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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ C.R.P. No.171/2017 & CM No.28100/2017 (for stay).
ANAND & ORS Petitioners

Through: Mr. Alamgir, Adv.

versus

LALITA Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **08.08.2017**

CM No.28101/2017 (for exemption).

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

C.R.P. No.171/2017 & CM No.28100/2017 (for stay).

3. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 29th May, 2017 in CS No.51677/16 of the Court of Additional Rent Controller (South-East), Saket Courts, New Delhi) dismissing the application of the petitioners / defendants no.1, 2, 6, 6A & 6B under Order VII Rule 11 of the CPC.
4. The counsel for the petitioners / defendants no.1, 2, 6, 6A & 6B states that the defendants no.3,4&5 have already been proceeded against *ex parte* in the suit.
5. Even if the defendants no.3,4&5 in the suit have been proceeded against *ex parte*, the petitioners / defendants no.1, 2, 6, 6A & 6B should have also impleaded them as respondents to this petition.
6. Notwithstanding the aforesaid, the counsel for the petitioners / defendants no.1, 2, 6, 6A & 6B has been heard.

7. The respondent has instituted the suit, plaint wherein was sought to be rejected, (i) for declaration that she is the lawful owner of the second floor of property no.2072/28, Tughlakabad Extension, New Delhi in her possession; (ii) for injunction restraining the defendants from dispossessing the respondent / plaintiff from the said property *inter alia* on the basis of “alleged Will dated 17.7.1992”; and, (iii) for cancellation of and declaration that the alleged Will dated 17th July, 1992 in respect of property no.2072/28, Tughlakabad Extension, New Delhi is null and void and non-est.

8. It is not in dispute that the property no.2072/28, Tughlakabad Extension, New Delhi belonged to Sh. Munshi Ram who was the father-in-law of the respondent / plaintiff and the father of the petitioners no.1 to 5 / defendants and that the respondent / plaintiff, being the widow of a pre-deceased son of Sh. Munshi Ram, would under the law of succession have a share in the property.

9. The counsel for the petitioners / defendants no.1, 2, 6, 6A & 6B at this stage states that it is also the plea of the petitioners / defendants no.1, 2, 6, 6A & 6B that the husband of the respondent / plaintiff was given away in adoption.

10. It is also not in dispute that the respondent / plaintiff is in possession of the second floor of the property and the petitioners / defendants no.1, 2, 6, 6A & 6B have instituted a suit for recovery of possession against the respondent / plaintiff and which is informed to be pending in the same Court where the suit from which the present petition arises, is pending.

11. The petitioners / defendants no.1, 2, 6, 6A & 6B have propounded a Will of Sh. Munshi Ram and claimed that under the said Will and otherwise

they are the only owners of the property after the death of Sh. Munshi Ram and the respondent / plaintiff has no share in the said property.

12. The respondent / plaintiff is disputing the said Will.

13. The counsel for the petitioners / defendants no.1, 2, 6, 6A & 6B on enquiry states that in the suit for possession, the respondent / plaintiff in her written statement has disputed the Will and fairly admits that in the issues to be framed in the said suit, an issue with respect to the Will shall be framed, the document claimed to be the Will having not been probated.

14. Rejection of the plaint in the suit filed by the respondent / plaintiff was sought on the grounds of (i) the relief of declaration in the absence of the relief of partition being not maintainable; and, (ii) the relief of declaration and cancellation of the Will having not been properly valued for the purposes of court fees and jurisdiction.

15. The said grounds did not find favour with the learned Civil Judge who has held that the suit is primarily for the relief of declaration and cancellation with respect to the Will and for which it was properly valued.

16. Without going into legalese, it appears that there is no need for the learned Civil Judge to proceed with both the suits. Once the petitioners / defendants no.1, 2, 6, 6A & 6B have invoked the legal process for recovery of possession, and even otherwise the respondent / plaintiff is entitled to the injunction restraining the petitioners / defendants no.1, 2, 6, 6A & 6B from dispossessing her from the portion of the property in her possession, save by due process of law. As far as the relief of declaration and cancellation qua the Will is concerned, as aforesaid, the same is already in issue in the suit for possession which is informed to be the prior instituted suit. There is thus no

need to go into the said question also in the subject suit.

17. It thus appears that the suit from which this petition arises can be disposed of with the observations that the respondent / plaintiff shall not be dispossessed save by due process of law and keeping all issues qua Will open for adjudication in the suit for possession filed by the petitioners / defendants no.1, 2, 6, 6A & 6B and which is the substantive suit.

18. Be that as it may, for the sake of completeness, the grounds urged for rejection of the plaint may also be considered.

19. It has been held by me in *Vijay Manchanda Vs. Ashok Manchanda* 2010 (114) DRJ 467 and SLP(C) No.8872-8873/2010 were dismissed on 1st April, 2010 that a co-owner cannot be compelled to seek the relief of partition and is entitled to seek cancellation of Sale Deed of one half share in the property to which he claims to be entitled to, without claiming the relief of partition.

20. In the present case, till the decision of the questions, whether the husband of the respondent / plaintiff was given away in adoption and whether the document dated 17th July, 1992 is the validly executed last Will of Sh. Munshi Ram, it cannot be said that the respondent / plaintiff, who is the widow of a pre-deceased natural son of Sh. Munshi Ram, has no share in the property; once she is in possession of the property, till she is found to be not having any share in the property, her possession has to be protected and for which relief the suit has been filed and she cannot be compelled to sue for partition.

21. It may also be noticed that it is the plea of the respondent / plaintiff in the plaint that the heirs of Sh. Munshi Ram had with mutual understanding

built their separate portion of the property and that her husband has built the second floor and she is in possession thereof. If the suit from which this petition arises were to proceed, an issue may also be required to be framed on the said plea of the respondent / plaintiff if disputed by the petitioners / defendants no.1,2, 6, 6A & 6B.

22. Thus there is no merit on the first ground taken for rejection of the plaint.

23. As far as the ground of valuation is concerned, though the counsel for the petitioners / defendants no.1, 2, 6, 6A & 6B has referred to the judgment of the Full Bench of this Court in *Mahant Purshottam Dass Vs. Har Narain* (1978) 14 DLT 8 (FB) but it cannot be lost sight of that the petitioners / defendants no.1, 2, 6, 6A & 6B have themselves sued for possession in the Court of the Civil Judge only, meaning that the portion of the property in possession of the respondent / plaintiff does not have value exceeding maximum pecuniary jurisdiction of the Civil Judge which is Rs.3,00,000/-. It thus cannot be said that the valuation is bad.

24. The counsel for the petitioners / defendants no.1, 2, 6, 6A & 6B at this stage states that in fact the market value of the second floor in possession of the respondent / plaintiff is between Rs.22,00,000/- and 30,00,000/-.

25. Upon it being pointed out to the counsel for the petitioners / defendants no.1, 2, 6, 6A & 6B that on the said submission, the plaint in the suit for possession filed by the petitioners / defendants no.1, 2, 6, 6A & 6B is liable to be returned for presentation in the Court of appropriate jurisdiction, the counsel states that the application in this regard moved by the respondent / plaintiff who is the defendant in that suit has already been

dismissed. Once that is so, there must be a finding of the Court to that effect and which would bind the petitioners / defendants no.1, 2, 6, 6A & 6B equally and estop the petitioners / defendants no.1, 2, 6, 6A & 6B from challenging that the Court of Civil Judge has no jurisdiction to entertain the suit filed by the respondent / plaintiff with respect to the same property.

26. Moreover, the nature of the claim of the respondent / plaintiff in the suit as a co-owner is such which cannot be said to require the respondent / plaintiff to value the suit for declaration on the basis of market value of the entire property and the dicta of the Full Bench aforesaid does not deal with a case of declaration qua a Will.

27. There is thus no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 08, 2017

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