

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

% **Date of decision: 11th December, 2018**

+ **CS(OS) 634/2018 & IA No.16956/2018 (u/O XXXIX R-1&2 CPC).**

UMA SHANKAR & ANR.

.... Plaintiffs

Through: Mr. K. Sunil, Adv.

versus

ANAND PRAKASH

..... Defendant

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.16957/2018 (for exemption).

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

CS(OS) 634/2018 & IA No.16956/2018 (u/O XXXIX R-1&2 CPC).

3. The two plaintiffs, namely (i) Uma Shankar; and, (ii) Ved Prakash, have sued for (i) partition of half *ad measuring* 162.5 sq. yds. of property no.2902, Bazar Sirki Walan, Hauz Quazi, Delhi – 110 006 in terms of Will dated 26th June, 2008 executed by the father of the two plaintiffs and the sole defendant; and, (ii) for declaration restraining the sole defendant from dealing with the plaintiffs' portion of the property.

4. It is the case of the two plaintiffs, that the subject property belonged to the paternal grandfather of the plaintiffs and the defendant, who gifted one portion of the same to another son and executed a Will with respect to the portion, for which this suit has been filed, in favour of the father of the parties and on the basis of the said Will, the father of the parties got the property mutated in his name. It is further the case of the plaintiffs, that the father of the parties has left behind a validly executed last Will bequeathing

different portions of the property as shown in the site plan stated to be annexed to the Will, in favour of each of the two plaintiffs and the defendant. The plaintiffs, though have filed a copy of the Will before this Court, but have not filed the site plan stated to be annexed to the Will.

5. Finding, that as per the claim of the plaintiffs, the property already stands partitioned by metes and bounds vide the Will of the father of the parties, in terms of which the plaintiffs claim the plaintiffs and the defendant to be having title to the property, I have enquired from the counsel for the plaintiffs, how does a suit for partition lie.

6. A suit for partition lies only when the parties have undivided share in the property and in such a suit, first a preliminary decree for partition is passed determining the shares of each of the parties, followed by a final decree for partition, either of division of the property by metes and bounds as per the shares of the parties, and if the property is not capable of being divided by metes and bounds, by sale of the property and distribution of sale proceeds as per share declared in the preliminary decree for partition. At times, under Section 4 of the Partition Act, 1893, if any of the shareholder shows desire to purchase the share of the others, a final decree for partition in terms thereof also is passed.

7. On the contrary here, the property already stands divided by metes and bounds under the Will of the father under which, according to the plaintiffs, the plaintiffs and the defendant have title to the property. Once it is so, the plaintiffs cannot seek partition inasmuch as, as per the case of the plaintiffs themselves, the property stands partitioned.

8. The only grievance of the plaintiffs is that the defendant is in possession of the entire property and inspite of demand by the plaintiffs, is

not delivering the possession of the portion of the plaintiffs.

9. However at the time of hearing the counsel for the plaintiffs states that the plaintiffs are also in possession but the defendant besides in possession of his portion, is also occupying part of the portions of the property which under the Will have been bequeathed to the parties.

10. Though the counsel for the plaintiffs has contended so but is unable to show the paragraph in the plaint where the plaintiffs have claimed to be in possession of any part of the property.

11. What emerges is, that the grievance of the plaintiffs is of being ousted of possession of their property. However the plaintiffs, instead of suing for recovery of possession of their part of the property under the Will aforesaid of the father, have sued for partition.

12. It is not as if the plaintiffs are not aware of the said fact. The plaintiffs, in the Legal Notice dated 29th May, 2018 stated to have been issued preceding the suit, have infact demanded possession from the defendant of their portions of the property. However the plaintiffs, when suing, instead of suing for possession have sued for partition and which relief as per admissions of the plaintiffs themselves, is misconceived and has obviously been made, to avoid payment of court fees inasmuch as the suit for partition is filed paying fixed court fees provided therefor.

13. The counsel for the plaintiffs states that the plaintiffs have sued for partition because the defendant is refusing to admit the document claimed by the plaintiffs to be the last Will of the father, to be the last Will of the father.

14. I have enquired from the counsel for the plaintiffs, where the plaintiffs have pleaded so and whether the plaintiffs are willing to make a statement giving a go bye to the Will and claiming partition on the basis of intestacy of

the father and in which case the sister of the parties will also get a share.

15. The counsel for the plaintiffs is neither able to show any such plea nor is willing to make a statement electing to ignore the Will.

16. The counsel for the plaintiffs then states that the suit be entertained for declaration of the document being the Will. However the plaintiffs have not claimed any such relief and have not valued the suit for the purposes of court fees and jurisdiction for the relief of declaration. Valuation of a suit for the purpose of court fees and jurisdiction for the relief of declaration has to be the same. Moreover, in my opinion no suit for declaration of the document being the validly executed last Will lies and the remedy is of seeking probate.

17. The suit as filed is thus misconceived and is dismissed.

18. Though the plaintiffs shall have liberty to sue for appropriate remedy but on the condition that the plaintiffs, along with the plaint, file a copy of this order and disclose the same in the plaint.

No costs.

Dasti.

RAJIV SAHAI ENDLAW, J

DECEMBER 11, 2018

‘pp’..