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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on :28th February, 2018

Date of decision :4th July, 2018

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RFA 228/2017 & CM APPLs. 7483/2017 & 26331/2017

HARJEET SINGH MAINI

..... Appellant

Through: Mr. Kamal Gupta, Ms. Kirti Kakkar,
Ms. Tripti Gupta, Ms. Ramya Kutty,
Ms. Chandni Ghai and Ms. Nalin
Tripathi, Advocates (M-9810988094).

versus

RAM SINGH MAINI (DECEASED) THR HIS LEGAL HEIR & ANR.

..... Respondents

Through: Mrs. Deepika V. Marwaha, Advocate
(M:9810046917) and Mr. Alok
Pandey, Advocate (M:9971322260)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. Late Sh. Ram Singh Maini (*hereinafter Plaintiff*) filed a suit of mandatory injunction against his son Sh. Harjeet Singh Maini (*hereinafter Defendant*) in respect of the First Floor of property bearing no. A-266, New Friends Colony, New Delhi. The said suit was decreed by the Trial Court on 23rd August, 2016 in the following terms:

“23. Plaintiff is entitled for decree of mandatory injunction against the defendant and defendant is directed to remove all his belongings from the suit property i.e. first floor of property bearing no. A-266, New Friends Colony, New Delhi and to grant the possession of the premises in dispute to the plaintiff as shown in red in the site plan annexed with.”

2. This suit was instituted on 29th October, 2001. The case in the plaint is that the Plaintiff was a sub-lessee being a member of the New Friends House Building Co-operative Society Ltd. which was the lessee of the said plot of land. A perpetual lease deed was executed in favour of the Plaintiff upon which the Plaintiff raised a three storeyed building. The Plaintiff got the leasehold property converted into freehold. According to the plaint, he had allowed the Defendant to occupy the First Floor of the property as a lessee. The Plaintiff pleads that the Defendant did not conduct himself properly with the Plaintiff and his wife, i.e., mother of the Defendant. As per the plaint, the mother had passed away due to the ill-treatment given to her by the son. Even after her death, he continued to have a hostile attitude. The Plaintiff gave a public notice dated 1st December, 1994 (Ex. PW1/DA) disowning his son - the Defendant. When his misbehaviour continued, notice dated 25th September, 2001 was got served by the Plaintiff asking the Plaintiff to remove his belongings from the property.

3. The suit thereafter came to be filed for mandatory injunction directing the Defendant to remove all his belongings from the premises in dispute and placing the Plaintiff in possession of the First Floor of the suit property. In support of the plaint, a certified copy of the conveyance deed Ex.P-7 was placed on record. The legal notice along with receipt and AD card were exhibited as Ex.P-1 to Ex.P-3. The Second Floor of the property had been sold during the life time of the father on September, 2003.

4. Written statement was filed by the Defendant claiming that the plot was purchased by the Plaintiff out of funds belonging to the father of the Plaintiff and hence the Defendant had a share in the same. The Defendant also claimed that he had given ₹30,000/- for raising construction on the First

Floor. The Defendant also claimed that in 1983-84, when the Defendant's younger brother, Sh. Paramjit Singh Maini was to be married, an oral partition was entered into by which it was decided that the first floor would fall in the share of the Defendant. It was claimed that there were documents executed by the Plaintiff expressly admitting that the property was a family property. He submitted that his mother died due to a brain tumour and that he had performed her last rites. The Defendant also claimed that he had been in possession of the First Floor of the property since 1983.

5. In the replication, the Plaintiff stated that his father Late Sh. Sardar Mehar Singh had passed away in February, 1973. It was categorically claimed that the Plaintiff was in employment in different organisations till his retirement and that he became a member of the New Friends House Building Co-operative Society Ltd., in the 1960s. He was an employee of the Intelligence Bureau and he had paid the instalments for the membership of the society out of his own funds. The contribution by the Defendant was completely denied by the Plaintiff.

6. The following issues were framed in the suit on 9th December, 2002:

- “1. Whether the present suit is not maintainable in the present form? (OPD)*
- 2. Whether the present suit is not properly valued for the purpose of court fees and jurisdiction? (OPD)*
- 3. Whether the plaintiff is entitled to mandatory injunction as claimed? (OPP)*
- 4. Relief.”*

7. In 10th March, 2003, the Plaintiff filed his evidence by way of affidavit. Unfortunately, on 29th January, 2004, the Plaintiff passed away before he could be cross-examined. An application under Order XXII Rule 3

came to be filed by his younger son-Sh. Paramjit Singh Maini. In the said application, it was pleaded that the Plaintiff had executed a registered Will dated 7th September, 2001 by which the property in dispute was bequeathed to Sh. Paramjit Singh Maini to the exclusion of the other legal heirs. This application was considered by the court and on 19th March, 2005, and the same was allowed. In the said order, the Trial Court records that Late Sh. Ram Singh Maini left behind three children- two sons Sh. Harjeet Singh Maini and Sh. Paramjit Singh Maini; and a daughter-Smt. Amrit Kaur. The said application was contested by the Defendant on the ground that since he was also the son, the applicant-Sh. Paramjit Singh Maini cannot be impleaded as Plaintiff. It was claimed therein that the applicant ought to take steps to prove the Will and until then the present suit should be adjourned sine-a-dine or kept in abeyance. This submission was rejected. The court recorded that notice of the application was served on the daughter-Smt. Amrit Kaur who chose not to contest the application. Sh. Paramjit Singh Maini was allowed to be impleaded and placed as a Plaintiff. The operative portion of the said order dated 19th March 2005 reads as under:

“Further it has been submitted on behalf of the pliff that the genuineness or otherwise of the present will can be proved in the present litigation itself as in case if the present applicant is allowed to continue the present suit as a pliff in that event he will necessarily have to prove the aforesaid will and in this eventuality the defdt shall also have full right and opportunity to challenge the same and disprove it firstly by cross examination of the pliff’s witnesses and secondly by leading evidence in rebuttal to disprove the aforesaid will.

In support of his contentions and arguments that no separate proceedings are required to be initiated by

the applicant in respect of the aforesaid will, the applicant has also relied upon the citation of Hon'ble Apex Court in a case titled as Smt. Ambalika Padhi and another Versus Shri Radhakrishna Padhi and others reported in AIR 1992 SC 431 wherein in a suit filed by the pliff for declaration of her title and possession on the basis of a previous partition having taken place between the parties or in the alternative for fresh partition, the Hon'ble Apex Court has held that if a person is impleaded as a LR of a deceased party after its death on the basis of a will executed in his favour, in that event such impleaded person cannot be held to have been pursuing or asserting any of his own independent rights and the effect of such impleadment is only the continuation and assertion of the rights of the original pliff. Further it has been held in para 21 of the aforesaid citation that there is no law to support the proposition that even where the subject matter of suit is right to property and the legal representatives wish to continue the same as originally framed, they cannot be permitted to do so if they are not natural heirs or if they claim on the basis of a deed of settlement and/or will.

Further it has been argued by the ld senior Advocate appearing for the defdt that impleadment in a suit and assertion of rights on the basis of a will by the applicant would have been permissible in case if the present suit would have been filed against an outsider but not against another son of the deceased pliff himself. I do not find any force or merits in this argument particularly in view of the fact that the aforesaid ratio has been laid down by the Hon'ble Apex Court in a suit which was filed originally for the relief of declaration or in alternative for fresh partition, which from the very nature of its relief negates the involvement of any outsider in such kind of litigations because in no eventuality partition can be sought by a person against an outsider and the same is

always sought against and amongst the family members themselves.”

8. On 13th May, 2005, a suit for partition was filed by Sh. Harjeet Singh Maini against his brother and sister before the Delhi High Court. The said suit was CS(OS) 664/2005 wherein Sh. Harjeet Singh Maini sought the following reliefs:

“(A) pass a decree declaring that the plaintiff is the absolute owner in possession of the First Floor being 1/3rd share of property no. A-266, New Friends Colony, New Delhi in terms of the oral partition/Family Settlement arrived amongst the family members in the year 1983, and no other person has any right/title and interest in the portion shown in RED in the site plan attached.

(B) pass a decree of permanent/prohibitory injunction restraining defendant from selling, transferring, alienating, encumbering, or creating any third party rights in respect of any portion of the property no. A-266, New Friends Colony, New Delhi.

(C) through the same decree the other assets [movable / immovable] belonging to Late Ram Singh Maini be partitioned in accordance with law.

(D) through the same decree costs of the suit be also awarded in favour of the plaintiff as against the defendant.

(E) pass such further order/ direction as this Hon’ble Court may deem fit and proper in the interest of justice.”

9. This suit was contested by his brother Sh. Paramjit Singh Maini. It was pleaded that his father-Late Sh. Ram Singh Maini had in fact borrowed funds from Life Insurance Corporation (*hereinafter ‘LIC’*) by mortgaging the suit property in order to raise funds for the construction of the super

structure. In the said suit, he also pleaded that the father had issued a public notice disinheriting Sh. Harjeet Singh Maini from his estate. On 28th February, 2008, an application under Section 10 was filed by Sh. Paramjit Singh Maini. The Learned Single Judge of this court dealing with the suit on the original side passed the following order on 31st March, 2008 in the said application:

*“25. As this Court has held that the second suit has a much wider scope than the first suit, it cannot be said that the decision in the first suit will operate as res judicata in the second suit for the reason that the ownership and title of Shri H.S. Maini in the suit property cannot be decided comprehensively even if Shri P.S. Maini is able to successfully establish in the first suit that the termination of the licence deed of Shri H.S. Maini by the deceased father of the parties was legal and valid and the Will of their deceased father as set up by Sh. P.S. Maini, was legally and validly executed, for the reason that Sh. H.S. Maini has claimed entitlement to 1/3rd share comprising of the first floor in the suit property described as ancestral by him, on the basis of an oral family settlement stated to have been arrived at during the life time of the father of the parties, in the year 1983-84, which claim shall have to be put to trial for the purposes of returning a finding one way or the other. In this view of the matter, the judgment in the case of **Chuni Lal Vohra (supra)**, relied on by the counsel for Shri P.S. Maini, is not applicable to the present case, the same being entirely distinct on facts as also on law, from the case in hand.”*

10. While dismissing the application under Section 10, the Learned Single Judge transferred the suit filed by Late Sh. Ram Singh Maini for injunction and directed that consolidated affidavits shall be filed. Relevant portion of

the order dated 31st March, 2008 reads as under:

“28. The anxiety expressed on behalf of Shri P.S. Maini that any order of transferring the first suit to this Court shall result in causing delay in its disposal, can be assuaged by binding Shri H.S. Maini to his offer that at the stage of recording his evidence as defendant in the first suit, after framing of issues in the second suit, he may be directed to file a consolidated affidavit for both the suits in a time-bound manner, to which he shall have no objection and further binding him to his undertaking not to press any issue for a decision as a preliminary issue, so as to avoid prolonging the suit proceedings. Sh. H.S. Maini shall remain bound by the aforesaid undertaking.”

11. Thus, the parties were directed to file a consolidated affidavit, though the suit themselves was not consolidated. The following issues were framed in the suit for partition:

- “1. Whether the plaintiff is entitled to a decree of declaration of ownership in respect of first floor of the property bearing No. A-266, New Friends Colony, New Delhi? OPP*
- 2. Whether the plaintiff is entitled to a decree of permanent injunction, as prayed for in prayer (b) of the prayer clause in the plaint? OPP*
- 3. Whether the plaintiff is entitled to a decree for partition of the suit property? OPP*
- 4. Whether the property bearing No. A-266, New Friends Colony, New Delhi was purchased benami by Lt. Shri Sardar Mehar Singh in the name of Lt. Shri Ram Singh Maini? OPP*
- 5. Whether any oral partition took place in the year 1983 in respect of the property bearing No. A-266, New Friends Colony, New Delhi and if so, the effect thereof? OPP*
- 6. Whether the plaintiff contributed any sum towards*

the completion and improvement of the suit premises, and if so, the effect thereof? OPP

7. Whether Lt. Shri Ram Singh Maini had left behind a Will dated 7.9.2001 in favour of the defendant? If so, to what effect? OPD

8. Relief.”

12. A consolidated affidavit was then filed in the suit for partition. In his affidavit-in-evidence, Sh. Harjeet Singh Maini relied upon the following documents:

- PW-1/1 – Affidavit given to IOC by Late Sh. Ram Singh Maini;
- PW-1/2 – Allotment of petrol pump in favour of Sh. Harjeet Singh Maini;
- PW-1/3 to PW-1/7 – Income tax returns of Sh. Harjeet Singh Maini;
- PW-1/8 – Savings bank account 8040 of Late Sh. Ram Singh Maini in Central Bank of India, Parliament Street, New Delhi;
- PW-1/9 – Photographs of First Floor of the property;
- PW-1/10 – Complaints by Sh. Harjeet Singh Maini to the Police;
- PW-1/11 – Site plan.

13. In his cross-examination, Sh. Harjeet Singh Maini neither admitted nor denied the fact that his father had membership in the New Friends Co-operative House Building Society Ltd. since 1960. He also neither admitted nor denied the sale consideration paid of ₹15,000/- or ₹16,000/- for the suit property. He clearly admitted *“I have no personal knowledge that my grandfather received any compensation after he migrated to India”*. He further admitted that Late Sh. Ram Singh Maini - his father contributed money for the allotment of the petrol pump. He also agreed that his father retired from Intelligence Bureau. He further admitted *“It is correct that*

when I occupied the first floor of the suit property, it was with the consent of my parents and the defendants”. He further admitted that his father had mortgaged the property with LIC. He claimed that Sh. Harjeet Singh Maini had stood as guarantor for the said loan. Insofar as Ex.PW-1/1 was concerned, he denied the suggestion that it was a forged photocopy.

14. PW-2 was the Manager in Indian Oil Corporation (IOC) who produced the documents in respect of allotment of the petrol pump, Ex.PW-2/A and Ex.PW-2/13 and Ex.PW-2/C. Ex.PW-3 was a senior Manager in the Central Bank of India who could not confirm the contents of the passbook, as the records were old and were not preserved for more than 8 years. In his cross-examination, Sh. Harjeet Singh Maini claimed that he had not read any notice published by his father in the newspaper disowning or disinheriting him. Insofar as Ex.DW-1/1, which was a letter given to the IOC, relied upon by Sh. Harjeet Singh Maini, he admitted that it was a matter of record. that the signatures of Late Sh. Ram Singh Maini were denied by him in the suit filed by him for injunction.

15. Initially, the affidavit by way of evidence was filed by Late Sh. Ram Singh Maini in the suit for injunction. However, after his death, Sh. Paramjit Singh Maini filed his affidavit-in-evidence dated 7th September, 2005. His cross-examination was conducted in the suit for injunction. In his affidavit-in-evidence, he exhibited the following documents:

- Certified copy of Will dated 7th September, 2001- Ex. PW-2/1;
- Notice and postal cards thereof – Ex. PW-1 to PW-3;
- Mortgaged deed of the suit property with LIC for rais the sum of ₹60,000/- and ₹30,000/- – Ex. PW-4 and PW-5;
- Perpetual lease deed in favour of Late Sh. Ram Singh Maini –

Ex. PW-6;

- Original certified copy of the conveyance deed in favour of Late Sh. Ram Singh Mani – Ex.PW-7;
- Site plan – Ex.PW-8.

16. The Plaintiff also produced PW-2, Sh. M.S. Bisht who was a witness to the Will. His deposition is important and is set out below:

“I knew Shri. Ram Singh Maini. I have seen the original will dated 7.9.01 which was executed by Shri Ram Singh Maini. He had signed on both the pages of the said will. His signatures appeared at points A and B on the certified copy of the said will. He had signed the said will in my presence and in the presence of other witness Shri. Kanwaljit Singh. First the said will was signed by Shri Ram Singh Maini, then by me and then by Shri. Kanwaljit Singh. All the three of us put the signatures in the presence of each other. My signatures appear at point C on the certified copy of the said will and the signatures of Shri Kanwaljit Singh appear at point D on the certified copy of the said will. The certified copy of the said will is Ex. PW2/1. Thereafter the will was presented for registration by Shri Ram Singh Maini. At the time of execution and registration of the said will the Ram Singh Maini was in sound disposing mind.”

17. In his cross-examination, he stated that he is working with Delhi Police in 1979-80 while Late Sh. Ram Singh Maini was working with the Intelligence Bureau. He confirmed that he had signed the Will outside the Sub-Registrar's Office at Asaf Ali Road. He denied the suggestion that Late Sh. Ram Singh Maini did not sign the Will in his presence. He confirmed that he came by his own to depose as witness. His cross-examination was recorded on 18th October, 2006. The order passed by the Trial Court on the

said date is important and is set out herein below:

“18/10/06

*Present : Shri Sanjay Aggarwal, Advocate,
counsel for the plaintiff.*

*Shri Nalin Tripathi, Advocate,
counsel for the defendant.*

*PW1 tendered his affidavit. Documents
exhibited accordingly. Witness cross-examined and
discharged. Plaintiff's evidence is closed. Plaintiff
has summoned one more witness Shri M.S. Bisht who
is present in the court for his examination. His
examination-in-chief with cross examination
recorded. Witness is discharged....”*

18. In his cross-examination, Sh. Paramjit Singh Maini confirmed that his brother- Sh. Harjeet Singh Maini was living in the suit property since 1980. He also admits that he had not made any financial contribution in the purchase of the property. He also confirmed that Sh. Harjeet Singh Maini- his brother was the guarantor in the loan documents with LIC. He denied that there was a family settlement in 1980s. He claimed that his brother did not perform the last rights and last rites was performed by his father and himself. He confirmed that the Second Floor of the property was sold by his father for a consideration of ₹15 to ₹16 lakhs. He stated that he was not aware as to from where his father got the Will drafted. He denied that the property was purchased from the funds of the joint family. He also denied that his brother had any independent right. He also denied the suggestions that the suit for injunction was a proxy litigation filed by his father on his behalf.

19. Though the issues in both the suits are different since the evidence has been led in common, the analysis of the evidence is being done in the

present case which shall also apply in RFA 227/2017.

20. The Trial Court in the present RFA vide its judgment dated 23rd August, 2016 passed a mandatory injunction directing Sh. Harjeet Singh Maini to remove his belongings. Subsequent to the said decree being passed, the decree sheet was drawn by the Trial Court. On 19th October, 2016 warrants of possession were issued, bailiff was appointed for the possession of the First Floor and the possession was handed over to Sh. Paramjit Singh Maini-the decree holder.

21. The main grounds raised in the present appeal by Sh. Harjeet Singh Maini is that the impleadment of Sh. Paramjit Singh Maini by virtue of an order passed under Order XXII Rule 3 does not automatically mean that the status of Sh. Paramjit Singh Maini as a legal heir to continue the suit filed by his father has been established.

22. The second issue raised is that the original Will was never produced, only a certified copy had been produced. Thus, the Will has not been proved in accordance with law. Whether the Will has been proved in accordance with law, a lot has been said on behalf of the Defendant-Sh. Harjeet Singh Maini that the original Will was not produced and also not proved. A decision on this issue would in fact decide both the suits.

23. A perusal of the Trial Court Record reveals that initially a certified copy of the Will (*certified by the Sub-Registrar where the Will was registered.*) was placed on record and was marked. The Will is a registered Will. The same was thereafter exhibited as Ex.PW-2/1, upon being proved by the witness, PW-2- Sh. M.S. Bisht. He identified the signatures of Late Sh. Ram Singh Maini at points A and B on both the pages of the Will. He also identified his own signatures at point C and the signature of another

witness - Sh. Kanwaljit Singh at point D. In his examination-in-chief, he categorically states that *"I have seen the original Will dated 7th September, 2001 which was executed by Sh. Ram Singh Maini"*. The argument of the Appellant is that the original was never produced and only the certified copy was exhibited. It is relevant to note that initially the certified copy of the Will was filed by Sh. Paramjit Singh Maini. It was only marked for identification as Mark A. However, Sh. M.S. Bisht appeared and made the statement that he had signed the original Will and when he identified the signatures, the certified copy was exhibited. This is the usual procedure followed in the Trial Court. The submission that the original was never produced and the certified copy could not have been exhibited, seems like an afterthought inasmuch as the order dated 18th October, 2006 does not record any objection. There is also no objection recorded in the text of the cross-examination. The Learned Trial Judge specifically records that both the witnesses were present. The examination and cross-examination were recorded. Documents were exhibited and witnesses were discharged. If the original had not been produced, there ought to have been an objection recorded by the counsel for the Appellant.

24. The counsel for Sh. Paramjit Singh Maini has submitted that the original was in fact produced before the Trial Court and it was only thereafter that PW-2 said that he had seen the original Will dated 7th September, 2001. During the hearing of the appeal also, the original Will was produced.

25. In the written submissions, the counsel for the Appellant has raised various objections to argue in support of his submission that the original Will was not produced. In both the judgments passed by the Trial Court,

there is no finding that the original Will was not produced. The Trial Court has taken the Will as having been proved. The Trial Court has held that the Will is neither forged nor fabricated and probate of the Will is not compulsory and mandatory in Delhi. The attesting witness has proved the Will beyond reasonable doubt. Thus, this court holds that the objection as to non-production of the original Will is completely baseless. In order to satisfy itself, this court had also examined the original Will which was produced during the course of the arguments and there is no reason whatsoever to disbelieve the same. Held accordingly.

26. Coming to the issue of the impleadment/substitution Order XXII Rule 3 and as to whether Sh. Paramjit Singh Maini was rightly allowed to pursue the suit filed by his father, - the Appellant has sought to make a distinction between an application under Order XXII Rule 10 and Order XXII Rule 3. The suit filed by Late Sh. Ram Singh Maini is a suit for mandatory injunction. Upon the demise of the father, on the basis of the Will, Sh. Paramjit Singh Maini was permitted to be substituted/impleaded as Plaintiff. When such an impleadment takes place, the suit is continued and the cause of action is the same as what was originally filed for. In ***Ambalika Padhi (Smt) and Anr. v. Radhakrishna Padhi and Ors.*** AIR 1992 SC 431, the Supreme Court held that there is no need for amendment of the suit or the relief asked for as the cause of action remains the same as that of the Plaintiff.

27. The Appellant relies upon ***Dukh Haran Tewary & Ors v. Dulhin Bihasa Kuer & Anr.*** AIR 1963 Pat 390 to argue that mere impleadment does not mean that the issue as to the entitlement of the LR is denied. There cannot be any dispute on this proposition. The mere impleadment of Sh.

Paramjit Singh Maini does not make him the owner of the suit property without establishing and proving the Will. Thus, it was incumbent upon Sh. Paramjit Singh Maini to prove the Will in accordance with law. He has done so by producing the Will, producing the attesting witness and proving that the Will was duly registered. Once these elements are proved and probate not being mandatory, he becomes the exclusive owner of the suit property. The issue as to whether he can continue the suit as filed by his father gets answered in the affirmative upon him proving the Will. Thus, the distinction sought to be drawn between Order XXII Rule 3 and Order XXII Rule 10, is rendered academic. There is no quarrel to the proposition that an order passed under Order XXII Rule 3 being not an appealable order, is challengeable in the appeal against the final judgment. This court accordingly heard submissions on the impleadment of Mr. Paramjit Singh Maini. However, since the Will stands proved, the impleadment is held to be correct and in accordance with law.

28. The Trial Court has therefore rightly held that the Plaintiff is entitled to the decree prayed for. The judgment warrants no interference and the appeal is dismissed. No order as to costs. All miscellaneous applications stand disposed of.

PRATHIBA M. SINGH, J.
Judge

JULY 04, 2018
Rahul