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

+ CM(M) 682/2015, CMs No.13103/2015 (for stay), 4768/2017 (of petitioners under Order 22 Rule 4 & 11 CPC)

KRISHAN KUMAR SAINI (DECEASED)

THROUGH LRS

..... Petitioner

Through: Mr. Ravi Awasthi, Mr. Ramakant
Sharma, Advocate

Versus

RAJINDER KUMAR SAINI (DECEASED)

THROUGH LRS & ORS

..... Respondents

Through: None

AND

+ CM(M) 1169/2017, CMs No.38013/2017 (for stay), 38014/2017 (for condonation of delay of 6 days in re-filing)

KRISHAN KUMAR SAINI (DECEASED)

THROUGH LRS

..... Petitioners

Through: Mr. Bhupinder Singh Saini, Advocate

Versus

RAJINDER KUMAR SAINI (DECEASED)

THROUGH LRS & ANR Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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13.11.2017

1. This order is in continuation of the earlier order dated 27th October, 2017 in CM (M) No.1169/2017.
2. The counsel for the petitioner has been heard.
3. CM (M) No.682/2015 has been preferred impugning the order dated 10th February, 2015 in Suit No.677/2014 of the Court of Additional District Judge-14, Central District, Tis Hazari Courts, Delhi.

CM(M) Nos. 682/2015 & 1169/2017

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4. After hearing the counsel for the petitioner, what emerges is, (i) that Rajender Kumar Saini and Surinder Kumar Saini filed a petition seeking probate of a document stated to be the validly executed last Will of their father Som Nath Saini; (ii) the said Probate Case was dismissed; (iii) FAO No.104/1987 was preferred by Rajender Kumar Saini only against the order of dismissal of the Probate Case; (iv) during the pendency of the aforesaid appeal, Rajender Kumar Saini expired; (v) application was filed by one Premshila Saini and her son Achal Kumar Saini for substitution as heirs of Rajender Kumar Saini claiming to be the wife and son respectively of Rajender Kumar Saini; (vi) the aforesaid claim of Premshila Saini and Achal Kumar Saini was disputed by Krishan Kumar Saini, being another son of Som Nath Saini and who claimed that Rajender Kumar Saini was unmarried and issueless and on his demise, his living brothers and sisters were required to be substituted in his place or his name was liable to be deleted from the array of parties in the FAO No.104/1987; it is the claim of Krishan Kumar Saini that Premshila Saini was maid in the house of Rajender Kumar Saini; who lived alone; (vii) that after the dismissal of the Probate Case, Krishan Kumar Saini had also filed CS(OS) No.616/1987 in this Court for partition of the immovable property left by Som Nath Saini; in the said Suit, on 26th October, 1989, the following issues were framed:

- (a) Whether Shri Som Nath Saini, deceased, made a valid Will dated 26.8.1982?
- (b) In case Issue No.1 is held against the defendants, what directions are to be given to the Local Commissioner in the case of passing the preliminary decree?

(c) Relief;

On 13th July, 1992, the following additional issues were framed:

(2A) Whether the Suit is properly valued for the purpose of court fee?

(viii) on the demise of Rajender Kumar Saini who was a party to that Suit also, enquiry for substitution of his LRs were pending in the Suit as well; (ix) finding so, vide order dated 15th October, 2003 in FAO No.104/1987 aforesaid, the question of substitution of the legal representatives of Rajender Kumar Saini was ordered to be decided in the enquiry underway in the Suit; (x) that the learned Additional District Judge has answered the said enquiry vide impugned order dated 10th February, 2015 and has held Premshila Saini and Achal Kumar Saini to be the wife and son of Rajender Kumar Saini; (xi) FAO No.104/1987 has since been dismissed for non-prosecution on 9th May, 2016; (xii) that with the dismissal of the appeal aforesaid, the issue framed in the Suit qua the Will also stands decided and the only question which remains to be decided in the Suit is, whether Premshila Saini and Achal Kumar Saini are the heirs of Rajender Kumar Saini or not.

5. The orders/proceedings sheets handed over in the Court at the time of hearing are taken on record.

6. I have wondered whether the validity of the findings of fact returned in the impugned order dated 10th February, 2015 and which are determinative of the Suit also are to be gone into under Article 227 of the Constitution of India inasmuch as the same would entail appreciation of evidence recorded in the enquiry.

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7. Order 43 Rule 1 of the CPC is not found to provide for any appeal against such an order.
8. Unless the order is appealable under any provision or is to be treated as a decree, correctness of it will have to be gone into under Article 227 of the Constitution of India.
9. In the aforesaid scenario,
 - A. CM (M) No. 1169/2017 is dismissed.
 - B. List CM (M) No.682/2015 on 13th December, 2017 as already scheduled but before this Bench instead of before the Joint Registrar.
 - C. The file of CSDJ No.10509/2016 pending in the Court of Additional District Judge-14, Central District, Tis Hazari Courts, Delhi be requisitioned before this Court before the next date of hearing.
 - D. The further proceedings in the said Suit are stayed.Order dasti under signature of Court Master.

RAJIV SAIHAI ENDLAW, J.

NOVEMBER 13, 2017
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