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

+ RFA(OS) 33/2019 and CM APPL. 16344/2019

DR RAVI AGARWAL Appellant
Through: Mr. S. Bhandari, Advocate

versus

USHA KUMAR & ORS Respondents
Through: Mr. Rohit Rattu, Adv. for R-1 to R-3.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

% **11.03.2020**

1. The appellant/plaintiff is aggrieved by a judgment and order dated 11.02.2019, passed by the learned Single Judge, disposing of a suit for partition instituted by him against his siblings, praying *inter alia* for a decree of declaration and a decree of partition in respect of a residential premises owned by the father of the parties.

2. By the impugned order, the learned Single Judge has allowed an application moved by the respondents No.1 to 3/defendants under Order VII Rule 11 CPC (I.A. 250/2017), praying for rejection of the plaint on three grounds, firstly that the suit was barred by *res judicata* in view of a settlement arrived at by the parties in CS(OS) 315/2016, a suit instituted by the respondents against the appellant herein in respect of the very same premises, secondly on the ground that there was deficiency in the court fee

and lastly on the plea of lack of cause of action.

3. In the impugned order, the learned Single Judge observed that a Probate Case has been filed by the respondent No.1 in the Saket District Court, for grant of a Letter of Administration in respect of the last Will and testament dated 01.01.1997, purportedly executed by the predecessor-in-interest of the parties, late Brig. A.D. Agarwal, wherein issues had already been framed and the said matter was at the stage of recording of evidence. Holding that a decision of the Probate Court is a judgment in rem and would be conclusive as to the execution and validity of a Will and that a previously instituted civil suit challenging execution of the Will, as has been done in the present case, ought not take precedence over a subsequently instituted probate proceedings, the learned Single Judge opined that the civil suit cannot conclude till the probate proceedings are finalised. As a result, it was observed that it was inappropriate to multiply proceedings for determining the same question, i.e. whether the document claimed to be the Will of the predecessor-in-interest of the parties, is the validly executed last Will and testament of Brig. A.D. Agarwal, since deceased and therefore the suit instituted by the appellant was disposed of in terms of an earlier order dated 18.12.2018, with liberty granted to the parties to seek drawing up of a decree in the suit in terms of para 18 of the aforesaid order, subject to the outcome of the probate proceedings.

4. We may note that para 8 of the order dated 18.12.2018, that has been extracted in the impugned order dated 11.02.2019, reads as follows:-

“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.”

5. Learned counsel for the appellant questions the peremptory manner in which the suit instituted by the appellant/plaintiff has been disposed of. He submits that ideally, the probate petition filed by the respondent No.1 ought to have been clubbed with the suit for partition instituted by the appellant. On our enquiring from him as to whether any steps were taken by the appellant to approach the High Court or the Probate Court asking for transfer of the Probate Petition to the High Court for being clubbed with CS(OS) 575/2016, the reply is in the negative.

6. In our opinion, it was for the appellant/plaintiff to have taken timely steps if such was his request. It cannot be left to the court to summon the records of the Probate Petition pending before the District Court and tag it with the suit instituted by the appellant, on its own.

7. Learned counsel for the appellant states that his client would be satisfied if it is clarified by this court that upon conclusion of the probate proceedings, if he is left with a lawful grievance, the appellant would be entitled to file a civil suit for seeking partition of the movable and immovable assets of late Brig. A.D. Agarwal. Learned counsel for the respondents states that he has no objection to the aforesaid prayer being allowed.

8. Accordingly, with the consent of the parties, the present appeal is

disposed of while making it clear that upon disposal of the Probate Petition filed by the respondents No.1 to 3, pending in the District Court, Saket, wherein the appellant is participating, if permissible in law, the parties shall be entitled to file a civil suit for partition and other reliefs in respect of the estate of late Brig. A.D. Agarwal.

9. The present appeal is disposed of alongwith the pending application.

HIMA KOHLI, J

ASHA MENON, J

MARCH 11, 2020

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