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

\+ **FAO(OS) 617/2015**

DINESH AGGARWAL & ORS ..... Appellants
Represented by: Mr.Rajat Joseph, Advocate.

versus

KAMLESH GUPTA & ORS ..... Respondents
Represented by: Mr.Rohit Kumar, Advocate for R-1 and 2.
Mr.Harish Malhotra, Sr.Advocate instructed by Mr.Rajender Agarwal, Advocate for R-3 and 4.
Mr.Anil Sharma, Advocate for R-5, 6, 7 and 8.

\+ **FAO(OS) 619/2015**

DINESH AGGARWAL & ORS ..... Appellants
Represented by: Mr.Rajat Joseph, Advocate.

versus

MANOJ AGARWAL & ORS ..... Respondents
Represented by: Mr.Harish Malhotra, Sr.Advocate instructed by Mr.Rajender Agarwal, Advocate for R-1 and 2.
Mr.Rohit Kumar, Advocate for R-3 and 4.
Mr.Anil Sharma, Advocate for R-5, 6, 7 and 8.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

Signature Not Verified
Digitally Signed
By:AMULYA

ORDER

% **14.03.2016**

CM No.26112/2015 (Delay) in FAO(OS) 617/2015
CM No.26124/2015 (Delay) in FAO(OS) 619/2015

1. For the reasons stated in the applications the delay of 3 days and 10 days in filing the appeal is condoned.

2. Applications are disposed of.

FAO(OS) 617/2015
FAO(OS) 619/2015

1. Though service report is awaited qua R-6 to R-8 and R-2 is unserved, but counsel as above appear for all the respondents and we note that Mr.Anil Sharma, Advocate is the counsel for R-5 to R-8 in the suit.

2. Two suits: CS (OS) No.1604/2005 and CS (OS) No.1485/2004 were pending on the original side of this Court when an order each was passed in the two suits on September 09, 2015.

3. CS (OS) No.1604/2005 has been instituted by respondent Nos.1 and 2 in the appeal: Kamlesh Gupta and Rakesh Kumar Gupta. The three defendants impleaded were: Bishan Chand Agarwal, Manoj Agarwal and Meenu Agarwal. Manoj is the son of Bishan Chand Agarwal, Meenu is Manoj's wife.

4. Kamlesh Gupta and Rakesh Kumar Gupta claimed to be owners of property bearing No.G-92, Preet Vihar, New Delhi and sought multifarious reliefs. The sum and substance was a declaration that they are the owners of the suit property. They claimed possession and mesne profits.

5. They pleaded in the plaint that Mukesh Kumar Gupta, husband of Kamlesh Gupta and brother of Rakesh Kumar Gupta, had been handling their affairs and Bishan Chand Agarwal and Manoj Agarwal negotiated

through a property dealer with Mukesh to purchase the suit property. Sale price agreed to was ₹15 lakhs, pursuant whereto ₹5 lakhs were paid. ₹10 lakhs had to be paid by November 30, 2001. Kamlesh Gupta and Rakesh Kumar Gupta handed over the original title documents as well as possession of the basement and the first floor of the property to Bishan Chand Agarwal and Manoj Agarwal. They pleaded that thereafter three cheques totalling ₹9 lakhs were received out of which one cheque in sum of ₹2 lakhs was dishonoured. Thus, ₹3 lakhs remained payable. It was pleaded that being in dire need of money, the plaintiffs executed General Power of Attorney and Wills in favour of Bishan Chand Agarwal and Manoj Agarwal. It was pleaded that thereafter ₹1 lakh was further received by the plaintiffs and thus only ₹2 lakhs remained.

6. It was pleaded that the plaintiffs received a notice from the Income Tax authorities attaching the property and learnt that Bishan Chand Agarwal had lodged a complaint against his son Manoj Agarwal. It was pleaded that Bishan Chand Agarwal filed CS (OS) No.1485/2004 against his son and his daughter-in-law impleading Shri Rakesh Kumar Gupta, Smt.Kamlesh Gupta, the Tax Recovery Officer and the Commissioner of Income Tax.

7. It was in the backdrop of the aforesaid pleadings that reliefs were claimed in the suit.

8. Bishan Chand Agarwal died during the pendency of the suit instituted by Kamlesh Gupta and Rakesh Kumar Gupta. Needless to state he died during the pendency of the suit filed by him.

9. Issue of substitution cropped up. In both suits, his son Manoj Agarwal, a natural heir was already a party and therefore his wife, another son and two daughters were impleaded as defendants in the suit filed by

Kamlesh Gupta and Rakesh Kumar Gupta. They were impleaded as plaintiffs in the suit filed by Bishan Chand Agarwal.

10. Thereafter, the appellants who are the brothers and nephews of Bishan Chand Agarwal filed applications one each in the two suits under Order XXII Rule 10 of the Code of Civil Procedure predicating a stand under a Will dated February 19, 2009 statedly executed by Bishan Chand Agarwal.

11. Giving detailed reasons, the application filed in CS (OS) No.1485/2004 has been dismissed by the learned Single Judge observing that since the applicants had already sought probate of the Will their right would be subject to said decision. The learned Single Judge has held that if issue of the Will was decided in the suit, the same would be putting the suit on a path taking it at a tangent.

12. Adopting the reasoning in CS (OS) No.1485/2004 application filed in CS (OS) No.1604/2005 has been dismissed.

13. In the aforesaid backdrop we have put it to learned counsel for the parties whether they would be agreeable to the suggestion that in both suits, the brothers and nephews of Bishan Chand Agarwal be impleaded as parties with the direction that in CS (OS) No.1604/2005 they would first cross-examine witnesses of Kamlesh Gupta and Rakesh Kumar Gupta and thereafter the witnesses would be cross-examined by Vimla Gupta, Jyoti Agarwal, Shipra Patel and Deepak Aggarwal and thereafter by Manoj Agarwal and Meenu Agarwal. The reason being any suggestions put to the witnesses detrimental to Manoj Agarwal and Meenu capable of being taken care of during cross-examination.

14. Learned counsel agree to this.

15. As regards suit filed by Bishan Chand Agarwal the counsel agree that

the applicants would be entitled to lead evidence in the affirmative after the wife, daughters and son of Bishan Chand Agarwal lead evidence and cross-examination of all witnesses would be carried out by Kamlesh Gupta & Rakesh Kumar Gupta and the cross-examination by Manoj Agarwal and Meenu Agarwal shall be thereafter, to obviate improvements of a kind which destroy the defence of Manoj and Meenu Agarwal. No evidence would be led qua the disputed Will which issue shall be decided in the probate proceedings.

16. Participation by the appellants is without prejudice to the rights of the wife, daughters and son as also Manoj Agarwal and Meenu Agarwal that the Will relied upon is not genuine.

17. The appeals are disposed of in terms of para 13 and 15 above. The applications filed by the appellants in the two suits are allowed.

18. No costs.

PRADEEP NANDRAJOG, J.

MUKTA GUPTA, J.

MARCH 14, 2016
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