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

+ **FAO(OS) 131/2016 and CM Nos. 15446-15447/2016**

KENNETH AURORA Appellant
Through **Mr. Siddharth Yadav, Advocate**

versus

VEENA AURORA & ORS Respondents
Through **Ms. Isha Khanna, Advocate**

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

ORDER

% **13.04.2017**

The present appeal is directed against the order dated 27.01.2016 passed by the learned single Judge, dismissing two applications i.e. IA. Nos.2553/1994 & 7906/1995 (the first application being filed under section 5 of Limitation Act seeking condonation of delay in filing IA No. 7906/1995 and the second application being filed under Order 9 Rule 13 CPC seeking setting aside of a probate granted on 25.07.1983).

The respondent/petitioner sought probate of her father's will, who had died on 25.02.1982; and the probate was granted by this Court vide order dated 25.07.1983 passed in Testamentary Case No. 33/1982. This was proceeded by both citation and publication of notice in the newspapers etc. No objections had been received. The respondent had served a legal notice upon the appellant herein i.e. her brother on 17.05.1988 in respect of House No.532, Sector 15A, Faridabad intimating to him that she was the beneficiary

of the probate and consequently, called upon the appellant to vacate the suit property as she was the owner of the property.

The appellant replied to the notice and at that stage, did not contest or object to the Will. Eventually, proceedings for eviction were filed by way of a civil suit for possession being Case No.722/1988 and the said suit was later decreed on 24.11.1993 and that decree had attained finality.

The appellant has claimed that he had no knowledge of the probate proceedings and therefore, had moved both the applications being IA. No.2553/1994 & 7906/1995 for setting aside the order dated 25.07.1983 along with condonation of delay, on 16.02.1994.

After a notice was served on the respondent and in pursuance thereto, she filed a reply. Thereafter, the Court framed issues on 03.08.2015 on both the limitation aspect as well as the merits aspect of the application to set aside the probate granted in the year 1983. The proceedings in the Testamentary Case No. 33/1982 were pending adjudication.

On 27.01.2016, the learned single Judge had an occasion to consider the matter when it was listed before him. By the impugned order, the Court was of the opinion that the application to set aside the probate granted in the year 1983, in the facts and circumstances of the present case, should not be proceeded with, on account of the inordinate delay in presenting it. The learned single Judge reasoned as follows in the impugned order:-

“11. Having heard learned counsel for the applicant, I am of the view that there is absolutely no merit in either of these applications. The premise on which these applications have been moved is that the respondent/applicant learnt of the probate case only when he received the summons from the

Court of the Sub-Judge, Faridabad. This premise itself is wrong inasmuch, as, he had even earlier received notice issued by the petitioner's advocate clearly informing the respondent about the grant of probate in respect of the will propounded by her, by this Court in the present proceedings. He had responded to the same by merely claiming that a fraud had been played upon him and the other family members, and that he would take necessary action for the same. Thus, he was clearly put to notice of the grant of probate by this Court. Though he claimed that a fraud had been played upon him and that he would take action, no such action was initiated by him. He did not even approach this Court after he learnt of the grant of probate, to move the present applications for over a decade. It is very convenient for the respondent/applicant to put the blame on his counsel, by claiming that he was wrongly advised to pursue the suit, and not move the present application. The respondent/applicant has made these allegations behind the back of his counsel who was representing him before the Sub-Judge, Faridabad. No complaint against the said counsel appears to have been made before the Bar Council. Even otherwise, it is clear that the respondent/applicant indeed participated in the probate proceedings and gave his no objection along with his two sisters by signing the reply containing his no objection at two places, and also issued a vakalatnama in favour of the counsel.”

Mr. Siddharth Yadav, learned counsel appearing on behalf of the appellant urges that once the issue was framed as back as in the year 1995, the parties could reasonably expect that findings would be returned on all of them and the Court would not pick only one for determination at a later stage. Learned counsel relies upon Order XIV Rule 5 of the Code of Civil

Procedure, 1908 in support of his submission as well as the judgment of this Court in *Delhi Development Authority vs. Rama Associates Pvt. Ltd.* reported as (2013) 136 DRJ 342.

The Court is of the opinion that the appellant's argument, at least, in the facts and circumstances of the present case, with respect to Order XIV Rule 5 CPC, lacks merit. The facts speak for themselves, if one can say so.

The probate was granted in this case on 25.07.1983 after following due process including a public advertisement.

The appellant's argument is that he never authorized the respondent/probate petitioner to seek relief that she sought. Even if that was assumed to be correct, the appellant conceded getting notice of this fact on 17.05.1988 when his sister, the probate petitioner, served notice, yet he kept silent and did not approach the Court.

Furthermore, he does not appear to have applied for cancellation of probate under Section 263 of the Indian Succession Act, 1925. The learned single Judge did mention this in the operative portion of the impugned order.

Whilst ordinarily, the Court is expected to return finding when the issues are framed, what sets apart the facts of the present appeal, are that the main case had ended; the appeal seeks reversal of a decree allegedly made without notice to the appellant and being ex parte. In such situations, it cannot be held that as a rule, the Courts are to follow Order XIV Rule 2 CPC. Furthermore, the provisions of Order XII Rule 11 CPC and Order XII Rule 16 are categorical and empower the Court to summarily – based on the

admitted pleadings and the material on record, either reject or draw a decree to the extent permissible or to the extent it is possible, in accordance with law admit.

In view of the foregoing, this Court is of the opinion that there is no merit in the appeal and the same is accordingly dismissed.

S. RAVINDRA BHAT, J

YOGESH KHANNA, J

APRIL 13, 2017
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