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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 20/2017, CM Nos.2310 & 2312/2017**

UMESH PHALPHER Appellant
Through: Mr. Hrishikesh Baruah, Adv.

versus

UMA GHATE Respondent
Through: Ms. Manmeet Arora with
Mr. Tarang Gupta &
Mr. Keshav Sehgal, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

ORDER

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19.09.2018

The contentions of Mr. Hrishikesh Baruah, learned counsel for the appellant (defendant in the suit) are wholly meritless.

The contentions made by the learned counsel for the appellant in respect to rejection of suit are two-fold (i) having mentioned the existence of the Will, the respondent (plaintiff in the suit) is still required to prove it, and, (ii) the court fee affixed on the plaint is inadequate.

In the suit, the respondent averting to Will and certain rights accruing to her under it states that since the present appellant disputes the Will and has set up a rival contention, which is the subject matter of the probate proceedings, the respondent was seeking the relief of partition.

As to the first contention, learned counsel for the appellant emphasises that Section 180 of the Succession Act is applicable and

that if the respondent indeed wishes to disclaim the Will or anything flowing from it, there ought not to have been any mention of it in the plaint. The learned counsel submitted that the question of election as urged in the plaint, could not have been accepted by the Ld. Single Judge.

We are unpersuaded by the arguments. The respondent merely mentioned about the existence of the Will and at the same time, disclosed that the present appellant did not accept it as valid or binding and had therefore chosen to seek probate of another Will. In the circumstances, it cannot be said that the present appellant does not dispute the Will mentioned by the respondent. The appellant cannot dictate the manner of framing of the suit by stating that there ought not to have been any mention of Will at all by the respondent. This issue therefore could not have resulted into rejection of the plaint. Furthermore, the appellant's contention that in these circumstances, there was no intestacy enabling the respondent to approach the Court for partition - can only be done in furtherance of Section 15 of the Hindu Succession Act and not at this stage.

As far as the second issue is concerned i.e. inadequate court fees, the appellant emphasises that there are categorical pleadings in the plaint stating that respondent was in forced possession and therefore, the respondent's claim had to be valued in terms of the disclosed market value. The respondent on the other hand points out for specific pleas of co-ownership and being in constructive possession and visiting the property periodically (para 20) and so having also made various averments (in paras 7, 8, 9, 10, 13, 18, 20

and 38) in respect of constructive or joint possession.

The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

SEPTEMBER 19, 2018
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