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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:- 25.07.2019

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RFA 511/2012 & CM No.19729/2014

ASHOK RANI

..... Appellant

Through Mr.R.P.Taman, Adv.

versus

SHEELA DEVI

..... Respondent

Through Mr.Sudeep Sudan, Adv.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

1. The present regular first appeal u/s 96 of the Code of Civil Procedure has been preferred by the defendant/appellant impugning the judgment and order dated 15.09.2012 passed by the learned Additional District Judge, Dwarka Courts, New Delhi, whereunder the suit being CS No.195/11/10 instituted by the respondent seeking partition and permanent injunction has been decreed.

2. The respondent/Ms.Sheela Devi, who was the legally wedded wife of late Mr.Bahadur Singh had instituted the captioned suit seeking partition and injunction qua the property left behind by her late husband Mr.Bahadur Singh. It was pleaded that her husband had expired on 26.02.2004 leaving behind two legal heirs; the respondent his legally wedded wife and the appellant herein, who was his only child. The appellant who was arrayed as the sole defendant in the suit, opposed the suit and in her written statement filed before the learned trial court, took the plea that the respondent/Ms.Sheela Devi was not entitled to claim any share in the property left behind by her father as the respondent after her divorce from Late Bahadur Singh,

had received an alimony of Rs.5 lakhs in full and final settlement of her claims. The appellant thereafter raised an additional plea by filing an amended written statement, wherein she sought to rely on an undated note alleged to have been written by her father, bequeathing the suit property to her.

3. During the pendency of the suit, an application under Order 1 Rule 10 CPC seeking impleadment was moved by one Mr.Sanjay Kumar alleging that the late Mr.Bhadur Singh had entered into an agreement to sell with him in respect of the suit property and had also executed a G.P.A in his favour. Though this impleadment application was rejected, the appellant then sought to rely on a Will dated 23.05.1989 alleged to have been executed by her father, which she claimed had come to her knowledge, only after the filing of the impleadment application by Mr.Sanjay Kumar.

4. The learned trial court after granting a number of opportunities to the appellant to prove the hand written note claimed to have been written by her father as also the alleged Will dated 23.05.1989 vide its order dated 21.08.2012 rejected the appellant's prayer to lead evidence to prove the Will dated 23.05.1989 set up by her, by observing as under:-

“ An application has been filed on behalf of the defendant under section 151 CPC seeking permission to produce evidence to prove Will dated 23.5.1989. Repeatedly defendant is filing application to delay the outcome of the trial. Previously also an application for Will has been filed and defendant was given time to prove the Will but ultimately defendant failed to prove. There is no merit in application hence dismissed.

*Final arguments on behalf of the plaintiff heard.
Defendant to file written arguments within 7 days. Put up
on 15.09.2012 for order.*

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5. As neither the hand written note nor the Will set up by the appellant were proved, the learned trial court after finding that the appellant and the respondent were the only two class one legal heirs of late Mr. Bahadur Singh, decreed the respondent's suit for partition of metes and bounds by holding that the parties would be entitled to equal shares. The learned trial court also directed the appellant to hand over possession of half share of the suit property to the respondent and further restrained the appellant and her agents from selling and creating third party interest in the suit property till the possession of her share was handed over to the respondent/plaintiff.

6. Being aggrieved by the judgment passed by the learned trial court decreeing the respondent's suit, the appellant/defendant has preferred the present appeal. Along with the appeal, an application under Order XLI Rule 27 CPC seeking permission to produce additional evidence to prove the alleged Will dated 23.05.1989, has been filed. Learned counsel for the appellant submits that though the appellant did not lead any evidence since she has already filed a probate petition seeking probate of the Will dated 23.05.1989 in her favour, which petition is pending before the learned Additional District Judge, Dwarka Courts, she may be permitted to lead additional evidence before this Court, to prove the Will.

7. It is settled law that the provisions of Order XLI Rule 27 (1) of

the CPC can be invoked by a party to produce additional evidence before the Appellate Court, only if he establishes that the said evidence was not within his knowledge, or could not, after the exercise of due diligence, be produced by him during pendency of the suit before the trial court. In the light of the admitted position the appellant was well aware of the Will during the pendency of the suit and was also granted various opportunities by the learned trial court to produce evidence to prove the Will, which opportunities she miserably failed to avail, in my considered opinion, the appellant has not able to make out any case for leading additional evidence before this Court.

8. At this stage, it may be noted that during the pendency of the present appeal, the sole respondent has expired. Based on a Will dated 08.09.2010 claimed to have been executed by the respondent her brother Shri.Kashmiri Lal Pruthi has been substituted as her legal representative in these proceedings. Shri.Kashmiri Lal Pruthi has also filed a probate petition being PC/5/2016, in respect of the Will in his favour which petition is pending before the Court of learned Additional District Judge, Dwarka Courts, Delhi.

9. After some arguments, learned counsel for the appellant submits that keeping in view the changed circumstances, he does not press the appeal on merits, but states that this Court may protect the possession of the appellant, till the probate proceedings initiated at the behest of Shri.Kashmiri Lal Pruthi are decided. He submits that since the respondent/plaintiff Ms.Sheela Devi has expired and, in case, the Will set up by Shri.Kashmiri Lal Pruthi is not proved, the appellant in

any event being the only legal heir of Ms.Sheela Devi will become the sole owner of the entire suit property.

10. Learned counsel for the respondent has no objection to the said prayer made by the learned counsel for the appellant. He, however, prays that the appellant should also be restrained from creating any third party rights or changing the nature of the property in any manner till the probate petitions are decided by the Court.

11. The appeal is accordingly disposed of by confirming the impugned judgment and decree with the only modification that the appellant will not be dispossessed from the property till the probate petition initiated by Shri.Kashmiri Lal Pruthi being PC/5/2016 is decided. In the event the probate petition filed by Shri.Kashmiri Lal Pruthi is decided, the appellant will be liable to handover vacant possession of 50% of the suit property in terms of the impugned judgment and decree. The appellant is, however, directed to maintain status quo qua the title and possession of the suit property, till the decision of the pending probate petition initiated by Shri.Kashmiri Lal Pruthi.

12. The appeal stands disposed of in the above terms along with pending application.

REKHA PALLI, J

JULY 25, 2019

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