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

+ **FAO (OS) 548/2013 and CM APPL. 18955/2013 (stay)**

DHRUV GOYAL & ORS

..... Appellant

Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Trideep Pais, Mr. Sanjeevi Seshadri, Ms. Rakshanda Deka and Ms. Sanya Kumar, Advocates.

versus

ANAND PRAKASH GOYAL & ORS

..... Respondent

Through: Mr. Sanjiv Bahl, Ms. Apoorva Bahl, Ms. Richa Sandihuja, Ms. Niti Jain and Mr. Paras Aggarwal, Advocates for R-2.
Mr. Ankit Jain, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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03.02.2020

1. At the very first hearing of this appeal, the following order was passed:-

“CM No.18954/2013

Exemption is allowed subject to all just exceptions.

FAO(OS) 548/2013 & CM APPL. 18955/2013

Mr. Sorabjee the learned senior counsel appearing on behalf of the appellants states that the appellants would be willing to explore the possibility of settlement because it is long standing dispute amongst the family members. It is for this reason we are issuing notice.

Issue notice returnable on 27.01.2014.”

2. Consequently, the present appeal is taken up for hearing today. Learned counsel for the Respondent pointed out that the limited issue on which notice was issued has worked itself out, since the parties have not been able to reach a settlement.

3. Nevertheless, Mr. Dayan Krishnan, learned senior counsel for the Appellant, points out that one set of parties have anyway settled the disputes and insists that the appeal be heard.

4. One issue that has arisen is regarding the maintainability of the present appeal against the impugned order of learned Single Judge dated 26th September, 2013, which while disposing of the Plaintiff/Appellant’s IA No. 20137/2012 under Order XIV Rule 5 read with Rules 2 and 3 thereof and Section of the 151 Code of Civil Procedure (‘CPC’) has directed as under:

“IA 20137/2012 (under Order 14 Rule 5 CPC filed by the plaintiff No. 1 seeking leave to frame additional issues)

No reply is filed by the contesting defendants.

Heard the learned counsels for the parties on this application. On perusal of the record, the following additional issue is framed for trial as Issue No. 3A:

"If the findings of issue No. 3 are in the affirmative, what is the effect of the Will in the absence of probate?" OPD.

IA stands disposed of.”

5. When questioned on how the present appeal is maintainable, Mr. Krishnan refers to the decision of the Supreme Court in *Shah Babulal Khimji v. Jayaben D. Kania (1981) 4 SCC 8* and submits that since the

issue arising from the impugned order is one of limitation, the appeal would be maintainable.

6. On the strength of the decision in *Pratap Singh & Anr. v. State & Anr. 173 (2010) DLT 132 (DB)*, Mr. Krishnan submits that if a probate is not sought within three years of the dispute being raised in respect of the Will, no probate can be granted, and that this is the issue in the present suit as well.

7. The Court is unable to agree with the above submission. The issue that has been framed is simply whether the Respondents/Defendants would be able to take advantage of the Will set up by Defendant No. 3/Respondent No. 3 in the absence of a probate. The Court does not see the issue itself as being one of limitation.

8. It is needless to state that all other issues on merits are left open for the parties to urge at the appropriate stage in the suit.

9. Consequently, the appeal is not maintainable and is dismissed, as such. The pending application is also disposed of.

S.MURALIDHAR, J.

TALWANT SINGH, J.

FEBRUARY 03, 2020/ pa