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

Date of Decision: 2nd May, 2018

+ **RFA 932/2016**

SATVINDER SINGH & ORS. Appellants

Through: Mr. Umang Mittal and Mrs. Priyanka
Marwah, Advocates with Appellants
in person. (M:9953333092)

versus

SARDAR JOGINDER SINGH & ORS. Respondents

Through: Mr. R. N. Dubey, Advocate for R-1 to
3. (M:9811179209)

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (oral)

CM APPL. 45849/2017

1. Learned counsel for the Appellants submits that he wishes to get Respondent No.11 deleted from the array of parties. Ordered accordingly. CM is disposed of.

CM APPL.44477/2016 (condonation of delay of 671 days), CM APPL. 44478/2016 (interim stay) & RFA 932/2016

2. This is an appeal against the impugned order and judgment dated 29th September, 2014 by which the suit for partition filed by the Appellants in respect of the property bearing no.2/361, Subhash Nagar, New Delhi (*hereinafter, 'suit property'*) was dismissed by the Trial Court. The order came to be passed in an application under Order VII Rule 10/11 CPC filed by the Defendant Nos.1 to 3 namely Sardar Joginder Singh, Sardar Lakhbir Singh and Sardar Bhagat Singh. The plea taken by the said Defendants was that the property had devolved upon them by means of a Will dated 1st March, 1995 executed by Smt. Harbans Kaur, who passed away on 27th

November, 1997. It is their further submission that the said Will has even been probated. In the probate proceedings, father of the Appellants/Plaintiffs Shri Pritpal Singh was Respondent No.5 and after evidence was led, the probate was granted on 15th May, 2009 in P.C. No.192/2006. The findings in the probate petition, on issues no.1 & 2, which were framed, are as under:

“45. In view of the facts and circumstances of the case and considering the documentary as well as oral evidence adduced by the petitioners, in my view, the petitioners have successfully proved that the testatrix executed the Will Ex.PW-3/1 while in sound state of mind. Accordingly, issue no.1 is decided in favour of the petitioners and against the objectors.

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48. The primary function of the Probate Court is to ascertain and deal with the factum of due execution of the Will. It, has no jurisdiction to go into the question of validity of the provisions of the Will nor has the probate court the jurisdiction to decide the question whether the testator has or had not power to dispose of the property which he purports to dispose of by the Will.

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54. As a result of above discussion and my findings on issue no.1, the petition is allowed. The Letters of Administration with Will dated 01.03.1995 executed by Smt. Harbans Kaur, which is Ex. PW-3/1 be issued in favour of the petitioners on furnishing administration bond and surety bond and payment of requisite Court Fees. File be consigned to Record Room.”

3. The grant of probate vide order dated 15th May, 2009 has attained

finality as the same has not been challenged. In fact the property was thereafter mutated after the grant of probate. The present suit, according to the Respondents, was, therefore, not maintainable. The Trial Court has considered the law on the subject including the following judgments:

- ***Puran Chand Oberoi vs. Jitender Oberoi & Ors.* 196 (2013) DLT 7 (CN);**
- ***Raj Kumar Devraj & Anr. vs. Jai Mahal Hotels Pvt. Ltd.* 200 (2013) DLT 527;**
- ***Ram Dass, Chela of Late Mahant Net Ram vs. Thakurdwara Radha Krishan (Regd. Soc.);***
- ***Ram Dass, Chela of Late Mahant Net Ram v. Thakurdwara Radha Krishnan (Regd. Soc.)* 173 (2010) DLT 549;**
- ***Anita Kumari Gupta vs. Ved Bhushan & Ors.* 202 (2013) DLT 23B (CN);**
- ***Iqbal Singh Arora & anr Vs. Amit Singh Arora & ors.,* 204 (2013) Delhi Law Times 7B (CM);**
- ***Zahoor Ahmed Vs. Rakhi Gupta and others* 188 (2012) Delhi Law Times 9**
- ***Ram Chander Aggarwal and B.P. Aggarwal Vs. UOI and others* 187 (2012) Delhi Law Times 370 (DB).**

4. It was also found by the Trial Court that the Appellants/Plaintiffs were not in possession of the suit property. The findings of the Trial Court are that the probate petition, having been allowed and letters of administration having been issued in favour of the Petitioners therein i.e. Respondents in the subject suit, the suit for partition cannot be maintained.

The same property being the subject matter of the probate and suit for partition, it is clear that since the probate petition order has already been attained finality, the same cannot be disturbed. The Trial Court had, accordingly, allowed the application under Order VII Rule 11 CPC and dismissed the suit.

5. Learned counsel for the Appellants submits that subsequent to the impugned order dated 29th September, 2014, the Appellants preferred a review petition dated 27th October, 2014 which came to be dismissed on 22nd September, 2016. He submits that the Appellants, upon legal advice, waited for the decision in the Review petition and immediately thereafter filed the present appeal on 27th October, 2016, within the limitation period from the dismissal of the review.

6. It is the settled position in law that the filing of a review cannot be a ground for non-filing of an appeal within the period of limitation. The appeal ought to have been preferred by the Appellant within time, which has not been done leading to the delay of more than 671 days in filing the appeal. Learned counsel for the Appellants submits that the Appellants got legal advice and hence they waited for the review to be decided.

7. Considering this submission on behalf of the Appellants, this Court has also examined the matter on merits. The main contention of the Appellants is that the Will dated 1st March, 1995 was forged and that the mutation which was carried out was done on the basis of forged documents. Learned counsel for Appellants concedes that another suit being Suit no.374/2011 is pending in the Trial Court where the Appellants have sought cancellation of the mutation in favour of the mother of the Respondents.

8. Considering that the issue of mutation is also pending in a subsequent

suit, this Court cannot examine the said issue in these proceedings. The order granting probate has not been challenged and has attained finality and the letters of administration have already been issued. The validity of the Will by which the suit property has been bequeathed in favour of the Respondents, cannot be gone into in the suit for partition. The Supreme Court, in ***Rukmani Devi & Ors. v. Narendra Lal Gupta (1985) 1 SCC 144*** (hereinafter, '*Rukmani Devi*') has categorically held as under:

“2..... It is well settled that the decision of the probate court is a judgment in rem. The High Court rightly held that till the order granting probate remains in force it is conclusive as to the execution and validity of the will till the grant of probate is revoked. Apart from the fact that a decision of the probate court would be a judgment in rem not only binding on the parties to the probate proceedings but it will be binding on the whole world. Therefore, a solemn duty is cast on the probate court. Section 41 of the Indian Evidence Act, 1872 provides that a final judgment or order of a competent court in the exercise of probate jurisdiction is conclusive proof of what is decided there that is about the genuineness of the will. To be precise, a probate granted by a competent court is conclusive of the validity of such will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate...”

9. This Court as well has reiterated the above position in ***Ram Dass, Chela of Late Mahant Net Ram v. Thakurdwara Radha Krishan (2010) 173 DLT 549*** and held that:

“17.....It is also an undisputed proposition of law that the decision of Probate Court is a judgment in rem. A probate granted by the competent Court is conclusive of the validity of such a Will until it is revoked; no evidence can be admitted to impeach it except the proceedings demanding revocation of the Will. This principle has

been reiterated by the Supreme Court in (1985) 1 SCC 144, Rukmani v. Narender Lal. It is also not in dispute that although a probate being a judgment in rem binds not only the parties to the case but all other persons in all proceedings arising out of the Will, yet it is not decisive about the title of the properties of the testator which are the subject matter of the Will; such title can only be decided by a civil Court. This has been held by the Supreme Court in JT 2007 (13) SC 50, Kanwaljit Singh Dhillon v. Hardayal Dhillon.....”

10. As per the settled position, a decision in the Probate is final and operates *in rem* as to the validity of a Will, and the same cannot be brought into question in a suit for partition between competing heirs. What is open to challenge is the title of the testator only, which is not challenged in the present case.

11. This is, however, subject to the decision in the pending suit, where cancellation of mutation has been sought. At this stage, the Trial Court is right in holding that the suit for partition is not maintainable as the Will has been probated and the letters of administration have already been granted.

12. Delay of 671 days in filing the appeal is condoned. CM is disposed of. The Trial Court judgment does not warrant any interference.

13. Appeal is dismissed, however, with the observation that in case the suit where the cancellation of mutation is sought, is decided in favour of the Appellants, the Appellants are allowed to avail of their remedies, if any, in accordance with law, at that stage. Miscellaneous application is also disposed of.

**PRATHIBA M. SINGH
JUDGE**

MAY 02, 2018/dk