

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

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Date of Decision: 1st March, 2017

+ **CS(OS) 2475/2007 & IAs No.20732/2011 (u/O XII R-6 CPC) & 6952/2016 (u/O XXIII R-1 CPC)**

DR. MUKESH SHARMA & ORS. Plaintiffs

Through: Mr. Jagjit Singh, Adv.

Versus

DR. MAHESHWAR NATH SHARMA Defendant

Through: Mr. Deepak Dhingra and Ms. Shivangi Singh, Advs.

AND

+ **TEST.CAS. 27/2008 & IAs No.4936/2008 (u/O XXXIX R-1&2 CPC) & 21981/2015 (for condonation of 30 days delay in compliance)**

DR. MAHESHWAR NATH SHARMA Petitioner

Through: Mr. Deepak Dhingra and Ms. Shivangi Singh, Advs.

Versus

STATE OF NCT OF DELHI & ORS Respondents

Through: Mr. Jagjit Singh, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. CS(OS) No.2475/2007 (suit) was filed on 10th December, 2007 by (i) Dr. Mukesh Sharma, (ii) Promila Tiwari, (iii) Veena Kaushik, (iv) Rekha Sharma & (v) Neera Sharma against Dr. Maheshwar Nath Sharma for partition of property No.10 Todarmal Lane, Bengali Market, New Delhi (Bengali Market property) and of plot of land bearing No.C-2/2, Sector-11, DLF Model Town, Faridabad (Faridabad property), pleading:

- (i) That the five plaintiffs and the sole defendant are the sons and daughters of Late Dr. T.N. Sharma.
- (ii) The perpetual lease of plot of land under Bengali Market property was granted in favour of Pt. Amarnath Sharma, grandfather of the parties and on demise of Pt. Amarnath Sharma, was inherited by Dr. T.N. Sharma, father of the parties and mutated in the name of Dr. T.N. Sharma.
- (iii) Dr. T.N. Sharma died on 11th September, 1990, leaving besides the five plaintiffs and the sole defendant as his children, his widow viz. Mrs. Satyawati Sharma.
- (iv) Pursuant to the demise of Dr. T.N. Sharma, Bengali Market property was mutated on 19th December, 1991 in the name of Mrs. Satyawati Sharma, mother of the parties, who got the leasehold rights therein converted into freehold and a conveyance deed of freehold rights dated 28th February, 2000 was executed in favour of Mrs. Satyawati Sharma.
- (v) Mrs. Satyawati Sharma died intestate on 24th July, 2007 leaving the five plaintiffs and the sole defendant as her children and only natural heirs.
- (vi) Mrs. Satyawati Sharma has left behind the Bengali Market property and the Faridabad property and on her demise both these properties have been jointly succeeded by the five plaintiffs and the sole defendant in equal share.

- (vii) That the defendant has entered into a sale transaction with respect to the Faridabad property but the dispute with respect to the said sale transaction is pending.
- (viii) That the defendant is claiming to be the sole owner of both the properties on the basis of a Will of Mrs. Satyawati Sharma but has not shown the alleged Will and the alleged Will even if existing is forged and fabricated.

Hence, the suit, with the five plaintiffs claiming 1/6th share each of the two properties.

2. The sole defendant contested the suit by filing a written statement supported by affidavit verified on 24th March, 2008 pleading:

- (a) that the father of the parties Dr. T.N. Sharma had acquired title to the Bengali Market property vide Gift Deed executed by his own father Pt. Amarnath Sharma and not by way of inheritance.
- (b) Dr. T.N. Sharma, father of the parties, prior to his death executed a Will dated 10th March, 1988 bequeathing the Bengali Market property in favour of his wife Mrs. Satyawati Sharma.
- (c) The five plaintiffs as well as the sole defendant admitted the said Will left behind by their father Dr. T.N. Sharma in favour of their mother Mrs. Satyawati Sharma and executed documents of acceptance thereof including affidavits, no objection and indemnity in favour of Land & Development Office (L&DO) and the L&DO accepted the said Will left behind by Dr. T.N. Sharma and on 19th December, 1991 mutated

the Bengali Market property in the name of Smt. Satyawati Sharma, mother of the parties, making her the sole, absolute and exclusive owner of the Bengali Market property.

- (d) Mrs. Satyawati Sharma during her lifetime got leasehold rights in the land underneath the Bengali Market property converted into freehold.
- (e) Mrs. Satyawati Sharma has left a validly executed and registered Will dated 29th April, 2003 bequeathing Bengali Market property absolutely to the defendant and the property at Faridabad to her daughters being the plaintiff nos.2 to 5.
- (f) Mrs. Satyawati Sharma, mother of the parties, applied for mutation of the Faridabad property also in her exclusive name on the basis of the Will dated 10th March, 1988 of Dr. T.N. Sharma and also entered into an Agreement to Sell dated 22nd September, 2003 with one Sunil Kumar of the Faridabad Property and received an amount of Rs.2,00,000/- against the total sale consideration of Rs.16,45,000/-.
- (g) Disputes and difference arose between Smt. Satyawati Sharma and Sunil Kumar and Smt. Satyawati Sharma cancelled the Agreement to Sell.
- (h) Sunil Kumar, in 2004 filed a suit in the Court of Civil Judge, Faridabad.
- (i) If the said Sunil Kumar succeeds in the said suit, he will have to pay balance sale consideration; on the contrary, if Sunil Kumar fails in the suit at Faridabad, the Faridabad property has to be mutated in the

name of Mrs. Satyawati Sharma and thereafter it will, in accordance with the Will dated 29th April, 2003 of Mrs. Satyawati Sharma, devolve on the plaintiffs no.2 to 5.

3. The five plaintiffs in their replication to the written statement aforesaid controverted and denied the Will dated 10th March, 1988 of Dr. T.N. Sharma and the Will dated 29th April, 2003 of Mrs. Satyawati Sharma.

4. The sole defendant in the suit, besides filing the written statement aforesaid contesting the suit, on 18th March, 2008 also filed Test. Cas. No.27/2008 (probate case) seeking letters of administration of the estate of Mrs. Satyawati Sharma with probate of her Will dated 29th April, 2003.

5. Needless to state that the five plaintiffs in the suit have filed their objections to the grant of probate.

6. Vide *ex parte* ad-interim order dated 18th December, 2007 in the suit, the sole defendant in the suit was restrained from creating any third party interest in respect of Bengali Market property. The said interim order was confirmed on 17th January, 2013.

7. Vide order dated 23rd November, 2009 in the probate case, the following issues were framed therein:

- “1. Whether the petitioner proves that the Late Satyawati Sharma executed a valid Will dated 29.4.2003, as claimed? OPP
2. Whether the Will executed by Late Smt. Satyawati Sharma dated 29.4.2009 (sic for 29.4.2003) is a forged / fabricated document?

3. Whether Late Smt. Satyawati Sharma was legally incompetent and physically and mentally incapable of making the Will dated 29.04.2009 (sic for 29.04.2005)?
4. Whether the Will dated 29.04.2009 (sic for 29.04.2005) executed by Late Smt. Satyawati Sharma is not a genuine and invalid document?
5. Is the Petitioner entitled the relief of probate as sought by him in the petition? OPP”

and the probate case as well as the suit were ordered to be consolidated and tried together with common evidence being led and the following additional issue was framed in the suit:

- “6. Is the plaintiff in CS(OS) 2475/2007 entitled to partition of the Suit property, as claimed, if so, to what extent? OPP”

and the evidence was ordered to be led in the probate case.

8. The sole defendant in the suit and who is the petitioner in the probate case has examined himself and when the proceedings were pending for remaining evidence of the sole defendant in the suit (who is the petitioner in the probate case), IA No.20732/2011 under Order XXII Rule 6 CPC was filed in the suit for decree on admissions.

9. Notice of the said application was issued. The sole defendant inspite of repeated opportunities failed to file any reply thereto. On 3rd December, 2012, the right to file reply was closed.

10. On 14th February, 2013, after hearing some arguments on the application aforesaid, this Court expressed an opinion that all the parties to the proceedings were taking contradictory stands as per their convenience in legal proceedings and before statutory authorities and neither of the parties had any regard for truth and for this reason only the suit as well as the probate case were liable to be dismissed. Opportunity was given to the parties to address on the said aspect.

11. The proceedings were thereafter adjourned from time to time.

12. In the order dated 6th May, 2015, giving reasons in detail, again view was expressed that shifting stand taken on oath by the parties called for redressal under Section 340 of the Cr.P.C; show cause notice was accordingly issued to the parties.

13. The plaintiff no.1 in the suit Dr. Mukesh Sharma died and his legal heirs were substituted.

14. The legal heirs of the plaintiff no.1 Dr. Mukesh Sharma, on 3rd June, 2016, withdrew the objections filed in the probate case and also withdrew from the suit.

15. Two other witnesses of the sole defendant in the suit (and who is petitioner in the probate case) tendered their affidavits by way of examination-in-chief into evidence on 9th November, 2016.

16. On 17th January, 2017, counsel appearing for the plaintiffs in the suit (and who are the objectors in the probate case) stated that the plaintiff no.4

Mrs. Rekha Sharma also did not want to proceed with the suit or with the objections in the probate case.

17. The counsels, on 17th January, 2017 were heard on IA No.20732/2011 under Order XII Rule 6 CPC in the suit and orders reserved.

18. The plaintiffs, vide IA No.20732/2011 under Order XII Rule 6 of the CPC, seek decree on admissions in the suit pleading:

- (i) That the Court of Civil Judge, Faridabad, in the judgment dated 22nd May, 2010 in the suit for specific performance of agreement to sell filed by Sunil Kumar aforesaid against Mrs. Satyawati Sharma and all the parties hereto, has returned a finding of fact that the Faridabad property belongs to all the legal heirs of deceased Dr. T.N. Sharma and the document dated 10th March, 1988 alleged to be the validly executed last Will of Dr. T.N. Sharma was a forged and fabricated document and Mrs. Satyawati Sharma was thus held to be the owner of 1/7th share only in the Faridabad property, with the five plaintiffs and the sole defendant in the suit having the remaining 6/7th share in the Faridabad property. The Court of the Civil Judge, Faridabad disposed of the suit for specific performance filed by Sunil Kumar by directing the five plaintiffs and the sole defendant to return the amount of Rs.4,00,000/- paid by Sunil Kumar along with interest.

- (ii) That the said decree of the Court of the Civil Judge, Faridabad was appealed against by the five plaintiffs and the sole defendant as well as by Sunil Kumar.
- (iii) That the Court of the District Judge, Faridabad has vide judgment dated 25th July, 2011 dismissed the appeal of the five plaintiffs and the sole defendant and has partly accepted the appeal of Sunil Kumar. The Court of the District Judge, while maintaining the finding returned by the Civil Judge that Mrs. Satyawati Sharma and the five plaintiffs and the sole defendant all had 1/7 share each in the Faridabad property, has passed a decree for specific performance in favour of Sunil Kumar with respect to 1/7th share of Smt. Satyawati Sharma in the property.
- (iv) That the judgment of the Court of the District Judge, Faridabad also confirms that there is no Will dated 10th March, 1988 of Dr. T.N. Sharma.
- (v) Once there is no Will of Dr. T.N. Sharma, the five plaintiffs and the sole defendant along with their mother Mrs. Satyawati Sharma inherited not only 1/7th share in the Faridabad property which was subject matter of the suit at Faridabad but also 1/7th share in the Bengali Market property.
- (vi) That thus the plaintiffs are entitled to preliminary decree for partition, holding the five plaintiffs to be having 1/6th share each in the two properties.

19. During the hearing on 17th January, 2017 it was enquired from the counsel for the plaintiffs that even if the contentions of the plaintiffs in the application under Order XII Rule 6 of the CPC were to be accepted, the issue, whether the document dated 23rd April, 2003 is the validly executed last Will of Mrs. Satyawati Sharma would remain to be determined and without adjudicating the same, how could the five plaintiffs and the sole defendant be held to be 1/6th owner of the two properties.

20. The counsel for the plaintiffs on 17th January, 2017 stated (and as recorded in the order of that date) that if the application under Order XII Rule 6 CPC is accepted, “then probate may be granted of the document dated 29th April, 2003 claimed by the defendant in the suit to be the validly executed last Will of the mother of the parties Mrs. Satyawati Sharma but the grant of the said probate would enure to the defendant only the mother’s share in the estate of the father.”

21. The counsel for the plaintiffs, during the hearing on 17th January, 2017, drew attention to i) the written statements filed by the five plaintiffs, the sole defendant and Mrs. Satyawati Sharma in the Faridabad suit denying the document dated 10th March, 1988 to be the Will of Dr. T.N. Sharma; ii) the portion of the cross-examination of the sole defendant in these proceedings admitting the said written statements; iii) the finding of the Court of the Civil Judge, Faridabad to the effect that there is no Will dated 10th March, 1988 of Dr. T.N. Sharma; and, iv) the finding of the Court of the District Judge, Faridabad in appeal, also to the effect that Dr. T.N. Sharma did not leave any Will dated 10th March, 1988, and contended that the sole

defendant having taken such a stand in the Faridabad Court cannot now before this Court plead to the contrary i.e. that Dr. T.N. Sharma left a Will dated 10th March, 1988.

22. Per contra, the counsel for the sole defendant argued i) that the recording of the evidence in the proceedings having commenced, the application under Order XII Rule 6 of the CPC cannot be entertained; ii) that the five plaintiffs, the sole defendant as well as the Mrs. Satyawati Sharma, after the demise of Dr. T.N. Sharma, at the time of getting the Bengali Market property mutated from the name of Dr. T.N. Sharma to the name of Mrs. Satyawati Sharma, took a stand that the document dated 10th March, 1988 is the validly executed last Will of Dr. T.N. Sharma and on the basis thereof the Bengali Market property was mutated in the sole name of Mrs. Satyawati Sharma.

23. It was however enquired from the counsel for the sole defendant as to how the aforesaid documents were of any avail in the face of the parties subsequently, before the Faridabad Court, taking the stand that Dr. T.N. Sharma had died intestate and the document dated 10th March, 1988 was forged and fabricated.

24. The counsel for the sole defendant contended that the answer to the question, whether a document is the Will of the deceased person is not dependent upon the statement of the natural heirs of that person and the Court is required to make an independent enquiry in this regard. Reliance in this regard was placed on *Sisir Kumar Chandra Vs. Monorama Chandra* AIR 1972 Calcutta 283 and *Jerbanoo Rustomji Garda Vs. Pootlamai*

Manecksha Mehta AIR 1955 Bombay 447 holding that a court of probate is a court of conscience which is not to be influenced by private arrangement of the parties and it either grants probate of a Will or rejects such grant and for such a court there is no middle path for a happy compromise and there can be no probate by consent.

25. It was enquired from the counsel for the sole defendant, whether not the aforesaid judgments cannot be said to be good law in the face of the judgment this Court in ***Harinder Singh Kochhar Vs. State*** (2010) 173 DLT 365 holding that with consent of the parties, the probate proceedings can be converted into a partition suit and a decree for partition can be passed therein. To same effect is the judgment of Division Bench of this Court in ***B.S. Oberoi Vs. P.S. Oberoi*** 2013 SCC OnLine Del 616 and judgment of Coordinate Bench in ***Ambica Mengi Vs. State*** MANU/DE/4557/2015.

26. No response was forthcoming or has come till now.

27. It was further enquired from the counsel for the sole defendant as to how the aforesaid question arises in the present case inasmuch as the sole defendant in the testamentary case filed is not claiming probate of any Will of Dr. T.N. Sharma and is claiming probate only of the document dated 29th April, 2003 claimed to be the validly executed last Will of Mrs. Satyawati Sharma. No specific issue even with respect to the document dated 10th March, 1988 claimed to be the validly executed last Will of Dr. T.N. Sharma was pressed by the counsel for the sole defendant or has been framed.

28. Again no response was forthcoming or has come till now.

29. The counsel for the sole defendant then contended that the findings of the Faridabad Court are with respect to the Faridabad property only and not with respect to Bengali Market property and for this reason also no case for decree on admissions is made out.

30. The counsel for the sole defendant, with respect to the notice to show cause issued on 6th May, 2015 why proceedings under Section 340 Cr.P.C. should not be taken against the parties, referring to ***Iqbal Singh Marwah Vs. Meenakshi Marwah*** (2005) 4 SCC 370, contended that the said proceedings have to be before the Faridabad Court only and cannot be before this Court inasmuch as the plea of document dated 10th March, 1988 claimed in the Faridabad Court to be not the validly executed last Will of Dr. T.N. Sharma was taken after having got the Bengali Market property mutated in the name of Mrs. Satyawati Sharma on the basis of the said Will.

31. I have considered the rival contentions.

32. The contention that after framing of issues, judgment on admissions under Order XII Rule 6 CPC cannot be passed was rejected in ***Parivar Seva Sansthan Vs. Dr. (Mrs.) Veena Kalra*** 2000 (54) DRJ 914 (DB), SLP(C) 18712-18713/2000 preferred whereagainst was dismissed on 27th November, 2011. To the same effect are ***Charanjit Lal Mehra Vs. Kamal Saroj Mahajan*** (2005) 11 SCC 279 and ***State Trading Corporation of India Ltd. Vs. Nirmal Gupta*** 2012 SCC OnLine Del 3556 (DB).

33. It is not as if Dr. T.N. Sharma is claimed to have left separate Wills, both dated 10th March, 1988 with respect to Bengali Market property and Faridabad properties. Admittedly there is only one document dated 10th

March, 1988 purporting to be the Will of Dr. T.N. Sharma and which purports to bequeath both the properties to Mrs. Satyawati Sharma.

34. Though Mrs. Satyawati Sharma as well as the five plaintiffs and the sole defendant, on the basis of the document dated 10th March, 1988 got the Bengali Market property mutated from the name of Dr. T.N. Sharma to the name of Mrs. Satyawati Sharma, but in response to the plea of Sunil Kumar in the plaint in the Faridabad Court that “previously Dr. T.N. Sharma son of Sh. A.N. Sharma, resident of 10 Todarmal Lane, Bengali Market, New Delhi was the sole owner in possession” of the Faridabad property and that “Dr. T.N. Sharma executed his last Will on 10.3.1988 in his perfect state of health” whereby he bequeathed and gave the Faridabad property to Mrs. Satyawati Sharma and as such on death of Dr. T.N. Sharma, Mrs. Satyawati Sharma became the sole owner in possession of the Faridabad property by virtue of the Will dated 10th March, 1988 executed by Dr. T.N. Sharma, the sole defendant who is now claiming to have become the sole owner of the Bengali Market property *inter alia* on the basis of Will dated 10.3.1988 of Dr. T.N. Sharma pleaded i) that Sunil Kumar along with property dealer and two-three other persons approached Mrs. Satyawati Sharma in presence of the sole defendant and lured her into agreeing to sell the Faridabad property by representing that they would get a decree of declaration of Mrs. Satyawati Sharma as the sole owner of the Faridabad property and after the court passes a decree in favour of Mrs. Satyawati Sharma, Sunil Kumar and the property dealer will arrive at an agreement with the five plaintiffs and the sole defendant herein; ii) the aforesaid persons further told the sole defendant that unless there is a decree in favour of Mrs. Satyawati Sharma,

no useful purpose would be served in arriving at a settlement with the five plaintiffs and the sole defendant; iii) however the aforesaid persons, making a payment of Rs.2,00,000/-, got a receipt signed from Mrs. Satyawati Sharma on the pretext that it was only with a view that if an agreement is made to sell the property, it should be made with Sunil Kumar only; iv) Sunil Kumar assured that it was a formal receipt and the agreement containing complete terms and conditions would be made with the five plaintiffs and the sole defendant and Mrs. Satyawati Sharma; v) on this assurance, Sunil Kumar obtained signatures of Mrs. Satyawati Sharma as executant and of the sole defendant as witness on some proforma which was not even stamped; vi) that Sunil Kumar made all out efforts to obtain decree of declaration as sole owner in favour of Mrs. Satyawati Sharma but the story of Will of Dr. T.N. Sharma forged by Sunil Kumar in collusion with the property brokers was negatived by the Civil Court at Faridabad earlier approached in the name of Mrs. Satyawati Sharma; vii) “it is denied that Dr. T.N. Sharma executed his last will on 10.3.1988 in his perfect state of health...”; viii) “it is denied that the original Will dated 10.3.1988 is in possession of defendant no.1” (Mrs. Satyawati Sharma therein); and, (ix) “as already submitted the Will was fabricated by the plaintiff (Sunil Kumar) and the same might be in possession of the plaintiff. Had there been any Will executed by father of answering defendants, it is impossible to believe that it would not have come to the notice of the answering defendants. Since the father of answering defendants never executed any Will, the question of it being in possession of defendant no.1 does not arise”.

35. It would thus be seen that the document dated 10th March, 1988, claiming which to be the validly executed last Will of Dr. T.N. Sharma, the sole defendant is controverting the claim in this suit, was unequivocally denied by the sole defendant himself in the Faridabad suit.

36. The question which arise is, whether the sole defendant, after having taken a stand in the pleadings and in evidence in the Faridabad Court of Dr. T.N. Sharma having died intestate and the document dated 10th March, 1988 to be not his Will, can be permitted to contest this suit for partition contending the same very document dated 10th March, 1988 to be the validly executed last Will of Dr. T.N. Sharma.

37. In my view, the answer has to be no.

38. Public policy requires the Courts to not allow a person from taking a stand before a Court which is diametrically opposite to the stand taken in a previous legal proceeding. A Division Bench of this Court as far back as in ***Umrao Singh Vs. Man Singh*** AIR 1972 Del 1 cited Bigelow on Estoppel opining that if parties in Court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of the Courts of justice would in most cases be paralysed and that consistency of proceeding is required of all those who come or are brought before the Courts and that a defendant who obtains judgment upon an allegation that a particular obstacle exists cannot in a subsequent suit based upon such allegation deny its truth. Reliance was also placed on ***Verschures Creameries, Limited v. Hull and Netherlands Steamship Company, Limited***, 1921 2 KB 608 holding that a plaintiff is not permitted to approbate and reprobate and that a person cannot

say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.

39. Again in *Mohinder Kaur Vs. Sardar Sarwan Singh Banda* MANU/DE/2974/2008 it was held that the parties, after taking a stand before the Land and Development Office (L&DO) with respect to their shares in the property, were precluded from asserting otherwise. Doctrine of, estoppel by representation of fact, was invoked. Even in *Mumbai International Airport Pvt. Ltd. Vs. Golden Chariot Airport* (2010) 10 SCC 422 the question was whether (i) a litigant was entitled to complete *volte-face* of its previous stand; (ii) an action at law is a game of chess; and, (iii) a litigant can change and choose its stand to suit its convenience and prolong a civil litigation on such prevaricated pleas. It was held (i) that the common law doctrine prohibiting approbation and reprobation is a facet of the law of estoppel and well established in our jurisprudence also; (ii) where a party has received a benefit under an Order, it could not claim that it was valid for one purpose and invalid for another; (iii) if a man once determines his election, it shall be determined forever; (iv) that it is an elementary rule that a party litigant cannot be permitted, to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent and that this wholesome doctrine applies not only to successive stages of the same suit but also to another suit than the one in which the position was taken up, provided that second suit grows out of the judgment in the first; (v) that it is a fundamental principle

of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him; the maxim, *qui approbat non reprobat* applies in our laws too.

40. In the same spirit, it was echoed in ***Telefonaktiebolaget Lm Ericsson (Publ) Vs. Intex Technologies (India) Limited*** 2015 (62) PTC 90 (Del) that an admission made by a party in a pleading, even in a different proceeding, can be used as evidence against such party. I have in ***New Era Impex (India) Pvt. Ltd. Vs. Oriole Exports Private Ltd.*** (2016) 234 DLT 615 also held that a litigant cannot be permitted to take a stand in the Court diametrically opposite to the stand taken by it before Taxation Authorities and if the courts permit such stand to be taken in the course of judicial proceedings and should the courts come to the rescue of such a litigant, the courts would be becoming privy to abuse of their own process.

41. Not only was the stand of the sole defendant qua the document dated 10th March, 1988, in the Faridabad Court diametrically opposite to the stand before this Court but the sole defendant on the basis of the said stand has also succeeded before the Faridabad Court. Sunil Kumar aforesaid has been denied a decree for specific performance of the Agreement to Sell by Mrs. Stayawati Sharma of the entire Faridabad property on the ground of Mrs. Satyawati Sharma having, on the basis of the invalidity of the Will dated 10th March, 1988, not become the sole owner of the property. Resultantly, Sunil

Kumar has been granted a decree for specific performance of the Agreement to Sell of only 1/7th share of Mrs. Satyawati Sharma in the Faridabad property.

42. During the hearing it was informed that second appeal before the High Court of Punjab & Haryana at Chandigarh against the judgment of the District Judge, Faridabad is pending consideration. It is not very clear whether the said second appeal has been filed by Sunil Kumar only or also by the five plaintiffs and the sole defendant herein or any of them. However on specific enquiry, whether the stand of the sole defendant in the second appeal remains the same as was taken in the written statement before the Faridabad Court, the answer was 'yes'. It thus transpires that while the sole defendant is pursuing the proceedings with respect to Faridabad property by controverting the document dated 10th March, 1988 to be the Will of Dr. T.N. Sharma, he is at the same time contesting the suit in this Court with respect to Bengali Market property by claiming the same document dated 10th March, 1988 to be the validly executed last Will of Dr. T.N. Sharma.

43. The same cannot be permitted. The sole defendant in this regard cannot take a stand contrary to that already taken by him in the Faridabad Court.

44. It is also not as if there is any factual explanation in the pleadings of the sole defendant for such contradictory stands and on which evidence can be held to be necessary.

45. If that be the position then I wonder what purpose putting the parties to evidence would serve. The plaintiffs as aforesaid have already stated that

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if the application under Order XII Rule 6 of the CPC is allowed, they are agreeable to getting 1/7th share each only in the Bengali Market property with the sole defendant, besides his 1/7th share in the said property, also getting the 1/7th share of the mother Mrs. Satyawati Sharma in the said property under the Will dated 29th April, 2003 set up by the sole defendant.

46. In my opinion, thus no trial is necessary.

47. I have also considered whether the pendency of the second appeal aforesaid before the High Court of Punjab & Haryana at Chandigarh makes any difference i.e. what will be the effect if any of that Court in second appeal setting aside the judgment of the Trial Court and the first Appellate Court disbelieving the document dated 10th March, 1988.

48. On consideration, I am of the view that even if it were to be finally held in the Faridabad proceedings that there was a Will dated 10th March, 1988 of Dr. T.N. Sharma and whereunder Mrs. Satyawati Sharma had become the sole owner of the Faridabad property and had so agreed to sell the same to Sunil Kumar, the same would not change the stand of the sole defendant as well as the five plaintiffs in those proceedings, of there being no Will of Dr. T.N. Sharma and contrary whereto the sole defendant or for that matter even the five plaintiffs cannot plead and contend in these proceedings.

49. I have also considered the effect of the five plaintiffs, sole defendant as well as Mrs. Satyawati Sharma getting the Bengali Market property mutated from the name of Dr. T.N. Sharma to the exclusive name of Mrs. Satyawati Sharma on the basis of the Will dated 10th March, 1988 of Dr.

T.N. Sharma i.e. whether the plaintiffs and the sole defendant are to be bound thereby, notwithstanding the stand taken in the Faridabad proceedings.

50. On a deeper consideration, I am of the view that a stand taken before the Court of law in a civil proceeding stands on a higher pedestal than the stand taken before the Municipal and other authorities for the purpose of obtaining mutation of the property. It cannot be lost sight of that inspite of having taken such a stand while obtaining mutation of the Bengali Market property, all the parties hereto before the Faridabad Court categorically denied the existence of any Will of Dr. T.N. Sharma. Once the parties who are members of a family are found to have jointly taken a stand that no Will of their predecessor exists, in my view neither of them can be permitted to renege therefrom.

51. The proceedings before L&DO were after all for mutation of the leasehold rights in the land underneath the Bangali Market property from the name of Dr. T.N. Sharma on his demise. Such mutations do not confer title to the property. Reference in this regard may be made to *E. Parashuraman Vs. V. Doraiswamy* (2006) 1 SCC 658, *Suraj Bhan Vs. Financial Commissioner* (2007) 6 SCC 186, *Shambhu Nath Vs. D.D.C.* MANU /UP /2222 /2015 and plethora of judgments discussed by me in *Vidyawati Vs. Financial Commissioner, Delhi* (2011) SCC OnLine Del 224 and *Ram Niwas Vs. Financial Commissioner, Delhi* (2011) 122 DRJ 708.

52. I have further considered, whether notwithstanding the aforesaid controversy about the Will of Dr. T.N. Sharma, Mrs. Satyawati Sharma can

be said to have become the sole owner of the Bengali Market property for the reason of mutation thereof in her name and for the reason of execution of Conveyance Deed of freehold rights in the land underneath the property with respect thereto in her name.

53. The parties however do not appear to have set up such a case and no issue also has been framed on this aspect. Moreover, the letter dated 19th December, 1991 of L&DO of mutation of the leasehold rights in the name of Mrs. Satyawati Sharma proved as Exhibit PW1/16 unequivocally provides that the same is on the basis of documents furnished. Further, the mutation and conveyance deed were not by way of claiming adversely to the plaintiffs and the sole defendant but by way of a legal title and which legal title Mrs. Satyawati Sharma herself as well as the five plaintiffs and the sole defendant in the Faridabad proceedings controverted.

54. I have yet further considered whether, as observed in the orders dated 14th February, 2013 and 6th May, 2015 *supra* in these proceedings, owing to the inconsistent stand taken by the parties before the L&DO, before the Faridabad Court and yet further inconsistent stand taken by the sole defendant before this Court and to suit their purpose from time to time, both proceedings should be dismissed.

55. I am however of the view that dismissal of both the proceedings would not serve any purpose and would keep the title of the two properties in a state of flux forever and which is not deemed to be conducive. It is also felt disputes *inter se* between the parties who are siblings, should be attempted to be settled finally in the hope that the same would restore the

goodwill and relationship between the parties. Though parties were referred to mediation but the same remain unsuccessful.

56. There is another factor which needs mention. The five plaintiffs in the suit have sought partition not only of Bengali Market property but also of the Faridabad property. The stand of the sole defendant in his written statement is not different with respect to the two properties as indeed it could not have been. The stand of the defendant on the basis of the document dated 10th March, 1988 claimed to be the validly executed last will of Dr. T.N. Sharma is not different. Even though the Bengali Market property was not the subject matter of the Faridabad suit but the stand of the defendant with respect to the Bengali Market property is clearly contrary to the stand being pursued with respect to the Faridabad proceedings. No merit is thus found in the contention of the counsel for the sole defendant of the findings of the Faridabad proceedings being not applicable to the Bengali Market property. Though Bengali Market property was not subject matter of the Faridabad proceedings, but the document dated 10th March, 1988 on the basis whereof the sole defendant claims to be the exclusive owner of the Faridabad property was very much the subject matter of the Faridabad proceedings.

57. In (i) ***Dinesh Chand Vs. State*** MANU/DE/7106/2007 (DB); and (ii) ***Sardar Khushwant Singh Vs. Kirpal Singh*** ILR (2010) III Delhi 278, SLP (C) No.10887/2010 preferred whereagainst was dismissed in *limine* on 19th April, 2010, it has been held that a finding with respect to validity of Will can also be returned in a civil suit with respect to the properties of the

deceased and is not in exclusive domain of the probate Court. Once a document claimed by the sole defendant herein to be validly executed last Will of Dr. T.N. Sharma has in a properly constituted prior civil suit been held not to be Will of the deceased Dr. T.N. Sharma, the same cannot be in issue in this subsequent suit. The issue of validity of the document dated 10th March, 1988 as the validly executed last Will of Dr. T.N. Sharma would also thus be barred by *res judicata*. I have in ***Manmohan Vs. Baldev Raj*** MANU/DE/4137/2013 held that once in a civil suit competent to adjudicate the validity of the Will, the said validity has been decided and the propounder is unable to prove the document to be the Will, he/she cannot thereafter have a second round by seeking probate thereof. SLP (C) No.3162-3164/2014 preferred thereagainst was dismissed on 7th March, 2014

58. The application under Order XII Rule 6 of the CPC being IA No. 20732/2011 in CS(OS) No.2475/2007 is thus allowed.

59. Though heirs of plaintiff No.1 and plaintiff No.4 have withdrawn from the suit but the same does not amount to transfer of their share in the properties of which partition is sought. They would also thus be entitled to a share.

60. Accordingly, in CS(OS) No.2475/2007:-

- (i) A preliminary decree for partition is passed declaring the five plaintiffs and the sole defendant and their deceased mother Smt. Satyawati Sharma to be having 1/7th share each in Bangali Market as well as the Faridabad properties.

- (ii) In view of the consent of the plaintiffs, the $1/7^{\text{th}}$ share of Smt. Satyawati Sharma in the Bengali Market property is held to have devolved on the sole defendant, making his share in the said property to be $2/7^{\text{th}}$ as against $1/7^{\text{th}}$ of each of the five plaintiffs. However in accordance with the stand of the five plaintiffs and the sole defendant, their share in the Faridabad property would be equal i.e. $1/6^{\text{th}}$ each.
- (iii) A decree for accounts is passed in favour of the five plaintiffs and against the sole defendant directing the sole defendant to render accounts of the rent and other monies earned from the Bengali Market w.e.f. three years since prior to the institution of the suit and till the implementation of the final decree to be passed in the suit.
- (iv) Parties to bear their own costs.

Decree sheet be prepared.

61. Needless to state that the Faridabad property would be subject to the outcome of the Faridabad proceedings.

62. In view of decree aforesaid having been passed in the suit on the basis of concession of the plaintiffs with respect to the document dated 29th April, 2003 seeking probate of which as the validly executed last Will of Mrs. Satyawati Sharma Test. Cas. No.27/2008 has been filed, the said testamentary case has become infructuous and is disposed of.

63. In the facts aforesaid, need to go into the question of initiating proceedings under Section 340 Cr.P.C. against the parties is not felt. However if it is found that the parties do not desist from continuing with the offences under Section 340 of the Cr.P.C., the said question would be revived.

RAJIV SAHAI ENDLAW, J.

MARCH 01, 2017

‘gsr/pp’

