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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CS(OS) 346/2016 & IA No.8340/2016 (u/O XXXIX R-1&2 CPC)**
AJIT GOGNA Plaintiff
Through: Mr. Sunil Lalwani & Mr. Rahul Vijay
Gupta, Advs.
Versus
JITENDER GOGNA & ORS Defendants
Through: Mr. Siddharth Aggarwal, Adv. for D-1.
Ms. Jhum Jhum Sarkar, Adv. for D-2.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **31.01.2018**

1. This suit for partition of flat bearing no.8050, Pocket-II, Sector-B, Vasant Kunj, New Delhi, belonging to the deceased brother of the parties to the suit and who is stated to have died unmarried and issueless and whose parents are stated to have pre-deceased him, is ripe for framing of issues.
2. The counsel for the plaintiff states that only the defendant no.1 is contesting the suit on the basis of document claimed to be the Will of the deceased brother but original of which has not been produced.
3. Only the counsel for the defendant no.1 and the counsel for the defendant no.2 appear.
4. None appears for the defendants no.3 to 7 and it is stated that they have not appeared despite service.
5. On enquiry, it is stated that defendants no.3 to 7 have not been proceeded against *ex parte* as yet.
6. The defendants no.3 to 7 are now proceeded against *ex parte*.



7. On enquiry, where is the original of the document claimed to be the Will, the counsel for the defendant no.1 states “I am not aware. It must be with the client.”

8. Subject to the defendant no.1 filing the original of the document stated to be the Will by 7th February, 2018, the following issues are framed in the suit:

(i) Whether the document dated 28th October, 2009 is the validly executed last Will of the deceased Manohar Lal Gogna? OPD1

(ii) Relief.

9. It is made clear that no relief with respect to the shares is being framed inasmuch as if the document is proved to be the Will of the deceased, the plaintiff and the other defendants will not have any share therein and if the document is not proved to be the Will, it is not in dispute that the plaintiff, defendant no.1, defendant no.2, defendant no.3, defendant no.4, defendant no.5(a),(b) and (c) together, defendant no.6 and defendant no.7(a) and (b) together shall have equal share in the property.

10. It is further made clear that no issue with respect the claim in the suit for *mesne profit* is being framed as it is not in dispute that the defendant no.1 is in exclusive possession of the property and inasmuch as, it is the statement of the counsel for the plaintiff, supported by the counsel for the defendant no.2, that the letting value of the flat is Rs.40,000/- per month and if the defendant no.1 vacates the flat, they will be able to let out the flat at a minimum rate of Rs.40,000/- per month and deposit the same in the Court.



It is thus made clear that if the defendant no.1 fails in the suit, the amount of *mesne profit* calculated at the rate of Rs.40,000/- per month from the date of institution of the suit till the date of sale of the property minus the share of the defendant no.1 in the rent, shall be deducted out of the share of the defendant no.1 in the sale proceeds of the property.

11. It is further made clear that no issue with respect to the plea of the defendant no.1 of the appropriate court fees having not been paid on the plaint is being framed, since possession of one co-owner is possession of all and till the document under which the defendant no.1 is claiming to be in exclusive possession of the property, is not proved in the Court, it cannot be said that the plaintiff is not entitled to pay fixed court fees on the suit for partition.

12. If the defendant no.1 does not file original of the Will as directed, the plaintiff or any of the other defendants to apply to the Court for decreeing the suit forthwith inasmuch without the original Will coming before this Court, no purpose will be served in putting the suit to trial.

13. No other issue arises or is pressed.

14. The parties to file their list of witnesses within 15 days.

15. The onus of only issue being on the defendant no.1, the defendant no.1 to lead evidence first.

16. If the defendant no.1 intends to examine all the witnesses to the Will, the affidavits by way of examination-in-chief of all the said witnesses be produced together and the witnesses be produced on the same date for cross-examination.



17. The defendant no.1 to file affidavits by way of examination-in-chief within six weeks.

18. Option of having the evidence recorded on commission has been declined.

19. List before Joint Registrar on 4th April, 2017 for fixing the dates of trial.

IA No.8340/2016 (of the plaintiff under Order XXXIX Rules 1&2 CPC)

20. Till decision of the suit, all parties to the suit are restrained from alienating, encumbering or parting with possession of flat bearing no.8050, Pocket-II, Sector-B, Vasant Kunj, New Delhi.

21. The application is disposed of.

RAJIV SAHAI ENDLAW, J

JANUARY 31, 2018

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