

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

% *Date of decision: August 17, 2015*

+ **RFA(OS) 80/2015**

MANAK DEVI

..... Appellant

Represented by: Mr.H.C.Kharbanda,
Mr.T.N.Saxena and Mr.Vipin
Kumar Saxena, Advocates.

versus

SHEELA DEVI (D) THR LRS & ORS

..... Respondents

Represented by: Mr.Alok K.Agarwal,
Mr.Gaurav Tanwar and
Mr.S.Rastogi, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

CM No.15305/2015 (Exemption from filing TCR)

For the purposes of deciding the instant appeal we have considered the record of the suit which has been sent to this Court as per practice directions issued. Learned counsel for the appellant states that the appeal may be heard today itself and no date for hearing of the appeal be fixed as contemplated by sub-Rule-1 of Rule 11 of Order XLI of the Code of Civil Procedure.

CM No.15303/2015 (Delay)

1. For the reasons stated in the application 04 days delay in filing the appeal is condoned.
2. Application is disposed of.

RFA(OS) 80/2015

1. Sheela Devi wife of late Durga Prashad filed a suit for partition against Manak Devi wife of late Ram Prashad, Surinder Kumar, Narendra Kumar and Varinder Kumar, grandsons of Ram Prashad from his son late Amar Singh and Sanjeev Kumar son of late Ram Prashad in respect of the suit property bearing Shop No.4730-31, located in the Main Bazar, Pahar Ganj, Delhi (in short 'the suit property') into two equal shares.
2. The claim of Sheela Devi was that the suit property was purchased vide a Sale Deed dated May 14, 1969 by late Ram Prashad and late Durga Prashad having equal rights, title and interest in the said property. From the said shop a partnership concern M/s Ram Prashad Durga Prashad was running the business of manufacture and sale of sweets wherein Ram Prashad and Durga Prashad were equal partners. After the death of Ram Prashad, Manak Devi and Amar Singh, widow and son of Ram Prashad were inducted as partners with 25% share each and Durga Prashad and his son Ram Prakash also with their shares of 25% each. After the death of Durga Prashad, Sheela Devi, the plaintiff, wife of Durga Prashad was inducted as a 25% shareholder whereafter the business was divided into two branches one of late Ram Prashad and the other of Durga Prashad with each branch getting in the ratio of 50% each. After the death of Amar Singh, Sanjeev Kumar another son of late Ram Prashad was also added in the partnership.
3. In view of the disputes and differences between the parties defendant Nos.2 to 4, that is, sons of Amar Singh and wife of Amar Singh filed a petition under Section 20 of the Arbitration Act claiming their shares in the business. In the said suit, the reference to arbitration pertained specifically

to the partnership however, there was no dispute referred to regarding the ownership and entitlement of Durga Prashad and Ram Prashad to the suit property.

4. In a subsequent suit filed by defendant Nos.1 to 5, that is, CS (OS) No.1283/1993 before this Court, reference in relation to the disputes regarding the various properties was sought however, there was no mention of the suit property again. Sheela Devi filed an application under Section 31 (C) of the Arbitration and Conciliation Act, 1996 with regard to the suit property and the partition thereof with metes and bounds with separate possession of 50% share to each however, the said application was withdrawn as the suit property was not a subject matter of the arbitration proceedings there being no reference on this count. Hence CS (OS) No.414/2009 was filed by Sheela Devi. During the pendency of the suit Sheela Devi passed away and thus her legal heirs Ram Prakash and Om Prakash Jaiswal were impleaded as plaintiffs.

5. In the suit, that is, CS (OS) No.414/2009 a written statement was filed by Manak Devi, defendant No.1 and Sanjeev Kumar, defendant No.5 however, defendant Nos.2 to 4 did not wish to file any written statement and thus their right to file written statement was dispensed with vide order dated September 01, 2009. During the pendency of the suit an application under Order XII Rule 6 CPC being I.A.No.1852/2012 was filed by the plaintiffs followed by another application being I.A.No.15203/2014 by the plaintiffs and defendant Nos.1 and 5 under Order XXIII Rule 3 CPC.

6. On the basis of the admitted stands of the parties, I.A.No.1852/2012 under Order XII Rule 6 CPC was disposed of vide the impugned order passing a preliminary decree on admissions that the plaintiffs being the legal

heirs of late Durga Prashad were collectively entitled to 50% undivided share in the suit property and the defendants who were the legal heirs of late Ram Prashad were collectively entitled to 50% undivided share of the property. A Local Commissioner was appointed to visit the suit property and to report inter alia as to whether it was feasible to partition the suit property by metes and bounds and if so the manner thereof and if not, alternative modes of partition be suggested.

7. Vide I.A.No.15203/2014 it was agreed between the plaintiffs, defendant No.1 and defendant No.5 that the suit property be divided by metes and bounds however, since defendant Nos.2 to 4 were not party to the said application and as any settlement would have impacted their rights, the learned Single Judge vide the impugned order declined the application.

8. The present appeal is by Manak Devi, wife of late Ram Prashad. The plea set up by Manak Devi is that by virtue of Will dated October 14, 1972 executed by late Ram Prashad she was the sole owner of the 50% individual share of Ram Prashad in the suit property and the learned Single Judge without adjudicating the shares of the parties allowed the application filed by the plaintiff under Order XII Rule 6 CPC passing a preliminary decree of half share in the suit property in favour of the plaintiffs and the remaining half in the joint ownership of Manak Devi and defendant Nos.2 to 4 besides defendant No.5 without adverting or whispering anything regarding the sole right claimed by Manak Devi on the basis of the Will. It is urged that the defendant Nos.2 to 4 had the knowledge of the Will executed by Ram Prashad and that is why they did not file any written statement and thus a preliminary decree be suitably modified.

9. As noted above vide the preliminary decree passed in

I.A.No.1852/2012 under Order XII Rule 6 CPC the learned Single Judge held that the legal heirs of late Durga Prashad were collectively entitled to 50% undivided share in the suit property and the defendants who were the legal heirs of Ram Prashad were collectively entitled to 50% undivided share. Inter-se the branch of Ram Prashad as to the entitlement of each of the defendants no adjudication has been given and thus by the impugned order and decree right of Manak Devi which she asserts on the basis of Will dated October 14, 1972 executed by her husband has not impacted and would not amount to res-judicata as urged by learned counsel for the appellant. Thus we find no reason to interfere in the impugned judgment and preliminary decree on this ground. The appeal is disposed of observing that there is no finding of the learned Single Judge with respect to the inter-se shares between the defendants with regards to the 50% undivided share in the suit property of the branch of late Ram Prashad.

CM No.15304/2015 (Stay)

Application is dismissed as infructuous

**(MUKTA GUPTA)
JUDGE**

**(PRADEEP NANDRAJOG)
JUDGE**

**AUGUST 17, 2015
'vn'**