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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision : 12.03.2020

+ TR.P.(C.) 161/2019 & CM No. 49960/2019

AMITESHWAR SINGH & ANR

..... Petitioners

Through: Mr.Akshay Makhija,
Mr.Saurabh Seth, Ms.Mahima
Bahl Malhotra & Ms.Seerat
Deep Singh, Advs.

versus

KAMAL NAIN

..... Respondent

Through: Ms.Deepika V. Marwaha &
Ms.Raunika Johar, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed *inter alia* praying for the following relief:-

"a. Pass an order directing the transfer of the Probate Petition No. 39/2016 [earlier 02 / 2014] titled as "Mrs. Kamal Nain v. State & Ors." currently pending before Sh. Sandeep Garg, Additional District Judge, Patiala House Court, New Delhi to this Hon'ble Court;

b. Pass further orders consolidating Probate Petition No. 39/2016 [earlier 02 / 2014] titled as "Mrs. Kamal Nain v. State & Ors." currently pending before Sh. Sandeep Garg, Additional District Judge, Patiala House Court, New Delhi with CS (OS) No. 1439/2015 titled as "Amiteshwar Singh v. Kamal Nain & Anr."

2. The probate petition referred hereinabove has been filed by the respondent herein seeking grant of probate with respect to the alleged Will dated 15.05.2007 of Late Shri. Surinder Singh Chowdhary. The suit has been filed by the petitioner against the respondent herein as also the petitioner no. 2 herein praying *inter alia* for a decree of partition with respect to the property bearing No. 64B, Sainik Farms, New Delhi. The said property is only one of the properties/assets of the deceased that are mentioned in the Will. The probate petition was filed in the year 2014 and the partition suit has been pending since May, 2015. The present petition has been filed only on or around November, 2017. It is stated that the probate petition is at the stage of recording of the evidence. It is further stated that in the suit, the respondent herein has filed an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 on which arguments are being heard. The learned counsel for the petitioners, however, submits that such application was filed only after framing of the issues in the Suit.

3. As far as the issues are concerned in the suit, following issues have been framed by the order dated 05.09.2016:-

“5. After hearing learned counsel for the parties, the following issues are framed:

(i) Whether the suit fails to disclose any cause of action and is, therefore, not maintainable in law?

OPD-1

*(ii) Whether the suit is barred by limitation? **OPD-1***

*(iii) Whether suit is barred under Order VII Rule 11 CPC? **OPD-1***

*(iv) Whether the Plaintiff is entitled to claim partition and ½ share of the suit property? **OPP***

*(v) Whether the Plaintiff is entitled to the relief of permanent injunction in relation to the suit property? **OPP***

(vi) Relief.”

4. In the probate petition, the following issues had been framed by the order dated 31.10.2019:-

“Pleadings are complete. From the pleadings of the parties following issues are framed:

*1. Whether the petitioner is entitled to letter of administration / probate in respect of Will dated 15.05.2007 executed by Late (Sh.) Surender Singh Choudhary, as prayed for? **OPP***

*2. Whether there is no legal impediment to grant of probate in favour of petitioner? **OPP***

3. Whether the petition is not maintainable? OPR 2 & 3

4. Whether the property in question could not have been bequeathed by Late (Sh.) Surender Singh Chaudhary, being HUF property of Sardar Surender Singh Choudhary, HUF? OPR 2 &3

5. Whether the Will in question is not tenable as per law? OPR 2 &3

6. Relief”

5. By the subsequent order dated 07.03.2020, Issue no. 4 framed in the probate proceedings has been ordered to be deleted.

6. As noted hereinabove, the probate petition has been filed seeking probate of the alleged last Will of Shri. Surinder Singh Chowdhary. The Will, apart from the property which is the subject matter of the suit, bequeaths other properties as well. The suit is confined only to the property which is mentioned hereinabove.

7. In the suit, the petitioner no.1 avers the following in the paragraph 9 of the plaint:-

“9. That Late S. Surinder Singh Chowdhary had during his lifetime executed a Will dated 15.05.2007 bequeathing the entire Suit Property to the Defendants in equal proportion. The said Will appears to have been made under a misconception as the Suit Property was always an HUF property and Late S. Surinder Singh Chowdhary could not have bequeathed the entire Suit Property to the

aforesaid persons. At best, Late S. Surinder Singh Chowdhary could have bequeathed his share in the Suit Property to the Defendants. To this extent, the bequest in the Will of Late S. Surinder Singh Chowdhary is void and bad in law. It may be pointed out that as per the Will of Late S. Surinder Singh Chowdhary, it had been clearly stipulated in Clause 5 that the share of Late S. Surinder Singh Chowdhary in the HUF would be divided equally between Mrs. Punit Kaur, the Plaintiff and the Defendants. It is submitted that the Suit Property itself forms the property of the HUF, and as such ought to be divided between the Plaintiff and the Defendants being the surviving coparceners.”

8. A reading of the above would clearly show that the petitioner infact accepted the execution of the Will by the testator. In view of the above, there will be no commonality of issues or evidence between the probate petition and the suit, especially when the Issue no. 4 framed in the probate petition by the order dated 31.10.2019 stands deleted by the subsequent order dated 07.03.2020.

9. The learned counsel for the petitioners has placed reliance on the judgments of the Supreme Court in **Balbir Singh Wasu vs. Lakhbir Singh and Others**, (2005) 12 SCC 503, and **Nirmala Devi vs. Arun Kumar Gupta and Others**, (2005) 12 SCC 505 to contend that in a similar circumstance the Supreme Court had directed the probate proceedings and the Civil Suit to be tried by the same Court. He further places reliance on the order dated 29.01.2013 passed by this Court in TR.P. (C) 20/2012 titled **Sanjay Arora and Ors. vs. Sudhir**

Kumar Arora and Ors, as also of the order dated 10.01.2017 of this Court in TRP. (C) 127/2019 titled ***Ajay Kumar Gupta & Anr. vs. Roopa Gupta***, to contend that even this Court has ordered transfer and joint trial of probate proceedings and Civil Suit.

10. In the peculiar facts of the present case, I am not persuaded by the arguments of the learned counsel for the petitioners. In the present case, as noted hereinabove, in the Suit there is no challenge to the execution of the Will by the testator. The only challenge is to the status of the property and the rights of the testator to bequeath the same. This is not the subject matter of the probate petition and the learned Court has rightly deleted the issue with respect to the same by its order dated 07.03.2020.

11. In view of the above, I find no merit in the present petition and the same is dismissed.

NAVIN CHAWLA, J

MARCH 12, 2020/rv