

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

% **Date of decision: 31st January, 2020.**

+ **CS(OS) 37/2020**

NILIMA SINHA

..... Plaintiff

Through: Mr. Divjyot Singh and Ms. Avsi M. Sharma, Advs.

Versus

DILIP KUMAR SHRIVASTAVA & ORS.

..... Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

IA No.1375/2020 (for exemption)

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CS(OS) 37/2020 & IA No.1373/2020 (u/O XXXIX R-1&2 CPC) & 1374/2020 (u/S 151 CPC)

3. The plaintiff has sued her two brothers and a sister and the heirs of another brother since deceased, for partition of property No.14, Palam Marg, Vasant Vihar, New Delhi.
4. It is the case of the plaintiff, (i) that the property was owned by the parents of the plaintiff; (ii) that the father of the plaintiff died on 21st January, 1992, leaving a Will whereunder his share in the property was bequeathed in favour of the mother of the plaintiff; (iii) that on demise of the father of the plaintiff, the mother of the plaintiff became the sole owner of

the entire property and the leasehold rights in the land underneath the property were mutated in favour of the mother of the plaintiff alone; (iv) that the mother of the plaintiff died on 6th January, 2017, leaving a Will dated 31st May, 1994 and four Codicils dated 25th August, 2002, 29th May, 2007, 20th March, 2008 and 14th October, 2008, bequeathing separate portions of the property to her two daughters and three sons, for their lifetime, and ultimately to their children; (v) that for this reason, the children of all the siblings have also been impleaded as defendants to the suit; (vi) that however the brothers of the plaintiff are denying the entitlement of the plaintiff to the ground floor of the rear wing of the property, which has been bequeathed exclusively to the plaintiff for her life and after the plaintiff to her children and the second floor of the rear wing, which has been bequeathed to the plaintiff and her sister defendant No.3 jointly, for their life and after them to their children; (vii) that in fact, the brothers of the plaintiff have set up a document dated 19th July, 2014 as the last Will of the mother of the plaintiff; and, (viii) that the mother of the plaintiff, on 19th July, 2014 when the said document is stated to have been executed, was not in a sound disposing mind.

5. On the aforesaid pleas, the suit for partition and for injunction restraining the defendants from dealing with the property and for rendition of accounts is filed.

6. The plaintiff, in paragraph 36 of the plaint, without giving any particulars, has vaguely pleaded that the mother of the plaintiff has also left behind movable properties including jewellery, bank balance, cash etc. and

which also, according to the Will of the mother relied upon by the plaintiff, are to be divided equally between the parties.

7. The suit is valued for the purposes of jurisdiction at Rs.25 crores and court fees of Rs.20/- for the relief of partition has been affixed thereon.

8. The case with which the plaintiff has approached this Court being of the plaintiff, under the Will of her mother having become the sole absolute owner of ground floor of the rear wing of property No.14, Palam Marg, Vasant Vihar, New Delhi and joint owner along with defendant No.3 of the second floor of the rear wing of the said property, I have enquired from the counsel for the plaintiff, how a claim for partition is maintainable, when according to the plaintiff, the property has already been partitioned under the Will and whether not the relief which the plaintiff as per the averments in the plaint is entitled to, is of recovery of possession of the ground floor from whosoever it is in possession of. The claim for partition can at best only be with respect to movables, against all the defendants, and with respect to the second floor of the rear wing of the property, but only against the defendant No.3 Arti Shrivastava with whom according to the plaintiff, the plaintiff has become the joint owner of the said second floor under the Will and Codicils of her mother.

9. The counsel for the plaintiff states that the plaintiff has also sought the relief of possession.

10. The plaintiff, in prayer paragraph (a) has sought the relief of preliminary decree for partition in terms of the Will dated 31st May, 1994 and the Codicils dated 25th August, 2002, 29th May, 2007, 20th March, 2008 and 14th October, 2008 and in prayer paragraph (b) sought the relief of final

decree for partition, again in terms of the Will and Codicils aforesaid and of putting the plaintiff in possession of her share in terms of the Will and Codicils.

11. There is a distinction in law, in claiming possession on the basis of exclusive title and in claiming separate possession pursuant to a decree for partition.

12. The question of partitioning the property as sought would arise, if according to the plaintiff, the plaintiff were to have an undivided share in the property and of which partition was required vis-à-vis others having the remaining share in the property. Here, as per the averments in the plaint, the plaintiff is the exclusive owner of the ground floor of the rear wing and the joint owner along with the defendant No.3 of the second floor of the rear wing of the property and the case for partition can only be against defendant No.3 and with respect to the second floor of the rear wing of the property only, and not against the others. The plaintiff having accepted the Will and Codicils under which according to the plaintiff separate portions of the property having been bequeathed to plaintiff and defendants, according to plaintiff there is no joint property. Only if it were the plea of plaintiff that her mother died intestate, would there have been a joint property, of which partition could have been sought.

13. The question is no longer *res integra*. Attention of the counsel for the plaintiff is invited to ***Prem Mehta Vs. Raj Kumar Mehta*** 2016 SCC OnLine Del 1756, ***Uma Shankar Vs. Anand Prakash*** 2018 SCC OnLine Del 12867, order dated 7th January, 2019 and 16th January, 2019 in CS(OS) 566/2016 titled ***Sukh Sagar Sahni Vs. Salil Sagar Sahni*** and order dated 1st February, 2019 in CS(OS) 63/2019 titled ***Uma Gupta Vs. Indu Gupta***.

14. As far as the relief of partition of movables is concerned, as aforesaid, no particulars thereof have been pleaded and no separate valuation thereof disclosed and the suit as aforesaid, is not maintainable for the relief of partition of movables.

15. The suit as filed is thus misconceived.

16. The counsel for the plaintiff, at this stage states that the plaintiff, if required to pay court fees, will pay court fees.

17. The plaintiff is required not only to pay court fees but also to frame the plaint in an appropriate manner and to confine the relief in the suit to that of recovery of possession as aforesaid, against whosoever may be in possession of the portion of the property exclusively bequeathed to the plaintiff i.e. the ground floor of rear wing of the property and of partition with respect to movable properties against her brothers/heirs of the deceased brother and with respect to the second floor, against her sister alone.

18. The plaint, on the averments contained therein does not disclose a cause of action for the reliefs claimed and is accordingly rejected.

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RAJIV SAHAI ENDLAW, J.

JANUARY 31, 2020

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