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

+ **FAO(OS) 52/2015**

MANOJ ARORA

..... Appellant

Represented by: **Mr.G.K.Mishra, Advocate**

versus

SWARAN KANTA BAJAJ & ANR

..... Respondents

Represented by: **Mr.S.K.Duggal, Advocate for
R-1**

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

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04.02.2016

CM No.1741/2015

One day's delay in filing the appeal is condoned. The application is allowed.

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1. Settlement talks have failed.
2. We proceed to hear arguments.
3. Undisputed facts are that late Shri Shiv Lal Arora was survived with three children : two sons and a daughter. The two sons claim that the father executed a will dated October 27, 1993 in their favour pertaining to house No.III-H/15, Lajpat Nagar, New Delhi-110024. The sister disputes said fact.
4. Probate of the will sought resulted in the issue being settled : Whether the will dated October 27, 1993, was last and valid testament executed by the deceased father.

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5. The two brothers failed to establish the genuineness of the will. Matter currently awaits decision in FAO No.288/2012.
6. In the meanwhile, the sister Swarn Kanta Bajaj, filed a suit for partition in which we find that the learned Single Judge settled two issues. The first being whether late Sh.Shiv Lal Arora duly executed his last will dated October 27, 1993? OPD- 1 and 2. The correct language of the issue should have been : Whether the will dated October 27, 1993 is the last legal and valid testament of late Sh.Shiv Lal Arora?
7. But even said issue was not required to be settled for the reason it is not in dispute that qua the will in question, Probate Petition No.111/2009 was filed and was dismissed on May 11, 2012. FAO No.288/2012 is pending.
8. Learned counsel for the parties do not dispute that decision concerning the will emerging from proceedings pursuant to Probate Petition No.111/2009 shall operate as *res judicata* and therefore in the suit for partition filed by the sister there is no need to lead any evidence.
9. If the two brothers succeed in the appeal and said decision attains finality, the sister would have no case to claim partition.
10. Likewise, if the appeal fails and the decision attains finality, the two brothers who would have nothing to resist the claim of the sister.
11. Grievance in the appeal is to the impugned order dated December 15, 2014 requiring parties to file list of witnesses and proceed to lead evidence.
12. For the reasons noted above, we set aside the impugned order dated December 15, 2014 and simultaneously stay proceedings in CS(OS) No.813/2011 which shall be revived once FAO No.288/2012 is decided.

13. Parties are advised to move an application for early hearing of FAO 288/2012 keeping in view the fact that its adjudication would resolve the issue.

14. No costs.

CM No.1738/2015

Dismissed as infructuous.

PRADEEP NANDRAJOG, J.

MUKTA GUPTA, J.

FEBRUARY 04, 2016

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