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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 31st October, 2019

+ **CM (M) 452/2019 & CM APPL. 12663/2019**

PRAVEER CHANDRA Petitioner
Through: Mr. Ranjit Sharma, Advocate.
(M:9818493174)

versus

APRAJITA & ORS Respondents
Through: Mr. S. K. Bhattacharya, Mr. Sushil
Kalra and Mr. Suresh Bharti,
Advocates for R-1. (M:9213107534)
Mr. Binay K. Das and Ms. Priyanka
Das, Advocates for R-2 & 3.
(M:9868888234)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition challenges the impugned order dated 25th April, 2018 by which the Petitioner's application under Section 10 CPC seeking stay of the partition suit has been dismissed.
2. The brief background is that the testatrix - Late Smt. Shanti Singh had executed an alleged Will dated 17th May, 2009. The Petitioner/Defendant No.6 (*hereinafter* 'Defendant No.6') filed probate petition no.46/2011 under the Indian Succession Act, 1925 before the Civil Judge, Motihari, Bihar. The said petition was dismissed in default on 16th April, 2013 and was restored on 17th January, 2017.
3. While the probate petition was dismissed and was yet to be restored, Smt. Aprajita – Respondent no.1 herein (*hereinafter* 'Respondent') filed a partition suit before the District Court in Delhi on 20th July, 2015 seeking

partition of the estate of Late Smt. Shanti Singh.

4. In this background, Defendant No.6 filed an application under Section 10 CPC seeking stay of the partition suit during the pendency of the probate petition. The same was rejected by the Trial Court on 25th April, 2018 by the impugned order. The finding of the Trial Court, after discussing the various case laws including the judgments in ***Ravi Khanna v. Pankaj Khanna*** 152(2008) DLT 484 and ***Kanwarjit Singh Dhillon v. Hardy Singh Dhillon and Ors.***, (2007)11 SCC 357 is that the petition seeking probate and proceedings for partition are not required to be stayed on account of the pendency of each other. The conclusion of the Trial Court in the impugned order is as under:

“13. In view of the above decisions, it is quite apparent that whereas a will may be in issue in two separate proceedings inter alia proceedings for probate and proceedings for partition qua the same property, neither of the two proceedings are required to be stayed on account of the pendency of the other. The proceedings in the probate petition only determine the genuineness and due execution of the will whereas a suit for partition is concerned more with the title/share of the parties. Since the two proceedings operate in different spheres, this court finds no reason to stay the present proceedings for partition as the matter directly and substantially in issue in the present suit is not the same as under consideration in the probate proceedings before the court at Motihari, East Champaran, Bihar.

14. The application under section 10 CPC is dismissed.”

5. The Defendant No.6, thereafter, sought review of the said order. The said review was rejected on 11th October, 2018. Ld. counsel for the

Defendant No.6 submits that the issue in the suit is that the Will is forged and fabricated. Until and unless the said issue is adjudicated in the probate proceedings and the probate is either rejected or granted in favour of the Defendant No.6, the partition suit lacks any basis. According to him, therefore, the suit ought to be stayed. He relies on the judgments of the Supreme Court in *Chiranjilal Shrilal Goenka (Deceased) through LRs vs. Jasjit Singh And Ors.*, 1993 SCC (2) 507 and *Binapani Kar Chowdhury v. Sri Satyabrata Basu and Anr.* [Appeal (Civil) 5784 of 2002, decided on 16th May, 2006]. He also relies on *Ashok Kumar Ray v. Smt. Reba Biswas and Ors.*, AIR 2017 Orissa 48 and *Shri Gurmeet Singh Chopra v. Smt. Taruna Chopra & Ors.*, [CM (M) 305/2010, decided on 22nd March, 2010].

6. On the other hand, ld. counsel for the Respondent submits that a probate petition cannot be considered to be a suit under Section 10 CPC. He also relies upon the judgment in *Ravi Khanna (supra)* to argue that under similar circumstances, the Court has refused to stay the partition suit. He further relies upon the judgment of the Patna High Court in *Amrita v. Rakesh Kumar*, [Civil Writ Jurisdiction Case No.6832 of 2013, decided on 11th February, 2016].

7. After going through the judgments cited on behalf of both the parties, the first question is whether a probate petition would constitute a suit under Section 10 CPC.

8. This court agrees with the Patna High Court decision in *Amrita (supra)* which holds that the nature of the proceedings i.e. the probate proceedings and partition suit are completely different. Probate proceedings are expected to be summary in nature whereas in a partition suit detailed evidence is led by the parties concerned. The Patna High Court in *Amrita*

(*supra*) observed as under:

“ In a petition under Article 227 of the Constitution of India before this Court, learned counsel for the petitioner refers to an order passed by the Hon’ble Supreme Court in the case of Nirmala Devi Vs. Arun Kumar Gupta and others reported in (2005) 12 SCC, 505. In the said order the title suit was transferred to be decided along with the probate case. Thus, it is argued that since identical question of law and fact is involved in the Probate Case and the Patna High Court CWJC No.6832 of 2013 dt. 11-02-2016 3 Partition suit, both proceedings either should be decided together or the partition suit should be stayed. Probate proceedings are summary in nature whereas partition suit is plenary in nature where the question of unity of title and possession is to be examined. In the said title suit the legality and validity of the Will can also be examined by the Civil Court.

The proceeding in a particular suit and the Probate proceedings are distinct. Proceeding in title suit cannot be stayed which are plenary in nature whereas the Probate proceeding are summary in nature to be granted by a Court of limited jurisdiction. The order of the Supreme Court referred to by the learned counsel for the petitioner is an order passed to club the proceedings of the Probate proceeding and the title suit and not deciding an issue that the proceedings of the title suit are required to be stayed. In that view of the matter, the said judgment is of no assistance to the learned counsel for the petitioner for the question raised in this writ petition

This writ application is, accordingly, dismissed.”

9. In **Ravi Khanna** (*supra*) the Id. Single Judge of this Court has held that there is no clash between probate proceedings and a partition suit. Insofar as the **Chiranjilal** (*supra*) judgment is concerned, the Supreme Court in the said judgment has laid down the nature of probate proceedings being

proceedings *in rem*, which proposition is not in dispute. The observations of the Supreme Court are as under:

“16. The grant of probate by court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is conclusive as to the due execution and validity of the will unless it is duly revoked as per law. It binds not only upon all the parties made before the Court but also upon all other persons in all proceedings arising out of the Will or claims under or connected therewith. The decision of the Probate Court, therefore, is the judgment in rem. The probate granted by the competent court is conclusive of the validity of the Will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate.

.....
20. ... The Probate Court has been conferred with exclusive jurisdiction to grant probate of the Will of the deceased annexed to the petition (suit); on grant or refusal thereof, it has to preserve the original will produced before it. The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act. It is a judgment in rem and conclusive and binds not only the parties but also the entire world. The award deprives the parties of statutory right of appeal provided under section 299. Thus the necessary conclusion is that the Probate Court alone has exclusive jurisdiction and the Civil Court on original side or the Arbitrator does not get jurisdiction, even if consented to by the parties, to adjudicate upon the proof or validity of the Will propounded by the executrix, the appellant”

10. The observations of the Supreme Court in ***Chiranjilal (supra)*** that the Probate Court alone has exclusive jurisdiction to grant a probate and a Civil Court would not be entitled to examine the validity of the Will is obviously

in the context of a petition seeking probate of a Will. A civil court cannot examine the validity of a Will for the purpose of granting a probate of the Will, but the scope of the issues to be determined in a probate petition is limited. In a civil suit where the Will is called in issue, the Court can look at various surrounding circumstances, including allegations relating to suspicious circumstances if any, genuineness of the Will, whether there were Wills prior to or subsequent to the Will relied upon etc., - which issues may not arise in a Probate petition. The scope of proceedings in a partition suit are broader than that in a probate petition.

11. Insofar as the present petition is concerned, the question is as to whether the partition suit requires to be stayed in view of the pendency of the probate proceedings. A perusal of the partition suit, clearly, shows that the Respondent - Smt. Aparajita is praying for partition of the estate of her mother - Late Smt. Shanti Singh and the Defendant No.6 being one of the sons of the testatrix, has set up a Will. In respect of the said Will, in paragraph 9 of the suit, the following is pleaded: -

“9. That the defendant No. 6 dishonestly and with malafide intention forged and fabricated the WILL dated 17.5.2009 allegedly executed by Smt. Shanti Singh in respect of three properties which are also subject matter of the present suit and on the basis of aforesaid forged and fabricated WILL dated 17.5.2009 filed a Probate Petition No.46/2011 before the Court of Subordinate Judge-1, Motihari, East Champaran, Bihar which has been dismissed vide order dated 16.4.2013.”

12. The allegation of the Respondent is that the Will is forged and fabricated and the Respondent has, clearly, disclosed that there is a petition for probate pending in the Civil Court at Motihari, Bihar. The partition suit

was filed at the time when the probate petition stood dismissed for non-prosecution. Thereafter, the said petition was restored only in 2017. All the legal heirs have been made parties in the present suit for partition. The issues to be considered in the present suit for partition, would be broader than just examining the validity of the Will. The questions as to what would be the various properties that are to be considered of the testatrix and what would be the shares of the various parties would also have to be examined in the partition suit. However, there is no doubt that the Will would play a crucial role in the defence of Defendant No.6.

13. A probate petition, strictly speaking, cannot be considered to be a 'previous suit' under Section 10 CPC. Ideally, a probate petition and the partition suit between the same parties ought to be heard and adjudicated together, in order to avoid multiplicity of proceedings and conflicting findings/decisions. However since the suit is pending in the District Courts, Delhi and the probate petition is pending before the Civil Judge, Motihari, Bihar, this Court is of the opinion that the probate petition having been filed 8 years ago i.e. in 2011 and the partition suit being also pending for more than 4 to 5 years, the trial in the partition suit shall continue.

14. In ***Binapani Kar Chowdhury (supra)*** the Supreme Court has resolved the issue of conflict between decision in a probate petition and a partition suit, in the following manner.

“4. Section 213 of the Succession Act (“the Act” for short) provides as to when the right of the executor or legatee is established. Sub-section (1) thereof provides that no right as executor or legatee can be established in any court unless a court of competent jurisdiction in India has granted probate of the Will under which the right is claimed (or has granted letters of

administration with the Will or with a copy of the Will annexed). It is not in dispute that the said section applies in the case of Wills made by a Hindu who is a resident of Calcutta. The trial court and the High Court have proceeded on the basis that having regard to Section 213 of the Act, the suit cannot be decided unless the executor of the Will produces the probate. Section 213 clearly creates a bar to the establishment of any right under a Will by the executor or legatee unless probate or letters of administration of the Will have been obtained. This Court in Hem Nolini Judah v. Isolyne Sarojbashini Bose [1962 Supp (3) SCR 294 : AIR 1962 SC 1471] held as follows: (SCR p. 303)

“The words of Section 213 are not restricted only to those cases where the claim is made by a person directly claiming as legatee. The section does not say that no person can claim as a legatee or as an executor unless he obtains probate or letters of administration of the Will under which he claims. What it says is that no right as an executor or legatee can be established in any court of justice, unless probate or letters of administration have been obtained of the Will under which the right is claimed, and therefore it is immaterial who wishes to establish the right as a legatee or an executor. Whosoever wishes to establish that right, whether it be a legatee or an executor himself or somebody else who might find it necessary in order to establish his right to establish the right of some legatee or executor from whom he might have derived title, he cannot do so unless the Will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration.”

5. Therefore, where the right of either an executor or a legatee under a Will is in issue, such right can be established only where probate (where an executor has

been appointed under the Will), or letters of administration (where no executor is appointed under a Will), have been granted by a competent court. Section 213 does not come in the way of a suit or action being instituted or presented by the executor or the legatee claiming under a Will. Section 213, however, bars a decree or final order being made in such suit or action which involves a claim as an executor or a legatee, in the absence of a probate or letters of administration in regard to such a Will. Where the testator had himself filed a suit (seeking a declaration and consequential reliefs), and he dies during the pendency of the suit, the executor or legatee under his Will, can come on record as the legal representative of the deceased plaintiff under Order 22 Rule 3 CPC and prosecute the suit. Section 213 does not come in the way of an executor or legatee being so substituted in place of the deceased plaintiff, even though at the stage of such substitution, probate or letters of administration have not been granted by a competent court.

6. *However, there appears to be some divergence in views on the question whether a decree can be passed in the absence of probate (or letters of administration), where the suit or action has been initiated by the testator himself (and not by anyone claiming a right as the executor or legatee under a Will), and the executor/legatee subsequently comes on record as the legal representative on the death of the testator. One view is that after the death of the testator, when an executor or a legatee comes on record and proceeds with the suit, he is trying to enforce his right under a Will and, therefore, Section 213 would come into play and the probate or letters of administration will have to be obtained before the judgment is delivered (see Arijit Mullickv. Corpn. of Calcutta [(1979) 2 Cal LJ 426]). The other view is that Section 213 will not apply as the suit was not filed to establish any right of*

an executor of legatee under a Will, and that as the testator himself having filed the suit, the issue in the suit is only about the right claimed by the plaintiff testator and not about the right claimed by the executor/legatee under the Will (see Gobinda Ballav Chakraborty v. Biswanath Mustafi [AIR 1980 Cal 143 : (1979) 2 Cal LJ 325]). We do not propose to examine this question in this appeal, as the respondent is unrepresented, and this appeal can be disposed of on the special facts and circumstances of this case. ”

15. From the above it is clear that both the probate petition and the suit for partition can proceed. If the Trial Court decides that the partition suit is liable to be dismissed, then no further orders would be required to be passed. However, if the suit is decreed, it is directed that the said decree would come into effect after the decision of the probate petition, which is pending in Motihari, Bihar. Post the decision in the probate petition, parties are left to avail of their respective remedies in respect of decisions in both proceedings.

16. The present petition along with all pending applications are, accordingly, disposed of.

PRATHIBA M. SINGH
JUDGE

OCTOBER 31, 2019/dk