

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

% *Judgment Reserved on : February 01, 2017*
Judgment Delivered on : February 13, 2017

+ **RFA (OS) 35/2016**

OM PRAKASH YADAV & ANR. Appellants
Represented by: Mr.Anil Sapra, Sr.Advocate
instructed by Mr.Syed Hasan,
Ms.Rupali Kapoor and Ms.Pyusha
Singh, Advocates

versus

KANTA YADAV & ORS. Respondents
Represented by: Mr.Jugal Wadhwa, Advocate with
Mr.Ramandeep Bawa, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J.

1. Late Zorawar Singh was the father of the appellants and the respondents. He died on January 04, 1986. The mother of the parties i.e. wife of Zorawar Singh was Ram Pyari. She died on June 18, 2009.
2. Respondent No.1 filed CS (OS) No.430/2012 alleging that both parents died intestate and since Zorawar Singh was the owner of property No.9988-C, New Rohtak Road, New Delhi, the same was liable to be partitioned amongst his children. He also sought a rendition of accounts since the property was on rent. In the written statement filed, the appellants pleaded that during his lifetime Late Zorawar Singh had executed a will on

June 16, 1985 and on October 21, 1995 had executed a codicil in respect of his estate and that qua the suit property the bequest was in favour of appellant No.2, with life interest in favour of the mother.

3. Vide order dated March 10, 2014 following issues were settled in CS (OS) No.430/2012:-

“i) Whether the suit of the plaintiff is liable to be rejected on account of concealment/suppression of material facts? If so, to what effect? OPD

ii) Whether the suit is liable to be rejected under Order 7 Rule 11(a) CPC?

iii) Whether the suit is liable to be rejected under Order 7 Rule 11(b) CPC on account of deficient courts fees? OPD.

iv) Whether Late Sh.Jorawar Singh had made a valid Will and a codicil dated 16.06.1985 and 21.10.1995 respectively? If so, to what effect? OPD

v) If the answer to issue no.(iv) is in the negative whether the plaintiff is entitled to a decree of partition in respect of property bearing Municipal No.9988-C, Khasra No.1002/583/340, Sarai Rohilla, Gadodia Road, Delhi measuring 298 square yards? If so, to what effect? OPP

vi) If the answer to issue no.(v) is in the affirmative, to what share the plaintiff is entitled and the consequential relief, if any? OPP

vii) Whether the plaintiff is entitled to a decree for a sum of Rs.80,000/- along with interest at the rate of 12% per annum being 1/7th share of the plaintiff of the mesne profits arising out of the suit property at the rate of Rs.5,000/- per month along with interest at the rate of 12% per annum? OPP

viii) Whether the plaintiff is entitled to a decree of permanent

injunction? OPP

ix) Relief.”

4. The appellants thereafter instituted CS (OS) No.3310/2012, in which they set out all the properties owned by Zorawar Singh and pleaded that under the will dated June 16, 1985, all properties save and except a plot at Kailash Park New Delhi was bequeathed by him to his wife. The plot at Kailash Park was bequeathed to the daughter Sushila Yadav. He executed a codicil on October 21, 1985, as per which the estate was bequeathed : (a) The agricultural land approximately measuring 30 acres acquired out of his own personal resources during his lifetime and situated in the native village at Aasiaki, Panchoor, District Riwari (Haryana) came to the share of his two sons Braham Prakash and Gyan Prakash (Defendants no.3 & 4) who have been in possession of the same and have been using it for agricultural purposes; (b) The new house built in his native village along with the building and tube well came to the share of his wife Late Smt. Ram Payari Yadav during her lifetime and thereafter all his four sons, the plaintiffs and the defendants 3-4 herein; (c) The ancestral agricultural land and the old house in the village came to the share of all the parties herein in equal share; (d) The property number 9988-C at New Rohtak Road, New Delhi was to vest in his wife Smt. Ram Pyari Yadav during her lifetime and was to vest thereafter in the plaintiff number 2; (e) The properties bearing number 321/2ZA and 321/2ZA-1 measuring 375 sq yds at Than Singh Nagar, Anand Parbat, Delhi – 110005 were bequeathed to his wife, late Smt. Ram Pyari Yadav with exclusive ownership rights; and (f) The vacant plot no.A-1, Kailash Park, measuring 125 sq. Yards, New Delhi was bequeathed to the

plaintiff no.2. It was pleaded that the mother executed a will dated June 18, 2009 bequeathing the property at Than Singh Nagar, Anand Parbat to appellant No.2. It was the case of the appellants that parties are in possession of the respective properties as per the bequest made by the parents.

5. It is apparent that qua property No.9988-C, New Rohtak Road, appellant No.2 claimed title as per the codicil statedly executed by the father of the parties. On the pleadings of the parties following issues were settled in CS (OS) No.3310/2012 vide order dated October 30, 2015:-

“1. Whether the plaintiffs are entitled for the decree of ownership qua the properties which are subject matter of the suit mentioning in the prayer clause as claimed? OPP

2. Whether the plaintiff are entitled for permanent and perpetual injunction qua the properties as mentioned in the plaint? OPP

3. Whether the unregistered Will dated 16th June, 1985 and unregistered Codicil dated 21st October, 1985 of late Zorawar Singh and Will dated 16th June, 2009 of Smt.Ram Pyari are genuine or not? OPD

4. Whether the suit of the plaintiffs is barred by limitation? OPD

5. Whether the suit of the plaintiffs is not properly valued for the purpose of Court fee qua the properties mentioned in the plaint? OPD

6. Relief.”

6. The respondents filed IA No.14607/2015 pleading that neither will set up by the appellants has been probated nor the codicil, and thus suit filed by

the appellants seeking declaration and permanent injunction was not maintainable. Section 34 of the Specific Relief Act, 1963 was pressed into aid.

7. There being a plethora of authorities that in view of Section 57 and Section 213 of the Indian Succession Act, for Hindus, concerning properties in the Northern part of the country, it is not necessary to obtain a probate of a will, appellants pleaded that they need not obtain a probate of the wills and the codicil. As per the respondents Section 34 of the Specific Relief Act, 1963 which relates to a declaratory decree, did not disentitle the appellants to the declaration claimed.

8. Vide impugned order dated March 14, 2016 the learned Single Judge has relied upon various authorities which hold that no declaratory reliefs qua properties can be granted on the strength of testamentary documents and the remedy is to seek probate.

9. Section 34 of the Specific Relief Act, 1963 reads as under:-

“34. Discretion of Court as to declaration of status or right –

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

10. A bare reading of Section 34 of the Specific Relief Act, 1963 shows that when a person seeks a title or a right in any property, the Court may in

its discretion give the declaration sought for. As per the proviso no such declaration shall be made where the plaintiff being entitled to further relief, omits to claim the same.

11. The intention of the proviso is obviously to prevent multiplicity of litigation and it reflects the well known rule of law that all reliefs flowing out of a cause of action must be bundled together in one suit.

12. In the suit filed by the appellants they have categorically pleaded that the children of Zorawar Singh and Ram Pyari are in possession of the properties bequeathed to them by the parents and thus it is not a case where the appellants being entitled to any further relief have omitted to claim so. The appellants are simply seeking a declaration that under the testamentary instruments executed by the parents the parties are in possession of the property bequeathed to them.

13. It assumes importance that in the suit filed by respondent No.1 seeking partition of property No.9988-C, New Rohtak Road, New Delhi and rendition of accounts, while settling the issues the learned Single Judge on the Original Side has settled the issue concerning the will and the codicil set up by the appellants, with onus on the appellants. Thus, evidence would be recorded in said suit concerning the due execution of the will and the codicil set up by the appellants. The same issue was settled, embracing the will statedly executed by Ram Pyari, in the suit filed by the appellants.

14. The matter could therefore be looked at from two angles. Firstly, the evidence of conduct of the parties to take possession of various properties owned by their father on his demise, if as per the will and the codicil propounded. If in conformity with the two testamentary documents, would be evidenced of the parties accepting the same and coupled with other

evidence, would non-suit the respondent No.1 in the suit for partition filed by him. In other words, the will and the codicil set up by the appellants can be relied upon in evidence to establish the defence adopted by them in the suit filed by respondent No.1. Meaning thereby, in the suit filed by respondent No.1 evidence to prove execution of the two wills and the codicil can be led and we highlight that qua the will and the codicil statedly executed by the father a specific issue has been struck. The second angle to look at the issue would be the specific issue being settled in the suit filed by respondent No.1 qua the will and the codicil concerning the validity of the two. Meaning thereby this Court has accepted that parties are at variance on the issue whether the father executed the will and the codicil. The issue being struck, a decision would have to be rendered and on attaining finality the decision would bind the parties.

15. We find that different Courts have been taking a different view. In the decision reported as 79 IC 249 Shambai vs.Goverdhan, a suit for declaration that the bequests under a will are void and for an injunction restraining expenditure of money on such bequests, was held to be maintainable without any claim for possession being made. In the decision reported as AIR 1925 All 110 Kyas Mahomed vs.Banna, a declaratory suit was held to be maintainable when the devisee was not in possession, though the plaintiff may also not be in possession. In the decision reported as 35 MLJ 144 Babba Padmavabhudu vs.Babba Buchamma a suit for declaration that a will said to have been executed by the deceased brother of the plaintiff authorising his widow to adopt was never executed, was held to be maintainable. In the decision reported as 36 IC 95 Hukam Singh vs.Gyan Devi, during the life time of the testator, the will is ambulatory, and hence a

declaratory suit was held to be maintainable. In the decision reported as AIR 1950 PC 70 Rai Shatranjrai vs. Raj Bahadur, a suit for construction of a will was held to be maintainable where the parties were vitally and immediately interested in the question as to which of them in an event, not necessarily remote, would be entitled to substantial property.

16. In the decision reported as ILR 25 Mad 504 Suryanarayanamurthi vs. Tammanna, a suit by a person for a declaration that a disposition made by his father by a will was invalid on the ground that the property was ancestral, and that he was entitled to his share in it by right of survivorship and that his father had no right to dispute it was held to be not maintainable since the suit was barred by the proviso to Section 34. It was open to him to sue for partition of his share in the joint family property. The fact that the property was in the possession of the tenants did not make any difference, as that did not constitute any bar to partition of the property, the tenants' right of occupation not being affected thereby. In the decision reported as 97 PR 1916 Hukam Singh vs. Gyan Devi, a testator executed a will in favour of one described as his wife. His brother's son sued after his death for a declaration that the will was void and she was not the wife. It was held that the plaintiff was not entitled to ask for a mere declaration, but was bound to pray for cancellation of the will. In the decision reported as ILR 43 Cal 694 PC Sheo Parsan vs. Ramnadhan, it was held that the suit for declaration by the plaintiff where he prayed that he was the nearest reversioner and as such was entitled to apply to the Probate Court to get the probate revoked, was not maintainable under Section 34 as having regard to an earlier decision of the Court that the will was genuine, the plaintiff was not entitled to a legal character or to a right as to property. In the decision reported as AIR 1960

AP 273 Sri Rajakakarlapudi Venkata Sudarsana Narasayamma Garu vs. Andhra Bank Ltd., the plaintiff who was acting an executor under the will was held entitled not to maintain a suit without obtaining a probate thereof.

17. Highlighting that in the suit filed by the appellants they are not claiming possession because as per them parties are already in possession of the properties as per the bequests, the question of the appellants omitting to claim a further relief which they ought to have claimed does not arise.

18. The appeal is accordingly allowed. Impugned order dated March 14, 2016 is set aside. CS (OS) No.3310/2012 filed by the appellants is restored with a direction that the said suit would be clubbed with CS (OS) No.430/2012 and common evidence would be led in both.

19. CS (OS) No.3310/2012 would be listed for directions before the learned Single Judge on April 10, 2017.

20. Parties shall bear their own cost in the appeal.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

FEBRUARY 13, 2017
mamta/skb