, in the suit properties plaintiff No.1 along with his sons defendant No.5 to 7 have $\frac{1}{4}^{\text{th}}$ share; plaintiff No.2 along with his son defendant No.8 have $\frac{1}{4}^{\text{th}}$ share; defendant No.1 along with his sons defendant No.2 to 4 have $\frac{1}{4}^{\text{th}}$ share; whereas defendant No.9 and 10 each have $\frac{1}{8}^{\text{th}}$ share therein. In the portion of the property mentioned above as H.U.F. in the ground floor defendants No.5 to 7 have half share and

defendant No.8 has half share in the ground floor, while the first floor thereof belong to defendant No.2 to 4 in equal shares. The defendant No.1 being the eldest member of family of the parties is its Karta after the death of Shri Mulakh Raj Khanna father of plaintiffs. The father of plaintiffs have lost confidence in defendant No.1 taking advantage of his residence in New Delhi, he started usurping New Delhi property in suit to his use and benefits, to the detriment of the plaintiffs and their sons. As such they have informed the defendant No.1 that they did not want to remain united with him and want partition of H.U.F. property. In the property No.BB-15 situated in Greater Kailash, New Delhi the defendants No.2 to 8 have joint interest and as such the partition is required amongst the parties. This is particularly necessary to avoid objection of partial partition. The property situated in Amritsar is let out to different tenants under MULKH RAJ KHANNA HUF. Out of the property in New Delhi referred above GARRAGE marked as MARK A in the site plan attached is let out to M/s Kaushal enterprises of New Delhi under MULKH RAJ KHANNA HUF. Thus along with partition of suit properties, there should be accounting of the rents derived from the HUF. The plaintiffs have requested the defendants No.1 to 4 to partition the suit property and to render the accounts of the rent amicably but they refused to do so on 5.8.1989 which led to cause of action to file the present suit. The prayer for passing of the preliminary decree is made as per para No.17 of the plaint and also the prayer for final decree is made for partition.

7. The defendants 1 to 4 i.e. Jatinder Khanna and his three sons i.e. Sanjay Khanna, Rajeev Khanna and Ravi Khanna contested the suit and filed the joint written statement taking preliminary objections regarding the maintainability of the suit at Amritsar, improper valuation and the suit being barred by limitation etc. In the suit number of issues were settled, however for the purposes of present suit issue No. (3) is relevant which is reproduced as under:

“(3) Whether Mulakh Raj deceased executed a legal and valid Will dated 29.10.1976 and also revoked his earlier Will, if so, its effect? (OPP)”

8. After the parties led their evidence vide the judgment dated 13th February, 2009 the learned Civil Judge came to the following conclusion:

“As no suit has been filed by the plaintiffs to challenge the award or the decree nor a single word has been mentioned in the pleadings of the plaintiffs that the award of the court is illegal or the decree is illegal except that the plaintiffs did not participate in the arbitration proceedings, but no such objection was raised before the Delhi Court at the time of making the award a rule of Court, hence, it is clear that the plaintiffs or the defendants No.5 to 10 have never raised their right, title or interest in the Delhi property on the strength of the Will Ex.P1. Such Will Ex.P1 had never seen the light of the day and this it is a suspicious document in the light of the case laws cited by the counsel for the defendants No.1 to 4. Accordingly, while deciding this issue against the plaintiffs, this Court holds that the Will dated 11.7.1976 is a valid Will in favour of the defendants No.1 to 4 and still is in existence and force and such Will has never been revoked and the Will dated 29.10.1976 relied upon by the plaintiffs as Ex.P1 is not a legal and valid Will and does not confer any right upon the plaintiffs and other beneficiaries mentioned in the same. Accordingly, this issue is decided against the plaintiffs and in favour of the defendants.”

9. Thus, the learned Civil Judge held the Will of Mulakh Raj Khanna dated 11th July, 1976 to be a valid Will in favour of defendant No.1 to 4 in the suit and Will dated 29th October, 1976 canvassed by the plaintiffs in the suit was held not to be a legal and valid Will and did not confer any right upon the plaintiff and other beneficiaries.

10. As noted above in the suit instituted before the Civil Judge Amritsar all the legal heirs of Mulakh Raj Khanna were parties wherein the finding as

noted above was arrived at. During the pendency of the said suit, the respondent Pankaj Khanna and Neeraj Khanna filed the probate case No.299/04 wherein the impugned order has been passed. In the probate petition following issues were framed:

- “1. Whether late Shri Mulakh Raj Khanna executed a valid and enforceable Will dated 29.10.1976 as claimed by the petitioners? (OPP)
2. Whether the petitioners are entitled for grant of probate/letter of administration in respect of aforesaid Will? (OPP)
3. Whether the petition is liable to be dismissed for the objections raised by the respondents in reply/WS? (OPR)
4. Relief.”

11. A perusal of the issues would show that issue No.1 again related to the validity and enforceability of the Will dated 29th October, 1976 as claimed by the respondents herein which issue was decided in the civil suit against the respondents herein. Thus, the petitioners filed an application under Order VII Rule 11 CPC read with 151 and 11 CPC. The learned Judge came to the conclusion that the probate petition was for grant of probate in respect of Will dated 29th October, 1976 wherein the testator has bequeathed half share of the ground floor of the property to his grand-sons Neeraj, Amit and Kaushal S/o of Prem Nath Khanna in equal shares and half share to Pankaj S/o of Pran Khanna and the first floor to Ravi, Rajeev and Sanjay S/o J.N. Khanna in equal shares, but the suit for partition was in respect of joint Hindu Family property in the name of “HUF MULAKH RAJ KHANNA”. The learned District Judge, Delhi in the probate petition vide the impugned order dated 20th October, 2009 held that the judgment and decree dated 13th

February, 2009 passed by the learned Civil Judge Amritsar would not operate as res-judicata and the probate petition cannot be rejected under Order VII Rule 11 CPC. It also noted that an earlier application under Order 10 CPC for stay of proceedings as suit for partition was pending has been dismissed by the learned District Judge against which CM(M) 1441/2006 was also dismissed before the High Court on 26th August, 2008.

12. During the pendency of the present petition before this Court, the appeal filed by the Respondents against the judgment of the Civil Judge Amritsar dated 13th February, 2009 has also been dismissed.

13. On the facts noted above the contention of the learned counsel for the petitioner is that the validity of the Will dated 29th October, 1976 already having been decided by a Court of competent jurisdiction the same cannot be re-agitated in the probate petition. Relying upon the decisions of this Court in Dinesh Chand Vs. State of Anr. MANU/DED/7106/2007 and Sardar Kushwant Singh & Anr Vs. Kirpal Singh 2010 II AD (Delhi) 335 it is urged that **if** the validity of the WILL is already decided then the application under Order VII Rule 11 CPC of the objector should be allowed. In Mathura Prasad Bajoo Jaiswal & Ors. Vs. Dossibai N.B. Jeejeebhoy (1970) 1 SCC 613 it is stated that decision of a competent Court on the matter of issue in another proceeding between the same party; may be an issue of fact or one of mixed law and fact and once an issue of fact or an issue of mixed law and fact is decided by competent Court finally between the parties it cannot be re-opened between them in another proceedings.

14. Learned counsel for the respondent/ probate petitioner on the other hand contends that in the same probate petition the present petitioners herein

filed an application under Section 10 CPC however the proceedings were not stayed which decision has become final upon dismissal of the petition under Article 227 of the Constitution of India by this Court in the decision reported as Ravi Khanna Vs. Pankaj Khanna & Ors. 152 (2008) DLT 484. Though admitting that the appeal against the judgment of the learned Civil Judge Amritsar has also been dismissed, learned counsel for the respondent urges that the proceedings in civil suit have not attained finality as still the parties would be at liberty to approach the higher forums. Relying upon the National High Way Authority of India Vs. Bel-ACC Joint Adventure 2009 (4) Arb LR 287 it is urged that the principle of estoppel and res-judicata will only apply when the proceedings attain finality after crossing necessary tiers of appeal as provided in law. Placing reliance upon Shashibhushan Prasad Mishra (dead) & Anr. Vs. Babuaji Rai (dead) by his LRs & Ors. AIR 1970 Sc 809 it is urged that once an appeal is filed against a decree, the decree does not operate as res-judicata. Referring to Kamala & Ors. Vs. K.T. Eshwara SA & Ors. (2008) 12 SCC 661 it is contended that Order 7 Rule 11 CPC has limited application and whether a suit is barred under any law has to be considered only from the averments in the plaint and the written statement or defence cannot be looked into. It is further submitted that the suit filed at Amritsar related to partition of property of Mulakh Raj Khanna HUF, however the probate petition relates to individual property of late Mulakh Raj Khanna. Hence there being no merit in the petition same be dismissed.

15. There is no dispute between the parties regarding the factum of civil suit being filed at Amritsar. The judgment of the learned Civil Judge dated

13th February, 2009 and that now the appeal against the said judgment filed by the respondents has also been dismissed on 10th April, 2012, the only plea taken by the respondents is that in the suit at Amritsar the partition of the property in the name of Mulakh Raj Khanna was sought whereas probate petition relates to the individual property of Mulakh Raj Khanna at Delhi. As noted in paras 5 and 6 the suit sought partition of the entire house No.BB-15, situated in Greater Kailash, Enclave-II. In the suit the back portion was stated to be owned by Mulakh Raj Khanna HUF and front portion by Mulakh Raj Khanna exclusively.

16. It is trite law that in an application under Order VII Rule 11 CPC only averments in the plaint can be looked into and the defence cannot be looked into. However, it is also well-settled that even if the scope of exercise of jurisdiction under Order VII Rule 11 CPC is limited in view of the nature of the pleadings and admitted documents, the Court can exercise suo-moto power under Order XII Rule 6 CPC without a formal application on this count and pass a judgment on admissions. In Keshav Chander Thakur & Anr. Vs. Krishan Chander & Ors. 211 (2014) DLT 149 (DB) a Division Bench of this Court held as under:

“38. We concur with the view of the learned Single Judge. However, we may like to note that the learned Single Judge has exercised powers under Order VII Rule 11 CPC while rejecting the plaint. The scope of exercise of powers under Order VII Rule 11 CPC is limited by the contours of the provision. While exercising those powers what has to be seen is only the averments in the plaint and the documents filed alongwith the plaint. The defence as taken in the written statement is not to be gone into for the said purpose. To that extent, the judgment of the learned Single Judge may suffer from an infirmity.

However, in our view given the nature of pleadings and admitted documents on record and the extensive arguments advanced by the parties on the issues discussed herein, this was a fit case for the Court to exercise powers under Order XII Rule 6 CPC where the Court has powers to suo moto pass a judgment. There is no requirement in Order XII Rule 6 CPC for filing of a formal application. The Court can on its own motion without any application by a party proceed to pass a decree on admissions as stated in Order XII Rule 6 CPC. Order XII Rule 6(i) CPC reads as follows:-

“6. Judgment on admissions.- (1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.”

In our view based on the pleadings and documents placed on record by the parties there are clear admissions of fact which warrant passing of the order of dismissal of the plaint.”

17. Thus, even if this Court does not exercise jurisdiction under Order VII Rule 11 CPC it can still exercise its jurisdiction under Order XII Rule 6 CPC. On the basis of admitted facts as noted above it has to be seen whether the decision on the issue of validity of the Will dated 29th October, 1976 has attained finality and operates as res-judicata. Indubitably, when the order was passed by the learned Trial Court only the judgment by the learned Civil Judge at Amritsar was passed but now the appeal filed by the respondents has also been dismissed, copy of which is placed on record which fact is not disputed. The appeal having been dismissed the judgment of the learned Civil Judge dated 13th February, 2009 has attained finality. As noted above,

the issue decided between the same parties by the learned Civil Judge Amritsar i.e. validity and enforceability of the WILL dated 29th October, 1976 is the same which is pending in the probate case at Delhi. The parties are the same and as noted from the averments in civil suit No.295/1989 the properties involved also related to the building No.BB-15, Greater Kailash Enclave II. The main issue in the probate case No.218/2006 is the validity and enforceability of the Will dated 29th October, 1976 of late Shri Mulakh Raj Khanna with consequential prayers. This issue having been decided and having attained finality in appeal the principle of res-judicata would squarely apply.

18. In Gulam Abbas & Ors. Vs. State of U.P. & Ors. (1982) 1 SCC 71 the Supreme Court noted that it is well-settled that Section 11 of the CPC is not exhaustive of the general doctrine of res-judicata and though the rule of res-judicata as enacted in Section 11 has some technical aspects, the general doctrine is founded on consideration of high public policy to achieve two objectives namely; that there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation. The Supreme Court also reiterated its decision in Daryao Vs. State of U.P. AIR 1962 SC 214.

19. Learned counsel for the respondent has laid emphasis on the fact that an application under Section 10 filed by the petitioners earlier before the probate Court in the probate petition was dismissed which decision has been approved by this Court. In Ravi Khanna Vs. Pankaj Khanna & Ors. 152 2008 DLT 484 this Court noted that mere pendency of a suit for partition puts no bar for grant of probate or letters of administration. The said

decision will not operate as res judicata as the proceedings in civil suit have now culminated and the appeal has also been dismissed.

20. Consequently, treating the application suo-moto as an application under Order XII Rule 6 CPC it is held that the issue of validity and enforceability of the Will dated 29th October, 1976 having attained finality the probate case is liable to be rejected. Ordered accordingly.

21. Petition is disposed of.

(MUKTA GUPTA)
JUDGE

JANUARY 30, 2015
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