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

% *Date of Decision : August 05, 2015*

\+ **RFA (OS) 75/2015**

RADHA KRISHAN VERMA & ANR. .....Appellants
Represented by: Ms.Santwana, Advocate for
Dr.L.S.Chaudhary, Advocate

versus

RAKESH KUMAR VERMA & ANR. .....Respondents
Represented by: None

CORAM:
HON'BLE MR.JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

CM No.13986/2015

Allowed subject to just exceptions.

CM No.13985/2015 & CM No.13988/2015

For the reasons stated in the two applications delay in filing and re-filing the appeal is condoned.

RFA (OS) No.75/2015

1. As per practice directions issued by this Court suit record is available. The same has been perused by us. We find no merit in the appeal.

2. Four siblings, three brothers and a sister named Rakesh Kumar, Anil Kumar, Sunil Kumar and Ms.Veena Verma filed a suit seeking partition of property bearing No.C-35, Rajouri Garden, New Delhi. As

pleaded by them they and defendant No.1, Radha Krishan Verma i.e. the first appellant, had 1/5th share each in the suit property. Appellant No.2 Kapil Verma was impleaded as defendant No.5, apart from three other persons as defendants No.2 to 4, and against him the plea was that being the son of defendant No.1 he used to threaten the plaintiffs. The basis of the five siblings having 1/5th share each in the suit property was a will stated to have been executed on August 21, 1993 by Late Raghunath Prasad Verma, the father of the parties, who died on January 25, 2000 as per which the five siblings and their mother Sarbati Devi were the beneficiaries. As per the plaintiffs, Sarbati Devi died intestate on January 16, 2006.

3. Served with summons in the suit, the defendant No.1 and defendant No.5 (father and son) i.e. the appellants did not deny the will propounded by the plaintiffs as having been executed by their father on August 21, 1993.

4. On September 11, 2014, a consent order was passed passing a preliminary decree declaring share of the four plaintiffs and defendant No.1 to be 1/5th each. The order records a consent. It records that after Meena dies her 1/5th share shall be inherited equally by her four brothers. That apart, in view of the written statement filed, the preliminary decree as passed on September 11, 2014 was the only legal course available for the learned Single Judge.

5. The appellants filed an appeal against the consent decree which was registered as RFA (OS) No.155/2014, which they withdrew on December 03, 2014 saying that they wanted to file a review application before the learned Single Judge.

6. RP No.21/2015 was filed thereafter in which the appellants admitted the father having executed the will on August 21, 1993, but

claimed that as per the will the suit property could not be partitioned and could not be sold. They also pleaded that plaintiff No.4 i.e. the sister sibling had only a life interest in the property.

7. Vide impugned order dated February 20, 2015, the learned Single Judge noted that while passing the preliminary decree, which was on consent, it was duly recorded that let the share of the parties be declared to be $1/5^{th}$ with the condition that on the demise of the sister her share would be inherited by her brothers i.e. plaintiffs No.1 to 3 and defendant No.1. The review application was accordingly dismissed.

8. We have perused the will dated August 21, 1993 executed by Late Raghunath Prasad Verma. He has duly recorded in the will the assets owned by him, one of which is the suit property i.e. House No.C-35, Rajouri Garden. The will shows that he has consciously bequeathed the house to his four sons, one unmarried daughters and the wife while consciously excluding his two married daughters. He has noted that the unmarried daughter Meena is physically handicapped. In the will he has made an unequivocal bequest in favour of his four sons, one unmarried daughter and the wife. After making the unequivocal bequest he has tried to cut down the same by recording that neither beneficiary shall have a right to sell the house, but restricted to the lifetime of Sarbati Devi and Meena. It is followed up by it being recorded in the will that after Meena's death her share in the house would be divided equally amongst his four sons.

9. Now, law is clear. Once an unequivocal bequest is made, any cutting down of the interest is void. Section 138 of the Indian Succession Act, 1925 reads that where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee receives the fund

sans the directions.

10. Be that as it may, if at all any grievance could be made to the preliminary decree, it could be by Meena who could argue that her counsel did not give her proper legal advice. But Meena accepts the preliminary decree which records that her 1/5th share would be treated as life interest and on her death would be inherited by her four brothers.

11. As regards the appellant, only appellant No.1 could have a say in the matter and not his son, the appellant No.2.

12. The argument of learned counsel for the appellant that the house cannot be sold has no legal foundation because as per law the bequest by the father has to be treated as absolute and the wish of the father that during the lifetime of his wife and his unmarried daughter Meena the house could not be sold is of no help to the appellant No.1, for the reason if at all, only Meena could have said that during her lifetime the house could not sold if she accepted the will to mean that it gave her a right of residence therein. As regards the appellant No.1 his interest as per the will can at best be 1/5th in his own right and 1/4th of 1/5th to be inherited on the death of Meena.

13. The consent given by the parties which has resulted in the preliminary decree is in harmony with aforesaid understanding of the will by the parties and the appellants cannot resile from the consent given.

14. We need to highlight that the appellants have a stake in continuing with the litigation because a perusal of the plaint would show that they are the ones who are occupying an area more than their entitlement and have even encroached upon common areas.

15. There is no merit in the appeal which is dismissed. And since the appeal is dismissed in limine without notice to the respondents, we do not impose any costs.

CM No.13987/2015

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

AUGUST 05, 2015
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