

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

+ **RFA No.42/2018 & CM Nos. 1612-13/2018**

% **Reserved on: 19th January, 2018**
Pronounced on: 22nd January, 2018

ANITA CHOPRA HASANWALIA Appellant
Through: Mr. Robin Kamra and Mr.
Paras Masija, Advocates.

versus

SUNITA CHOPRA & ORS. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

1. (i) This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.2 in the suit impugning the judgment of the trial court dated 17.11.2017 by which the trial court has decreed the suit filed by the respondents/plaintiffs for partition etc with respect to the property J-5/71, Rajouri Garden, New Delhi.

(ii) The subject suit was filed by the three respondents/plaintiffs. Respondent nos. 2 and 3/plaintiff nos. 2 and 3 in the suit were the

minor children of late Sh. Tarun Chopra, the son of late defendant no.1/Smt. Sushila Devi and the husband of the respondent no.1/plaintiff no.1. In this suit there were two defendants. Defendant no.1 as stated above was the mother-in-law of the respondent no.1/plaintiff no.1 and grand-mother of respondent nos. 2 and 3/plaintiff nos. 2 and 3 and the appellant/defendant no.2 was the daughter of the defendant no.1.

2. The suit as originally filed sought relief of partition of the suit property on the ground that suit property was HUF property having been purchased from HUF funds and that as per the oral family settlement the second floor of the suit property was given to the husband of the respondent no.1/plaintiff no.1, however, this aspect and pleading could not be proved and hence *qua* this cause of action, and with respect to which issue no.1 was framed was held against the respondents/plaintiffs. The suit was however decreed because the suit property was owned by the defendant no.1 who died *pendente lite*, and it was held that defendant no.1 died intestate because the appellant/defendant no.2 failed to prove the Will dated 22.8.2007 alleged to have been executed by the defendant no.1 in favour of the

appellant/defendant no.2. Once the defendant no.1 died intestate, respondent nos.2 and 3/plaintiff nos. 2 and 3 in the suit being the children/legal heirs of a pre-deceased son, were therefore held entitled to jointly 50% ownership interest in the suit property as they were legal heirs of the grandmother/defendant no.1, in view of Sections 15 and 16 of the Hindu Succession Act, 1956.

3. In the suit issues were framed and parties led evidence, and which aspects are recorded in paras 5 to 9 of the impugned judgment and these paras read as under:-

“Issues

5. After completion of the pleadings and from material on record, following issues were framed on 18.10.2010:

Issue no. 1: Does the plaintiff prove that her late husband had funded or paid amounts for the construction of the building at J-5/71, Rajouri Garden, New Delhi as claimed? OPP.

Issue no. 2: Whether the plaintiff is entitled to a decree of partition in respect of the suit property being J-5/71, Rajouri Garden, New Delhi as claimed? OPP.

Issue no. 3: Does the second defendant prove that she is the exclusive owner of J-5/7, Rajouri Garden, New Delhi by virtue of a genuine, valid and enforceable Will executed by the first defendant on 22.08.2017? OPD-2.

Issue no. 4: Relief.

Plaintiff's Evidence

6. In order to prove their case, plaintiffs have examined Sh. Sanjay Rana as PW-1. PW-1 has tendered evidence by way of affidavit Ex.PW1/A. PW-1 has deposed that he is the real brother of plaintiff no.1. He has been financially assisting the plaintiff in improvement of the suit property. He further deposed that all the expenses with respect to the construction of the suit property were incurred by husband of plaintiff no.1. He has further deposed that he came to know from the relatives that

the suit property is joint family property. PW-1 was cross-examined on behalf of defendant no.2 and then discharged.

7. Plaintiffs have also examined plaintiff no.1 as PW-2 who tendered her examination-in-chief by way of affidavit Ex.PW-2/A wherein she has reiterated the contents of plaint on oath. PW-2 relied upon the following documents:

- i) Ex.PW-1/1 is the plaint.
- ii) Ex.PW-1/2 is the copy of the application.
- iii) Ex.PW-1/3 are the bills.
- iv) Ex.PW-1/4 is the copy of ration card.
- v) Ex.PW-1/5 is the death certificate of Late Sh. Tarun Chopra.
- vi) Ex.PW-1/6 is the site plan of building.
- vii) Ex.PW-1/7 is the copy of order.
- viii) Ex.PW-1/8 is the copy of the order dated 04.05.1998.
- ix) Ex.PW-1/9 is the copy of the caterers application form.

8. PW-2 was cross examined on behalf of defendant no.2 and then discharged. No other witness was examined by the plaintiff. Thereafter, PE was closed.

Defendants' Evidence

9. Defendants have examined defendant no.2 as DW-1. She has tendered her affidavit in evidence as Ex.DW1/A wherein she has reiterated and reasserted the contents of the written statement on oath. DW-1 was cross-examined on behalf of the plaintiff at length and then discharged. No other witness was examined on behalf of defendants. Thereafter, DE was closed.”

4. As already stated above, the appellant/defendant no.2 failed to prove issue no.3 and consequently, the defendant no.1 was held to have died intestate resulting in respondent nos.2 and 3/plaintiff nos. 2 and 3 becoming 50% owners of the suit property with the other 50% being held to be of the appellant/defendant no.2, and who is the daughter of defendant no.1. The impugned judgment therefore passed a preliminary decree giving half share in the suit property to the

respondent nos. 2 and 3/plaintiff nos. 2 and 3 and half share to the appellant/defendant no.2.

5. Admittedly, the appellant/defendant no.2 only filed the Will dated 22.8.2007 but did not prove the Will by summoning any attesting witness to the Will. There was no evidence led on record as to whether the attesting witnesses were not summoned because they were not alive or were not traceable, and the fact of the matter is that the attesting witnesses to the Will were not called without any explanation whatsoever. To prove a Will in terms of Section 68 of the Indian Evidence Act, 1872 one attesting witness at least had to be called or if either of the two attesting witnesses were not available, then the Will could have been proved in terms of Section 69 of the Indian Evidence Act by showing the Will to bear the signatures of the executant and the attesting witnesses, however appellant/defendant no.2 failed to prove the Will in terms of the requirements of Sections 68 and 69 of the Indian Evidence Act. The appellant/defendant no.2 also herself did not depose that the Will dated 22.8.2007 of the defendant no.1 was duly executed and attested as there is no deposition in this regard. Trial court in my opinion therefore rightly in

terms of the following paras held that the Will dated 22.8.2007 of the defendant no.1 bequeathing the suit property to appellant/defendant no.2 is not proved:-

“13. The onus of proving this issue was upon the defendant no.2. As per the case of defendant no.2, defendant no.1 has executed a WILL thereby bequeathing the suit property in favour of defendant no.2. The original WILL has been placed on record. However, the said WILL has been neither exhibited by DW-1 in her testimony nor proved as per the provisions of law. DW-1 has filed her affidavit in her evidence which is Ex.DW1/A. In the same, Dw-1 has referred to the Will but has not identified the WILL which is on record as the one which was executed in her favour by her mother defendant no.1. Further, as per section 68 of the Indian Evidence Act any document which is required by law to be attested by the witnesses can be proved and read into evidence only when atleast one of the attesting witnesses has been examined in the court. As per proviso, any other document which is registered as per law can be proved without calling any attesting witness but the said proviso is not applicable in case of WILL. As per the provisions of Indian Succession Act, a WILL has to be attested by witnesses. Hence, in order to prove a WILL atleast one of the attesting witnesses has to be examined before the court. It is also held in catena of judgments that the attesting witness of WILL has to depose that the testator has signed the WILL in his presence and the same has been put voluntarily. In the present case, no such attesting witness has been examined by defendant. Hence, the WILL which has been placed on record has not been proved as per section 68 of Indian Evidence Act. Even, defendant no.2 herself has not identified the said WILL in her testimony as DW-1. Therefore, the WILL filed by defendant no.2 cannot be considered by court. Hence, the present issue is decided in favour of plaintiffs and against the defendants.”

6. Before this Court, on behalf of the appellant/defendant no.2 an application being CM No. 1612/2018 has been filed to lead additional evidence under Order XLI Rule 27 CPC, however, even in this application there are no ingredients mentioned as to why additional evidence for proving of the Will should be allowed to be led

at the stage of appeal after disposal of suit after trial because there are no averments as to why attesting witnesses were not available or could not be called or that why otherwise the Will could not be proved in the course of trial in the suit. Admittedly, there was full-fledged trial and the appellant/defendant no.2 had complete opportunity to prove the Will dated 22.8.2007 of the defendant no.1 in favour of the appellant/defendant no.2, but the appellant/defendant no.2 failed to do so and it is settled law that the object of allowing additional evidence under Order XLI Rule 27 CPC is not to permit a person to lead additional evidence to fill lacunae in his case. This application is therefore dismissed and in order to appreciate that there are no ingredients stated in the same so as to fall under Order XLI Rule 27 CPC, this application is reproduced as under:-

“APPLICATION FOR PERMISSION TO FILE ADDITIONAL DOCUMENTS UNDER ORDER 41 RULE 23/27 READ WITH SECTION 151 CPC.”

TO,

The Hon’ble the High Court of Delhi and his Companion Justices of the High Court.

The humble application of the Appellants above named:

MOST RESPECTFULLY SHEWETH:

1. That being aggrieved by the order dated 28.11.2017 whereby the Ld. Additional District Judge Court in Civil Suit (OS) 319/07, preliminary decreed the suit filed by the respondent without considering the registered will, executed by the deceased defendant “Smt. Sushila Devi Chopra” and without considering the evidences led by the appellant herein. That the appellant has filed the appeal which is pending for disposal before this Hon’ble Court the content of the appeal may be read as the part and parcel

of the present application and the same has not been repeated for the sake of brevity.

2. That the copy of the Will dated: 22/08/2007, Registered at the concerned sub-registrar office, was filed by the Appellant before this hon'ble court and the same was taken on record and a certified copy of the said Will was also taken by the appellant at that time thereafter the said registered Will was kept in sealed cover as per the order of the hon'ble court, but the concerned court of Id. ADJ did not consider the same. However, the said wWill is still there on record and a copy of the certified of the same is filed herewith and marked as **ANNEXURE P-3** to this application.

3. That as per the Will of the mother of the appellant, she is the exclusive and the only owner of the suit property.

4. That the appellant shall suffer irreparable loss and injury if same shall not be considered.

5. That the appellant has good prima facie case in her favour and nothing is against the appellant. The appeal is likely to be allow in her favour.

PRAYER

It is therefore, most humbly prayed that this Hon'ble Court may graciously be pleased to:

[a] allow the Appellant to file copy of the said registered Will dated 22/08/2007 as Annexure P-3

[b] order to remand back the suit for consideration of said Will dated : 22/08/2007 already on record and allow appellant to prove the same;

[c] pass any such further order (s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE APPELLANT(S) AS IN DUTY BOUND SHALL EVER PRAY"

7. I may also note that it is not as if that by the impugned judgment the appellant/defendant no.2 would not get any share in the suit property, all that the effect of the impugned judgment is that whereas the appellant/defendant no.2 gets 50% of the ownership property, the two minor children of the pre-deceased son of the defendant no.1 also get 50% of the ownership in the suit property.

8. In view of the above discussion, I do not find any merit in the appeal and the same is therefore dismissed, leaving the parties to bear their own costs.

JANUARY 22, 2018

VALMIKI J. MEHTA, J

