

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

% **Date of decision: 11th February, 2019**

+ **CS(OS) 575/2016, IA No.250/2017**

DR. RAVI AGARWAL

..... Plaintiff

Through: Mr. S. Bhandari, Adv.

Versus

USHA KUMAR & ORS.

..... Defendants

Through: Mr. Rohit Rattu, Adv. for D-1 to 3
along with Defendant nos. 1 to 3 in
person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. On 18th December, 2018, the following order was passed in IA No.250/2017 of defendant nos. 1 to 3 under Order VII Rule 11 of the Code of Civil Procedure, 1908(CPC) in this suit:

"1. The counsel for the applicants/defendants states that rejection is sought on the ground of this suit for partition being barred by res judicata. It is stated that the defendants No.1&2 had earlier filed CS(OS) No.315/2016 against the plaintiff and one Gopal Agarwal for recovery of possession of a portion of the said property and the said suit was disposed of as compromised vide order dated 12th August, 2016.

2. The applicants/defendants have however not placed before this Court the pleadings in CS(OS) No.315/2016.

3. It is informed that CS(OS) No.315/2016 was compromised at the initial stage, without even a written statement being filed.

4. Prima facie it appears that the plea of res judicata does not arise.

5. It has also emerged in the hearing that the father of the plaintiff, defendant No.1 and defendant No.2 (defendant No.3 is the wife of the defendant No.2) was the owner of the subject property and it is the stand of the defendants that he died leaving a Will whereunder he bequeathed demarcated portions of the property in

favour of the plaintiff, defendant No.1 and defendant No.2 respectively.

6. *The counsel for the plaintiff states that the plaintiff is disputing the said Will.*

7. *The counsel for the applicants/defendants has drawn attention to page 59 of Part II-A file being a legal notice dated 30th May, 2016 got sent by the plaintiff to the defendant No.2 and in which the plaintiff called upon the defendant No.2 to comply with the subject Will.*

8. *The counsel for the applicants/defendants also states that now a probate case has been filed in the Saket Courts seeking probate of the said Will.*

9. *It is also found that the plaintiff, besides seeking partition of ground floor of property No.M-142, Greater Kailash-II, New Delhi, has also sought partition of:*

“(ii) Majority shareholding in A.R. Electronics Pvt. Ltd., D-118, Sector 10, Noida, U.P.;

(iii) A.R. Electronics Pvt. Ltd. owns the immovable property, which consists of approximately 114 sq. meter plot area of Industrial Land with built up GF and FF factory at D-118, Sector 10, Noida, U.P.;

(iv) Property No.105/B-74B in Sector 153 Noida, U.P. which was bought from the sale assets of A.R. Electronics Pvt. Ltd., which has been registered in the name of defendant No.3;

(v) Fixed Deposits in sum of Rs.10 lakhs lying in State Bank of India and Standard Chartered Bank and HDFC Bank in Delhi (details may be provided by the defendants); and,

(vi) Total 94.037 and 238.047 Principal Mutual Funds Units in Account Number 13672202 in Central Bank of India Delhi.”

However, the pleas in this respect are vague and the counsel for the plaintiff, on enquiry states that he will be summoning the records to find out the exact position.

10. *The stage of summoning during evidence is for proving what*

is pleaded and not for the plaintiff to find out its own case.

11. *The plaintiff, while admitting the property at serial No.(iii) above to be of A.R. Electronics Pvt. Ltd., is claiming partition thereof, without A.R. Electronics Pvt. Ltd. being a party to the suit. Even otherwise, the property of a Private Limited Company cannot be the subject matter of a suit for partition and the counsel for the plaintiff has no idea why he has claimed the said relief for partition of property admittedly of A.R. Electronics Pvt. Ltd.*

12. *Similarly, the property at serial No.(iv) above is stated to be in the name of defendant No.3 and the claim thereagainst is made on the plea that the same has been purchased in the name of the defendant No.3 from the sale of assets of A.R. Electronics Pvt. Ltd.*

13. *The counsel for the plaintiff is reminded of The Prohibition of Benami Property Transactions Act, 1988. There is no basis in the plaint of making a claim for partition of property at serial No.(iv).*

14. *It appears that the plaintiff, in pursuing the suit in such a manner, is just interested in keeping the suit pending and is not interested in any effective relief.*

15. *Last opportunity is given to the plaintiff to first make proper enquiries and plead a specific case before this Court with respect to the aforesaid properties, else the properties No.(iii) & (iv) will be deleted from the list of properties subject matter of suit.*

16. *It also appears that the outcome of this suit depends upon the outcome of the probate which has subsequently been filed in Saket Courts.*

17. *The counsels to consider, whether any purpose will be served in proceeding with this suit till the decision of the probate case.*

18. *It would be appropriate that the parties make a statement that in the event of probate being granted, the present suit will be dismissed and in the event of the probate being refused, the ground floor of property No.M-142, Greater Kailash-II, New Delhi, shares of A.R. Electronics Pvt. Ltd., the monies in the Fixed Deposits and the Mutual Funds will be partitioned, with the plaintiff, defendant No.1 and the defendant No.2 having 1/3rd share each therein.*

19. *List for further consideration on 11th February, 2019."*

2. The counsel for the defendant nos. 1 to 3 states that he is agreeable to disposal of the suit as proposed in para 18 of the order dated 18th December, 2018.
3. The counsel for plaintiff states that, as observed in paragraph 13 of the order dated 18th December, 2018, *Benami* law does not come into play because it is the case of the plaintiff that property no.105/B-74 B in Sector 153, Noida, UP which was bought by defendant no.3 from the sale of assets of A.R. Electronics Pvt. Ltd., forms the estate of the common predecessor.
4. I have enquired from the counsel for the plaintiff, whether not for the purposes of finding out whether the monies for purchase of the subject property have flown out of the sale of assets of A.R. Electronics Pvt. Ltd., the accounts of A.R. Electronics Pvt. Ltd., will have to be gone into and how the said accounts can be gone into without A.R. Electronics Pvt. Ltd. being party to the suit. It has further been enquired, whether not for returning such a finding, A.R. Electronics Pvt. Ltd., which is not a party to this suit, has to be a party to the suit.
5. The counsel for plaintiff has no answer.
6. Now when this order is being dictated, the counsel states that under Order I Rule 10 CPC A.R. Electronics Pvt. Ltd. can always be added.
7. The fact remains that no application in this regard was filed and the counsel for the plaintiff wants this Court to *suo moto* do the same.
8. There are no averments in the plaint with respect to A.R. Electronics Pvt. Ltd. and in the absence of averments the Court cannot *suo moto* exercise the power. Even otherwise, the Court cannot proceed with

the suit on the basis of what may be possible and keep on deferring the orders in the suit. Thus, there is no merit in the said contention.

9. The counsel for the plaintiff then states that Probate Case has been filed two and a half years after the suit for partition and 18 years after the demise of the common predecessor.

10. If it is so, it was open to plaintiff to take the said plea in opposition to the probate.

11. On enquiry, it is stated that the Probate Case is pending in the Saket Courts and issues have been framed therein and the same has been listed for recording of evidence.

12. This Court cannot, in this suit, return a finding of the Probate Case, not pending in the court, being not maintainable or time barred. Though the Probate Case has been filed after institution of this suit but being a proceeding in *rem*, has primacy, specially when issues even have not been framed in this suit for partition.

13. In ***Rukmani Devi Vs. Narendra Lal Gupta*** (1985) 1 SCC 144, the question was whether an execution proceeding, in which the genuineness of a Will was for consideration, should take precedence or a subsequently filed Probate Case. It was held to be well settled that a decision of the Probate Court is a judgment in *rem* and is conclusive as to the execution and validity of the Will till the grant of probate is revoked. It was further held that a decision of Probate Court would bind not only the parties to the probate but the whole world and for this reason a solemn duty is cast on the Probate Court. It was held that the execution proceedings should await the outcome of the Probate Case. Similarly, in ***Chiranjilal Shrilal Goenka Vs. Jasjit Singh*** (1993) 2 SCC 507, the question for adjudication

was whether a previously instituted arbitration proceedings, in which the validity of a document claimed to be the Will was in issue or the subsequently instituted Probate Case should take precedence ; the Probate Case was again granted precedence. The matter is put beyond a pale of doubt by ***Balbir Singh Wasu Vs. Lakhbir Singh*** (2005) 12 SCC 503 where the question for adjudication was whether a previously instituted civil suit challenging the execution of a Will should take precedence or a subsequently instituted Probate proceedings. Reliance was placed on Section 10 of the CPC. It was held that the decision of the civil suit would not conclude the Probate proceedings because the question whether the probate should be granted or not would still be left to be determined, where no doubt the decision in the civil suit would be relevant. The two proceedings were however clubbed together by the Supreme Court in exercise of its jurisdiction. This is also found to have been the consistent view of the High Court of Orissa also in ***Ashok Kumar Ray Vs. Reba Biswas*** AIR (2017) Orissa 18, ***Charulata Panda Vs. Upendra Kumar Mohapatra*** (2017) SCC Online Ori 298 and ***Rajlaxmi Singh Deo Vs. Shivendra Narayan Bhanja Deo*** (2017) SCC Online Ori 462. The same has been the view of the Division Bench of the High Court of Madras in ***Alagammai Vs. V.Rakkammal*** AIR 1992 Madras 136.

14. The counsel for the plaintiff has also referred to ***Kanwarjit Singh Dhillon vs. Hardy Singh Dhillon & Ors.*** (2007) 11 SCC 357 and ***Harish Chander Kawatra Vs. State*** 2009 SCC OnLine DEL 1480 to contend that a probate proceeding is different from a suit.

15. However, a perusal of the said judgments shows that the suit in that case was concerning title of the properties which were subject matter of

the Will of which probate was sought. It was for this reason that it was so held.

16. Supreme Court in *Krishna Kumar Birla vs. Rajendra Singh Lodha*, 2008 4 SCC 300 as well as in *Pasupati Nath Das vs. Chanchal Kumar Das*, 2018 SCC Online SC 1647 held, that a Probate Court cannot go into questions of title and that a separate suit would be maintainable relating to questions of title. However, in this case the title of the deceased to their estate is not under dispute and thus the probate proceedings will determine whether the title to the property is to devolve in accordance with the document claimed to be the Will or in accordance with the law of succession.

17. Though the counsel for the plaintiff states that issues be framed in this suit also but since a Probate Case has precedence as aforesaid, it is not deemed appropriate to multiply proceedings for determination of the same question, i.e. whether the document claimed to be the Will of common predecessor is the validly executed last Will and it is deemed appropriate to dispose of this suit in terms of order dated 18th December, 2018 with liberty to the parties to seek drawing up of a decree in the suit in terms of the said paragraph 18 subject to the outcome of the Probate Case.

18. The parties are also granted liberty to apply for all interim orders required with respect to the estate in the said Probate Case. The suit is disposed of.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 11, 2019

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