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

+ **CS(OS) 106/2019**

RAMINDER AHLUWALIA Plaintiff
Through: **Mrs. Avnish Ahlawat, Adv.**

versus

SANDEEP WALIA & ANR. Defendants
Through: **None.**

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% 20.02.2019

IA No. 2632 & 2633/2019 (for exemptions)

1. Allowed, subject to just exceptions.
2. The applications are allowed.

CS(OS) 106/2019 & IA No.2631/2019(u/O.XXXIX R.1 & 2 CPC)

3. The plaintiff has sued the wife and son of the brother of the plaintiff for partition of property no.11/11, East Patel Nagar, New Delhi claiming that the plaintiff has a two-third share therein and the two defendants together have the remaining one-third share therein.
4. According to the plaintiff, the property aforesaid belonged to the father of the plaintiff who died leaving a validly executed last Will bequeathing the property for lifetime to his wife and after the demise of his wife to his three sons including the plaintiff, in separate divisible portions as detailed in the Will. It is further the case of the plaintiff that the mother of

the plaintiff survived the father of the plaintiff and after the demise of both parents, the three sons got the Will probated and also got the leasehold rights in the land underneath the property mutated in their names. It is further pleaded that the living arrangement of the parties in the property is not as provided in the Will.

5. It is yet further the case of the plaintiff that another brother of the plaintiff in his lifetime, for consideration agreed to sell his portion of the property to the plaintiff and executed a Will, registered Agreement to Sell, Power of Attorney, etc. in favour of the plaintiff but the said brother died before the sale deed could be executed and the plaintiff, under the Will of the said brother, has become the owner of the portion/share of the said brother in the property.

6. I have enquired from the counsel for the plaintiff, that the plaintiff having pressed title to the property under the Will of the father whereunder separate divisible portions of the property were bequeathed to three sons, how is the suit for partition maintainable. A suit for partition does not lie when the parties are owners of separate divisible portions of the property. Reference in this regard can be made to ***Uma Shankar vs. Anand Prakash***, 2018 SCC OnLine DEL 12867, ***Rajeev Chhabra vs. Surinder Khurana***, 2018 SCC OnLine DEL 7109, order dated 1st February, 2019 in CS(OS)63/2019 titled ***Uma Gupta vs. Indu Gupta*** and orders dated 7th January, 2019 and 16th January, 2019 in CS(OS) 566/2016 titled ***Sukh Sagar Sahni vs. Salil Sagar Sahni***.

7. The counsel for the plaintiff states that the property is not divided by metes and bounds.

8. Even if that be so, a suit for partition would not lie and a suit for recovery of possession of own portion of the property and for direction to the other owners of the property to allow the plaintiff to demarcate own portion would lie.

9. I have further enquired from the counsel for the plaintiff, that if the plaintiff claims title to the portion of his deceased brother under his Will, whether not the natural heir of the said deceased brother are a necessary and proper party.

10. I have yet further enquired from the counsel for the plaintiff that once the father of the plaintiff under his Will has bequeathed life interest to his wife i.e. mother of the plaintiff and the mother of the plaintiff survived the father, whether not under Section 14 of the Hindu Succession Act, 1956, the said limited interest of the mother would become absolute property of the mother and on the demise of the mother, the property will be inherited in the absence of her Will, by all her legal/natural heirs which would also include the two sisters of the plaintiff who have not been impleaded.

11. The counsel for the plaintiff has contended that the Will of the father has been probated and mutation has also been carried out.

12. Probate does not determine the entitlement under the Will and the mutation, it is well settled, does not divest title.

13. Counsel for the plaintiff seeks time to consider and if required to amend the plaint.

14. I am of the opinion that no purpose would be served by adjourning the matter. It is deemed appropriate to reject the plaint with liberty of course to

the plaintiff to file an appropriate suit addressing all the aforesaid questions, if according to the plaintiff, the plaintiff is still entitled to maintain a suit for partition. However, the plaintiff along with the fresh suit, if any, to file a copy of this order.

15. The plaint is rejected in terms of the above.

RAJIV SAHAI ENDLAW, J

FEBRUARY 20, 2019

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