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

CS(OS) No.491/2008 & IA No.3633/2017 (of defendant no.2 under Section 151 CPC).

DR. (MRS.) PRAMILA SRIVASTAVA ..... Plaintiff

Through: Mr. Irfan Ahmed, Adv.

versus

ASHA SRIVASTAVA & ORS. ..... Defendants

Through: Mr. Siddharth Yadav, Adv. for D-2.
Mr. Jeevesh Nagrath, Mr. Pratham Sharma and Mr. Rohan Ganpathi, Advs. for D-3&5.

AND

\+ TEST.CAS. No.89/2008 & IAs No.11490/2008 (u/S 151 CPC), 16178/2013 (u/O VIII R-1A(3)&6 CPC), 25581/2014 (u/O XVI R-1 CPC) & 1805/2016 (u/O XVI R-1 CPC).

GAUTAM SRIVASTAVA ..... Petitioner

Through: Mr. Siddharth Yadav, Adv.

versus

THE STATE & OTHERS ..... Respondents

Through: Mr. Jeevesh Nagrath, Mr. Pratham Sharma and Mr. Rohan Ganpathi, Advs. for D-3&4.
Mr. Irfan Ahmed, Adv. for R-6.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

<u>O R D E R</u>

% 25.04.2017

1. This order is in continuation of the order dated 21st April, 2017 in CS(OS) No.491/2008.

2. In accordance with the said order, the Test. Cas. is also listed today.

3. The controversy between the parties is with respect to the future course for recording of evidence.

4. CS(OS) No.491/2008 has been filed for partition of certain properties claimed by the plaintiff to be the properties of R.P. Srivastava & Sons, Hindu Undivided Family (HUF). It is further the case of the plaintiff in the suit that R.P. Srivastava has died intestate.

5. Gautam Srivastava being the defendant no.2 in the suit has filed Test. Cas. No.89/2008 seeking probate of the Will of R.P. Srivastava. Gautam Srivastava also disputes that the properties are of the HUF.

6. The defendant no.1 in the suit namely Asha Srivastava is the mother of Gautam Srivastava and is supporting Gautam Srivastava. Similarly defendants no.3&5 in the suit namely Anita Chandra and Sita Kumar are the sisters of Gautam Srivastava and though a separate counsel appears for them but their stand is also the same as of Gautam Srivastava .

7. The defendant no.4 in the suit Dr. Ms. Saroj Srivastava is stated to be *ex parte*.

8. The defendants no.6&7 in the suit namely Damini Srivastava and Aparajita Srivastava are the daughters of the plaintiff and though a separate counsel is stated to be appearing for them who is today not present; they are however supporting the plaintiff in the suit.

9. Though separate issues were framed in the two proceedings but the two proceedings were subsequently ordered to be consolidated for the purposes of evidence.

10. Gautam Srivastava being the petitioner in the Test. Cas. has examined his witnesses on the issues framed in the Test. Cas.

11. The counsel for the plaintiff in the suit however states that Gautam Srivastava, besides leading evidence in the Test. Cas. has also led evidence in the suit. He in this regard draws attention to the order dated 20th November, 2013.

12. I have however enquired from the counsel for the plaintiff in the suit that even if what he is claiming is correct, whether not owing to the onus of issue no.3 in the suit being on the plaintiff, the defendant no.2 Gautam Srivastava in the suit would have a right to lead evidence in rebuttal.

13. The counsel for the plaintiff in the suit then states that the defendant no.2 Gautam Srivastava in the suit being in possession of the property has been delaying the disposal of the suit. It is stated that already last opportunity has been given to him to file affidavits and the same have not been filed.

14. I have considered the controversy.

15. On enquiry it is informed that the immoveable properties subject matter of dispute were recorded in the name of R.P. Srivastava individually and there is no Income Tax Assessment in the name of R.P. Srivastava & Sons (HUF).

16. The counsel for the plaintiff however states that he has filed some documents from the Municipal Corporation of Delhi to the effect that the properties were of HUF. He also states that he disputes that there was no Income Tax Assessment in the name of R.P. Srivastava & Sons HUF. However the counsel for the plaintiff in the suit is unable to justify on what basis he states that there was a Income Tax Assessment of HUF; though he claims that all documents are with defendant no.2 Gautam Srivastava and he

is suppressing the same.

17. Further consolidated evidence be led in the proceedings in the following manner:-

(i) The counsel for the defendants no.3&5 who are supporting the defendant no.2 Gautam Srivastava are not to lead any evidence in proof of the Will set-up by Gautam Srivastava.

(ii) The plaintiff and defendants no.6&7 may lead evidence on the issues in the suit burden whereof is on the plaintiff as well as in opposition to the evidence led on the Will including on issue no.2 in Test. Cas. onus whereof is on the plaintiff and the defendants no.6&7 who have filed objections in the Test. Cas.

(iii) The said witnesses of the plaintiff will be cross-examined first by the counsel for the defendants no.6&7 and thereafter by the counsel for defendants no.3&5 and lastly by the counsel for the defendants no.1&2.

(iv) After conclusion of evidence of the plaintiff, the defendants no.3&5 may lead their evidence but confined to the issues in the suit except issue no.1 and by way of rebuttal to issue no.2 in the Test. Cas.

(v) The witnesses of the defendants no.3&5 to be cross-examined first by the counsel for the defendants no.1&2 and thereafter by the counsel for the plaintiff and/or the counsel for the defendants no.6&7.

(vi) After the evidence of the defendants no.3&5, the defendants no.1&2 to lead evidence in the suit save on issue no.1 therein;

the defendant no.2 shall also be entitled to lead evidence in rebuttal on the issue no.2 in the Test. Cas.

(vii) There is no need for giving to the plaintiff any opportunity for any further rebuttal evidence thereafter.

18. The counsel for the plaintiff states that he has already filed affidavits by way of examination-in-chief.

19. The parties to take time from the Court Commissioner appointed for recording evidence for further recording of evidence in the manner aforesaid.

20. The counsel for the plaintiff has expressed apprehension that the counsel for the defendants no.1&2 and the counsel for the defendants no.3&5 may use the separate rights of cross-examination to delay and to improve evidence already led.

21. It is stated that the defendants no.1,2,3&5 were appearing through the same Advocate though had filed separate written statements.

22. There is merit in the aforesaid contention of the counsel for the plaintiff.

23. Separate Advocates engaged by the defendants no.1&2 and defendants no.3&5 are indication of an attempt to use the same to delay and to have a second chance for further cross-examination; the same cannot be permitted.

24. The counsel for the defendants no.1&2 and the counsel for defendants no.3&5 to decide amongst themselves which one of them is to cross-examine and the other if requires any particular question to be put, to have the same put through the cross-examining counsel.

<u>IA No.3633/2017 (of the defendant no.2 under Section 151 CPC) in CS(OS) No.491/2008.</u>

25. The counsel for defendants no.2 states that though in pursuance to the order dated 17th April, 2017 a draft Agreement to Sell was to be filed but the defendant no.2 since then has received a better offer and would be filing the proposed Agreement to Sell within ten days.

26. The application stands disposed of.

RAJIV SAHAI ENDLAW, J

APRIL 25, 2017
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