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

+ CM(M) 1380/2013 & CMs No.13764/2017 & 13765/2017

VEENA MEHRA

..... Petitioner

Through: Mr. N.K. Verma, Adv.

Versus

RAJAN MEHRA & ANR

..... Respondents

Through: Mr. R. Vasudevan, Adv. for R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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31.08.2017

1. The counsel for the petitioner states that since the matter is listed before the Joint Registrar on 21st September, 2017 on application for substitution of Legal Representative (LR) of petitioner, the matter be adjourned.
2. The counsel for the respondent No.1 appears.
3. None appears for the respondent No.2.
4. On enquiry, it is informed that respondent No.2 has neither appeared before this Court nor has been appearing before the Suit Court.
5. On further enquiry, it is informed that in the suit the substitution of the LR of the petitioner/plaintiff has already taken place and the suit is proceeding with evidence.

6. Once the substitution has taken place in the suit, there is no need for separate substitution before this Court and the respondent No.2 for whose service the application for substitution is pending before the Joint Registrar is exempted from service.
7. For the sake of expediency, the delay in applying for substitution of LR of the petitioner/plaintiff is condoned and the LR of the petitioner/plaintiff is substituted in place of the petitioner/plaintiff.
8. CMs No.13764/2017 & 13765/2017 are disposed of.
9. This petition impugns the order (dated 17th July, 2012 in Suit No.819/2010 of the Court of Civil Judge-07 (Central), Tis Hazari Courts, Delhi) of dismissal of the application filed by the petitioner/plaintiff for amendment of the plaint.
10. The counsel for the petitioner/plaintiff and the counsel for the respondent/defendant No.1 have been heard.
11. The suit from which this petition arises was filed by the petitioner/plaintiff for the reliefs of declaration that the petitioner/plaintiff “as successor of Hindu Undivided Family (HUF) properties” as described in the plaint was entitled to a 1/3rd share therein and for permanent injunction restraining the defendants Rajan Mehra and Manju Dhupar being the siblings of the petitioner/plaintiff from alienating, encumbering or parting with possession or dealing with the said properties.
12. The petitioner/plaintiff by way of amendment sought to convert the suit from that for declaration and permanent injunction to that for partition, possession and rendition of accounts and to carry out consequential amendments in the plaint including in the prayer paragraph.

13. The learned Civil Judge has dismissed the application reasoning that if the amendments were to be allowed, it will result in changing the entire nature of the suit and altogether a new suit will come into existence and will also take away the right which had already accrued to the respondent/defendant No.1 under Order II Rule 2 of the Code of Civil Procedure, 1908 (CPC).

14. Though this petition has been pending in this Court for the last nearly four years but there is no stay of proceedings in the suit and the counsels state that the proceedings in the suit are going on and the evidence of the deceased petitioner/plaintiff already stands concluded and on substitution of LR of the petitioner/plaintiff, an option has been given to him to, on the next date of hearing inform whether any further evidence is required to be led.

15. The counsel for the respondent/defendant No.1 has argued (i) that the petitioner/plaintiff in the plaint has sought the relief of declaration on the basis of the properties being of HUF; (ii) that the respondent/defendant No.1 in his written statement has denied the properties to be of HUF and has further pleaded that the father of the parties having died prior to coming into force in 2005 of the amendment to the Hindu Succession Act, 1956, the petitioner/plaintiff being a daughter cannot claim a share in HUF properties; (iii) that the petitioner/plaintiff in the replication has mixed up her pleas and also claimed share as the heir under the Hindu Succession Act; and, (iv) that the respondent/defendant No.1 has set up Wills of the parents and the following issues have been framed in the suit:

- “1. *Whether suit is maintainable in its present form?*
2. *Whether suit is barred under Order 2 Rule 2 CPC?*
3. *Whether suit is time barred?*

4. *Whether there is no cause of action arises in favour of the plaintiff? OPP*
5. *Whether the plaintiff contributed any amount to the HUF property as alleged in the plaint? OPP*
6. *Whether all the properties mentioned in annexure A are HUF prop. of Gian Chand Mehra as claimed by plaintiff? If not whether the plaintiff is entitled to relief in the present suit in respect of such properties? OPP*
7. *Whether the plaintiff is entitled to any share in any of the properties in view of the averments of the defendant in their written statement? OPD*
8. *Whether the Wills of Gian Chand Mehra and of Durga Mehra are validly executed Wills and if so its effect? OPD*
9. *Relief.”*

16. On enquiry, it is further informed that though Issues No.1,2&3 were ordered to be treated as preliminary issues but now it has been ordered that they will be decided at the final stage only.

17. On further enquiry, it is stated that the issue of Order II Rule 2 of CPC was framed owing to the petitioner/plaintiff, prior to the institution of the suit from which the present suit arises, having earlier also filed a suit for permanent injunction against the same parties.

18. I have put it to the counsel for the respondent/defendant No.1, whether not in view of the issues, as aforesaid, even in the event of the petitioner/plaintiff failing to prove the HUF, the petitioner/plaintiff, if the respondent/defendant No.1 were to fail to prove the Wills of the parents, still entitled to a declaration of her share as the heir of the parents under the Hindu Succession Act. It thus appears that irrespective of the petitioner/plaintiff having sought the relief of declaration on the basis of

existence of HUF, in view of the issues framed, the petitioner/plaintiff, even in the absence of HUF, in the event of the Wills being not proved, would be entitled to declaration.

19. The counsel for the respondent/defendant No.1 agrees.

20. It has further been enquired from the counsel for the respondent/defendant No.1 that if that be the case and as per the issues the entire controversy between the parties is still at large, whether not it will be expedient that in the event of the petitioner/plaintiff succeeding and being found entitled to any share in any of the properties, instead of granting merely a relief of declaration and in which case the petitioner/plaintiff will file another suit for partition and the parties would be vexed second time in that suit, it is expedient that a decree for partition is passed in such an eventuality.

21. The counsel for the respondent/defendant No.1 after consideration contends that if it were to be ordered here that in the event of the petitioner/plaintiff being found entitled to any share, a decree for partition would follow, the respondent/defendant No.1 would lose the benefit of the issue qua Order II Rule 2 of CPC.

22. It has been held in *Vijay Manchanda Vs. Ashok Manchanda* 2010 (114) DRJ 467 and in *Manita Khurana Vs. Indra Khurana* (2010) 167 DLT 58 that a person having a share in property cannot be compelled to sue for partition, if is satisfied merely by having his share declared and by restraint order against the others from dealing with the property and wanting to keep the properties joint. Thus, Order II Rule 2 of CPC would in any case not bar a suit for partition and a partition decree can always be claimed, once

a declaration of share is made.

23. The counsel for the respondent/defendant No.1 has also pointed out that the petitioner/plaintiff had filed a suit for declaration of the Wills as forged and fabricated and which suit has been pending but on enquiry, fairly states that in that suit, the Wills were not proved and hence the need for issues aforesaid framed in the subject suit.

24. Though the counsel for the petitioner/plaintiff states that an appeal against the order of dismissal of that suit is pending but since the documents claimed to be the Wills of the parents have not been proved, because there was no issue in the said suit, the said aspect is also immaterial.

25. The counsel for the respondent/defendant No.1 has in the circumstance fairly agrees that in the event of the petitioner/defendant being found entitled to any share in the property, instead of a mere declaration, a decree for partition of that share be granted, to avoid a second round of litigation. He however states that this concession is subject to the suit continuing as it is, only with this clarification. It is pointed out that the petitioner/plaintiff, by way of amendment sought, also wants to enhance the valuation of the suit and which would result in the plaint being returned and the proceedings starting *de novo*, axiomatically resulting in wastage of time since 2000, since when the subject suit is pending.

26. The counsel for the petitioner/plaintiff is agreeable thereto.

27. The petition is thus disposed of only with the clarification that in the event of the petitioner/plaintiff being found entitled to any share in any of the properties subject matter of the suit, notwithstanding there being no prayer for partition in the plaint, instead of a mere decree for declaration, a

preliminary decree for partition of the share if any of the petitioner/plaintiff, and of the respondent/defendant No.1 shall follow.

28. The counsel for the petitioner/plaintiff assures that he will not object or challenge the decree for partition on the ground of the Court passing it having no pecuniary jurisdiction to pass the decree, considering the valuation of the properties.

29. The petition is disposed of.

No costs.

The date of 21st September, 2017 before the Joint Registrar stands cancelled.

RAJIV SAHAI ENDLAW, J.

AUGUST 31, 2017
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