

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

% Judgment reserved on: 20th November, 2015
Judgment delivered on: 02nd February, 2016

+ **FAO(OS) 296/2015 & CM No.10431/2015 (stay)**

GAURI SHANKAR

....Appellant

versus

NISHA RANI GUPTA & ORS.

.... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Tanmay Mehta, Mr Rajeev Aggarwal and Mr Asit Tewari,
Advocates.

For the Respondents : Mr Rajiv Aneja, Advocate for respondent Nos.2 & 3.
Mr Mohit Gupta, Advocate for respondent No. 4.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. The appellant (defendant No. 1 in the suit) is aggrieved by the impugned order dated 23.04.2015 in IA No. 10299/2014 in CS(OS) No. 2102/2011 under Order 14 Rule 5 of the Code of Civil Procedure (hereinafter referred to as the CPC) whereby issues No.(ii) & (iii), as framed on 24.04.2014, have been deleted.

2. The respondent No. 1 (plaintiff in the suit) filed the suit for partition and rendition of accounts contending that the late father of the appellant and the respondent No. 1 had died intestate and as such, the respondent No. 1 was a co-sharer in the properties left behind by the father and was entitled to partition and rendition of accounts.

3. The appellant has contested the suit taking a defence in the written statement that the deceased father had not died intestate but had left behind his last and final registered Will dated 03.06.2010. It was contended that by the last and final Will dated 03.06.2010, the deceased father had cancelled his previous two Wills i.e., registered Will dated 05.03.1992 and registered Will dated 21.09.1982.

4. Based on the pleadings of the parties, on 24.04.2014, the following issues were framed:-

- “(i) Whether the document dated 3rd June, 2010 is the validly executed last Will of Shri Ved Prakash father of the plaintiff and the defendant no.1? OPD-1
- (ii) If the above issue is decided against the defendant no.1, whether the document dated 5th March, 1992 is the validly executed last Will of Shri Ved Prakash aforesaid? OPD-1
- (iii) If the above issue is also decided against the defendant no.1, whether the document dated 21st September, 1982 is the validly of 3 executed last Will of Shri Ved Prakash aforesaid? OPD-1.

(iv) If the issues aforesaid are decided against the defendant no.1, what is to be the effect thereof on the Gift Deeds executed by the defendant no.1, of the property of the father claimed by him under the Will aforesaid, in favour of his wife defendant no.2 and his son defendant no.3 as well as on the Sale Deed of the said property by the defendant no.2 in favour of the defendant no.4? OPP.

(v) Relief.”

5. In the Written Statement, the appellant has claimed rights under the Will dated 03.06.2010 and has at several places referred to the said Will as ‘last and final registered Will’. In paragraph 11 of the Reply on Merits in the Written Statement has stated *“It is submitted that Late Shri Ved Prakash executed Registered Will Dated 03-06-2010 in favour of Defendant No. 1 thereby bequeathing his properties and estate to Defendant No. 1 and by said last and final Will Dated 03-06-2010 Shri Ved Prakash also cancelled his previous two Wills i.e. Registered Will Dated 05-03-1992 and Registered Will Dated 21-09-1982”*.

6. The pleadings clearly show that while the Appellant is claiming rights under the last and final registered Will dated 03.06.2010, he is asserting that prior to the said Will the deceased father had executed two more Wills i.e. Registered Will dated 05.02.1992 and Registered Will dated 21.09.1982.

7. By the impugned order, issues No. (ii) & (iii) pertaining to the Wills dated 05.03.1992 and 21.09.1982 have been deleted on the ground that the whole case of the appellant/defendant No. 1 was premised on the document dated 03.06.2010 and that the said Will was the only valid Will of the deceased father and the other two Wills had been cancelled.

8. We are of the view that the learned Single Judge fell in error in holding that the whole case of the appellant was premised on the document dated 03.06.2010 and the Wills dated 05.03.1992 and 21.09.1982 had been cancelled. The issues, as framed on 24.04.2014, show that though the defence of the appellant was premised on the last and final Will dated 03.06.2010 yet in case the said Will dated 03.06.2010 was not found to be the last and validly executed Will of the deceased father, the defendant No. 1 was alternatively claiming title on the basis of the previous Will dated 05.03.1992 and further, alternatively, on the Will dated 21.09.1982.

9. The issues as framed on 21.04.2014 correctly crystallized the disputes between the parties and the defence of the appellant. The issues No. (ii) & (iii) could not have been deleted unless issue No.(i) was held to be proved in favour of the defendant No. 1 i.e., it is only in case the document dated 03.06.2010 was held to be validly executed last Will of the deceased that issues No. (ii) & (iii) would not arise. Issues No. (ii) & (iii) have been framed in the alternative to

issue No.(i). Unless the findings are returned on issue No.(i) in favour of the appellant, issues No. (ii) & (iii) could not have been deleted.

10. In view of the above, the impugned order is, accordingly, set aside and issues No. (ii) & (iii) are, accordingly, restored. The issues No. (iv) & (v) shall continue to be read as issues No.(iv) & (v) and not issues No. (ii) & (iii) as directed by the impugned order. Accordingly, IA No. 10299/2014 in CS(OS) No. 2102/2011 under Order 14 Rule 5 CPC is dismissed.

11. The appellant is also aggrieved by the impugned order whereby IA No. 10969/2014, under Order 8 Rule 1 CPC, filed by the appellant seeking permission to file the additional documents i.e. Wills dated 05.03.1992 and 21.09.1982 has been dismissed as infructuous on the ground that the issues pertaining to the said Wills have been deleted.

12. Issues were framed on 24.04.2014 and immediately thereafter the respondent No. 1 filed IA No. 10299/2014 under Order 14 Rule 5 seeking deletion of the issues. The appellant, on 27.05.2014, soon after the framing of issues sought to place on record the certified copies of the two Wills dated 05.03.1992 and 21.09.1982. The appellant has contended that since issues were framed in the alternative with regard to the two earlier Wills of the deceased father, it became necessary to place the Wills on record.

13. The evidence of the parties is to yet to commence. Since the onus of proof of the Wills is on the defendant No. 1, the defendant No. 1 is to commence the evidence. We do not find that there is any inordinate delay on the part of the appellant in seeking to place on record the certified copies of the two Wills. The explanation given by the appellant is plausible and reasonable. The evidence is yet to commence. Since we have set aside the order deleting the issues, the order pertaining to IA No. 10969/2014, under Order 8 Rule 1 CPC is also set aside. The documents filed by the appellant are taken on record.

14. The appeal is allowed, leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

FEBRUARY 02, 2016
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