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

+ C.R.P. 177/2017

NEELAM ANAND

..... Petitioner

Through: Mr. S.S. Ray, Mr. Vaibhav Gulia &
Mrs. Rakhi Ray, Advs.

Versus

SADHANA GUJRAL

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **11.08.2017**

CM No.28756/2017 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CM No.28757/2017 (for condonation of 53 days delay in re-filing the petition)

3. For the reasons stated in the application, the delay is condoned.
4. The application is disposed of.

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5. This Revision Petition under Section 115 of the CPC impugns the order [dated 2nd March, 2017 in CivDJ/610896/2016 of the Court of Additional District Judge (ADJ)-05, West, Tis Hazari Courts, Delhi] of dismissal of the application filed by the petitioner / defendant under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) for rejection of the plaint in a suit for partition of immovable property filed by the respondent / plaintiff.

6. The petitioner / defendant and the respondent / plaintiff are sisters. The respondent / plaintiff instituted the suit for partition pleading that the property of which partition was sought was owned by the father of the parties who had vide Will bequeathed the same to the parties, to the exclusion of other natural heirs and that the father had allowed the petitioner/defendant to reside in the property as a licensee.

7. Rejection of the plaint was sought on four grounds, namely i) that without seeking probate of the Will, no right under the Will could be claimed; ii) that the suit filed in the year 2015 was barred by time as the father had died in 2004; iii) that the property was under-valued; and, iv) that appropriate court fees had not been paid on the plaint in as much as *ad valorem* court fees was payable owing to the petitioner/defendant being in possession of the property.

8. I have heard the counsel for the petitioner/defendant.

9. No error is found in the order of dismissal of the application under Order VII Rule 11 of the CPC which in fact is found to have been filed under a misconception of law and pursuing the same by way of preferring this petition is found to be in abuse of the process of law and an attempt to delay the disposal of the suit for partition filed by the respondent/plaintiff, to take advantage of the petitioner/defendant being in possession of the property.

10. Though the learned ADJ, save for stating that as far as the city of Delhi is concerned, it is not necessary for Hindus to obtain probate before making a claim under a Will but reference in this regard can be made to:

- (i) ***Clarence Pais Vs. Union of India*** (2001) 4 SCC 325.
- (ii) ***Aishwarya Dev Chand Katoch Vs. T.M. Properties Pvt. Ltd.***
(2006) 133 DLT 89.
- (iii) ***Capt. (Retd.) O.P. Sharma Vs. Kamla Sharma*** (2009) 158
DLT 361 (DB).
- (iv) ***Anand Prakash Vs. Ram Kala*** ILR (2010) III Delhi 404.
- (v) ***Rajesh Vs. Munni Devi*** 2011 SCC Online Del 1257.

and the filing of the application appears to be in ignorance of this settled law.

11. The petitioner / defendant though took the plea of the suit claim being barred by time but neither any Article of the Schedule to the Limitation Act which would apply to a suit for partition appears to have been cited before the ADJ nor before this Court and the counsel for the petitioner / defendant is also unable to state as to which Article of the Schedule to the Limitation Act would apply.

12. The plaint could have been rejected only if on the reading of the plaint and without looking at anything else, the suit as per averments in the plaint was not maintainable.

13. Once the suit is for the relief of partition and title to the property is claimed under the Will of the father, the suit for partition could not be said to be barred by time when there was nothing in the plaint from which it could be said that the respondent/plaintiff had lost right to seek the relief of partition.

14. As far as the ground of valuation of the property is concerned, the same has to be the subject matter of evidence. The respondent/plaintiff has

valued the property at Rs.70 lacs and the petitioner/defendant, in the application under Order VII Rule 11 of the CPC, is not found to have furnished any valuation according to the petitioner/defendant, of the property.

15. The last ground, of proper court fees having not been paid, is equally misconceived. As per para 20 of the plaint, the respondent/plaintiff has paid *ad valorem* court fees on her half share of the property, value whereof has been put at Rs.35 lacs and thus it again proves that the application was filed without even properly reading the plaint.

16. Resultantly, the petition is dismissed with costs of Rs.25,000/- payable by the petitioner/defendant to the Delhi High Court Bar Association Lawyers' Social Security and Welfare Fund, New Delhi as a condition for the petitioner / defendant to further participate in the suit.

17. The counsel for the petitioner/defendant to on the next date before the trial Court, furnish proof of payment of costs.

18. A copy of this order be forwarded to the trial Court to ensure compliance.

RAJIV SAHAI ENDLAW, J

AUGUST 11, 2017

‘gsr’..